

CHAPTER TEN

EVIDENTIARY RULES

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1. INTRODUCTION

J Kriegler in his criminal law text-book¹, sets out that the criticisms levelled against the so-called cautionary rules in relation to sexual offences are 'not deserved' ('onverdiend'). Kriegler is presently a Judge of the Constitutional Court and his views in relation to sexual offences and cautionary rules are set out in full hereunder in order to understand the basis upon which our Courts rely so heavily on these rules:

'Sexual acts - Because of distinctive considerations, a peculiar cautionary rule applies in the case of alleged sexual offences. Complaints of a sexual nature are distinguished for several unique characteristics, which distinguish such offences from other offences against the person. Sexual offences, being inherently intimate, normally take place in seclusion; consequently direct corroboration is exceptional. Unlike the case of most other impairments of the person, there often are no recognisable effects of such actions. Even those which are recognisable are often just as reconcilable with participation with consent, as participation obtained by force. As in the case of an accomplice, the participant in an alleged sexual offence is obviously also extraordinarily capable of bending the truth without it being possible to detect the distortion.

Allegations of sexual crimes are consequently not only easily made but often difficult to counter. The problem does not only lie with malicious incrimination. The human sexual urge is by its very nature irrational, and is often distinguished by deep-seated emotions and passions of which the person himself/herself is unaware; therefore the versions of the participants are afterwards often unreliable without them being aware of it. Moreover, judicial credibility findings and weighing up of probabilities by Courts are in such instances more fallible than ever. Rational criteria can only be applied to irrational material with great circumspection.

When you deal with crimes against women, particularly in tradition-bound communities cultural beliefs (e.g. that the male person must be seen as the "hunter") often play an unexpressed role which should not be underestimated. External factors such as current moral norms or communal or family sanctions often play a role, which makes the function of the *judes facti* more difficult. Known internal factors such as feelings of guilt, shame, disappointment or frustration are even more difficult to establish or to evaluate. Furthermore, experience has learnt that there are sometimes psychosexual factors which even common sense cannot detect.

Our practice insists that the judicial officer who has to decide the facts, must at all times be aware of the problematic nature of this type of case and that must be recognisable

¹ Hiemstra Suid - Afrikaanse Strafproses 5de uitg, J Kriegler, at 506-7, 'Sekshandelinge'.

from the evaluation by the said judicial officer of the facts of the case that he/she was aware of the said problematic nature of the case and duly considered it...

Because the witnesses of sexual crimes are mostly women, the cautionary rule is sometimes called sexist. (See e.g. the strong criticism on what is regarded as the origin and effect of the rule in *S v D* 1992 (1) SACR 143 (Nm). This reproach is not deserved because the rule is based on strong grounds of principle which do not specifically relate to the gender of the victim.

This notwithstanding, the criminal procedure is - especially in practice - not wholly to be exonerated from aloofness and even prejudice against women complainants in sexual offences. The cautionary rule is no pretext and not a licence for discrimination or for personal views on gender roles."²

Kriegler goes on to set out the gist of the rule as follows: 'The adjudicator of the facts must throughout be cautious of the special problems in sexual offence cases and it must be clear from the Court's evaluation of the facts, that the evidence was approached and considered in this manner.'

There is much to be said for the views of Kriegler (and our judicial system) and it appears that this is what the Law Commission is attempting to address in its provisions dealing with evidentiary rules.

In this paper I propose dealing with Clauses 17, 18, 19 and 21³ of the Draft Bill in relation to evidentiary rules and the need for legislative reform in relation thereto

2. RULES OF CORROBORATION

As a starting point it is imperative to note that the rule of corroboration is not a statutory requirement in South African law. In fact, the opposite view forms part of Section 208 of the Criminal Procedure Act⁴, which provides that an accused may be convicted on the evidence of a single witness. It has however, become a rule of practice and has been consistently applied by our Courts.

Even if it is conceded that sexual offences cases do not require 'corroboration' as such, and that there is no specific rule of law requiring same, how then does a Court stop itself from applying rules of corroboration?

² The above is a free translation from Afrikaans.

³ The cautionary rule and clause 20 is dealt with in.....of this document.

⁴ Act 51 of 1977 as amended

Some Courts simply require corroboration, whilst others merely warn themselves to be alert to the special problems that may arise in sexual cases, not being that women complainants are prone to lie, but that it is often more difficult to establish the truth in sexual cases compared to cases where crimes such as theft are involved.

The foregoing is problematic particularly in the context where a complainant is a child and/or a single witness where the Court has to apply in effect three cautionary rules, which are all overlapping to some extent.

This is illustrated by the case of **S v Ngxumza and Another**⁵ where the Court held as follows:

“A child has not developed the subtlety of logical reasoning and is not alive to fallacies in reasoning. In the mind of a child there is not a clear demarcation between fact and inference. The court should examine the evidence of a child very carefully to determine whether that evidence is clearly based on fact, or whether the child is drawing inferences and describing them as facts. Many children who testify have been traumatised by the events they testify about. Such trauma may cause the child not to be able to look at the events objectively. It is always dangerous to rely on the uncorroborated evidence of a child. That does not mean that a court can never convict on the evidence of a child. Corroboration can be found in the evidence of another child ... Corroboration can also be found in the untruthful evidence of the accused if those lies cannot be explained for another reason ... Especially lies directly connected to evidence material to the commission of the offence or identification will be important.”⁶

From the foregoing it is apparent that our Courts often look for corroboration even though it is not formally required and this may lead to unfavourable and unjust results in the context of sexual offences. From an analysis it is clear that the corroboration requirement has been abolished in Canada and in all American States.⁷

3. RECOMMENDATION

The Law Commission's recommendations are covered in Clause 21 of the Draft Bill. The writer has the following comments in this regard:

⁵ 2001 (1) SACR 408 (T)

⁶ At 412A-D

⁷ The writers do not propose repeating the comments contained in Chapter 36 of the Discussion Document in relation to international jurisprudence and simply wish to endorse the comments made by the Law Commission in this regard.

- Subsection (1) should remain in the final draft for the reasons set out hereinabove, as read with the explanatory chapter dealing with corroboration.
- However, the writers are of the view that subsection (2) is not necessary for the following reasons:
 - The rules relating to relevance apply to all evidence and judicial officers are required to assess relevance on this basis;
 - The inclusion here may mistakenly be used by judicial officers to come to a conclusion that because there is no corroboration the evidence is unreliable. If this is the outcome of the inclusion of the section then the entire section becomes meaningless.
 - If evidence is unreliable then a basis for such unreliability should be made out and should not in any way relate to corroboration.
 - Thus subsection (2) should be deleted as a deletion in this regard would in no way leave a lacunae in the legislation as this aspect is already covered as a general principle of law.

4. EVIDENCE OF PSYCHO-SOCIAL EFFECTS OF SEXUAL OFFENCE

This aspect deals with the issue of expert evidence and the admissibility of expert evidence in relation to sexual offences. Whilst this is an aspect which has not received attention in many of our decisions dealing with sexual offences, it is apparent that mechanisms need to be put in place in order for our Courts to effectively deal with the evidence of experts.

Sexual offences bring about a range of psychological effects, which are often different to the reactions of victims of other crimes. It is therefore, necessary to assist judicial officers in the process of understanding the nature and effect of sexual offences.

Whilst there has been a decision in relation Sexual Assault Trauma Syndrome by our Courts⁸ there is yet to be a decision in relation Child Sexual Abuse Accommodation

⁸ Holtzhausen v Roodt 1997 (4) SA 766

Syndrome, and perhaps we should not be relying on the courts to deal with this aspect. The judgments will inevitably not be able to provide for the procedural aspects in relation to expert evidence in these circumstances. Thus, the courts should only be tasked with developing the jurisprudence in relation to the new provision to be included in the new Act and should not be tasked with introducing same. An analysis of what has happened in this regard in other jurisdictions illustrates that leaving the task to the courts may produce conflicting results.

In 1992 the Pennsylvania Supreme Court in Commonwealth v Dunkle⁹ held that the introduction of the Child Sexual Abuse Accommodation Syndrome (CSAAS) was a reversible error because the CSAAS was not scientifically valid and was not generally accepted within the field of child psychology. The case involved allegations that Dunkle sexually assaulted his 14-year-old step-daughter in 1983. The crime was not reported until three years later. The state called an expert to testify as to the reactions and behaviours of children who have been sexually assaulted. The expert testified as to why the victim would not report the assault early, why the victim would not be able to give a clear recollection of the assault, why details may be omitted and then recollected over time in cases involving CSAAS. Dunkle was convicted but the Superior Court remanded the case ruling that the evidence of CSAAS should not have been admitted. The Supreme Court then affirmed this decision.

By contrast the decision in the Delaware Supreme Court in Wheat v State¹⁰ held that the introduction of CSAAS was not an error because evidence of the behaviour of sexually abused children was relevant to the issue of determining if sexual abuse occurred.

In the Wheat case, Wheat was accused of sexually assaulting his 10-year-old stepdaughter. After his arrest and incarceration, the girl recanted her story of sexual abuse to his wife (her mother). She later recanted it to the police officers in charge of the case as well. During the trial, seven months later, the girl claimed that he had in fact sexually abused her and testified to the effect that *“after Wheat abused her, he told her that if she told her mother, her mother would tell the state, and that when*

⁹ 602 A.2d 830 (Pa. 1992).

¹⁰ Del. Supr., 527 A.2d 269 (1987).

*Wheat went to jail, he was going to break out and kill her and her mother.*¹¹ With regard to the recantations, the state and defence attorneys offered opposing explanations. The state introduced expert testimony on CSAAS. The expert testified as to studies and data, which revealed that 30-40% of children recant but fewer than 5% recant and maintain the altered statement. She also gave additional testimony as to why recantations occur.¹²

Each court reviewed the testimony submitted by expert witnesses on children and their reactions and behaviours to the event of sexual abuse, but dealt with the legal question of admissibility very differently.

The **Dunkle Court** held that CSAAS was not derived through scientific method, neither was it accepted in the discipline in which it belonged, thus it was inadmissible. The **Wheat court** held that CSAAS provides the fact-finder with an explanation other than deceit for behaviour that appears to be inconsistent with the claim of sexual abuse. For this reason the Court held that CSAAS evidence was relevant to a material issue in the case and was thus admissible.

It is clear that the court in Dunkle focussed on the reliability of CSAAS evidence and considered whether it was “scientifically viable and reliable.” The court in Wheat focused on CSAAS as a tool to aid the jury in making a determination on a material fact at issue: the superficially inconsistent behaviour of a child who claims to be a victim of sexual assault. Thus, the fact that one Court has accepted expert evidence in relation to the psycho-social effects of sexual offences will not automatically mean another Court will interpret and use it in the same way.

The important characteristic which should be the basis of any expert testimony is that Sexual Assault Trauma Syndrome and CSAAS should not be used as a diagnostic tool to prove that a woman or a child was sexually assaulted or abused. Rather, it should be seen as explanatory tools used to rebut defence claims in relation to the

¹¹ supra at 270.

¹² Supra at 271 "Factors described included: (a) pressure on the complainant by family members, especially through continued contact with the alleged abuser; (b) fear of the legal process (c) the child's conflicting feelings towards the alleged abuser and (d) a desire to prevent the withdrawal of affection that may accompany allegations of abuse."

inconsistency's or a victim's deceit. McCord¹³, at 41-58 notes there are different ways in which expert testimony is proffered by the prosecution to prove the truth of the claim of sexual abuse:

- a direct opinion by the expert that the complainant is telling the truth; or
- testimony from the expert that it is rare for a child to fabricate or fantasise a claim of sexual abuse.

Similarly expert testimony can be used to bolster the credibility of a witness in two ways:

- to explain the delay in the reporting of the abuse; and
- to explain why the child would make a claim of sexual abuse, recant the claim and then try to retract the recantation.

Thus, when utilised and assessed properly expert testimony can and will assist the court by showing that behaviour that seems inconsistent with sexual abuse may not be. The court then obtains an understanding in relation to the dynamics of the sexual offence and the very real physical and emotional impact on the woman or child are taken into account.

The writer is of the view that it should always be borne in mind that not all women or children will display all the dynamics noted in Sexual Assault Trauma Syndrome and CSAAS. This should not be used against a complainant, as complainant's responses to sexual assault trauma vary according to their own emotional development, personal characteristics and social environment. Therefore, Sexual Assault Syndrome and CSAAS should never be used in order to draw any negative inferences as against the complainant who does not display any or some of the defining features of these syndromes.

¹³ McCord, Expert Psychological Testimony about Child Complaints in Sexual Abuse Prosecutions: A foray into the Admissibility of Novel Psychological Evidence, 77 The Journal of Criminal law & Criminology 1, 20 (1986) at 41-58

Syndrome evidence should furthermore not be used to *prove* physical or sexual abuse. It should rather be used as a tool to assist the Court in understanding the complexities involved in sexual offences, as pointed out by Satchwell J in the Holtzhauzen case.

5. RECOMMENDATION

The recommendation contained in the Draft Bill at Clause 18 should be adopted for the reasons set out hereinabove.

However, the writer is of the view that there may be some problems in relation to the recommendation and specifically what is termed a "recognised syndrome." The problem here is:

What is a "recognised syndrome"?

Who decides whether it is "recognised" or not?

What if there is a school of thought or some mental health professionals who come up with articles questioning the validity and claiming that there is no such thing as CSAAS or Sexual Assault Trauma Syndrome?

This opens the door for conflicting expert opinions, which may lead to a "battle of the experts." This would then have to be solved by the presiding officer using his/her discretion.

The discretion of judges is in turn problematic, which would lead to conflicting decisions.

6. FURTHER PROPOSAL BY THE WRITER

The writer suggests that the State should consider creating an office such as Family Advocate's Office created in terms of the Divorce Act.¹⁴

This may prevent conflicting expert reports and testimony resulting in a "battle of the experts."

A State appointed person likened to assessors in Criminal Trials and an office such as the Family Advocates Office would circumvent these problems and oblige the Court to

¹⁴ Act 70 of 1979, as amended.

refer all sexual offence matters to the office of the "Sexual Offences Advocate" to assist with expert evidence.

In terms of the Mediation in Certain Divorce Matters Act¹⁵ in proceedings concerning the custody or guardianship of, or access to a child, made in terms of the Divorce Act, the Family Advocate may be requested by the Court or by a party to the proceedings, to institute an inquiry and to furnish the Court with a report and recommendations on any matter concerning the welfare of the child concerned. Even if no request is made the Family Advocate may, if he/she considers an inquiry to be in the best interests of the child concerned, take the initiative by applying to Court for authority to conduct such an inquiry.¹⁶ Where this is done the Court is then obliged to consider the recommendations and report of the Family Advocate before any decision is made.¹⁷

This may prove to be a viable option in order to address the above concerns.

7. EVIDENCE OF THE PERIOD OF DELAY BETWEEN THE OFFENCE AND THE LAYING OF THE COMPLAINT

Legislative intervention is required here, as it is clear that our courts have been drawing negative inferences and attaching undue weight to the delay between the commission of the offence and the reporting thereof.

This is illustrated by the case of S v De Villiers en 'n Ander¹⁸ where the Court held that it was a general principle that a complainant was to lay her complaint at the first reasonable opportunity. Thus, the failure to do so was considered to be a factor against acceptance of such evidence. In this case the three complainants delayed for one year before reporting the rape and Cillie J rejected the explanation given and accordingly rejected the evidence.

According to the complainants the accused had threatened them with a fire-arm and hence they were afraid to report the matter. The judge considered it suspicious that the second complainant waited until she was beaten by her mother a year later in relation to her weak performance at school and constant absenteeism. She then explained to her mother what had happened. The community then interrogated the

¹⁵ Act 24 of 1987

¹⁶ S 4(1)(b) and S 4(2)(b) of Act 24 of 1987

¹⁷ S 8(1) of the Act 70 of 1979

¹⁸ 1999 (1) SACR 297 (O)

third complainant who reluctantly came forward and confirmed that she too had been raped by the accused.

It is submitted the judge placed undue weight on this “general principle” and in so doing failed to deal with the issue correctly. In this regard he states as follows:

“Die feit dat die klaagsters, volgens die getuienis, so lank gewag het voordat die aangeleentheid openbaar is, is 'n verdere faktor teen die aanvaarding van hulle getuienis. Die datums waarop hierdie gebeure sou plaasgevind het, was volgens alle aanduidings aan die begin van 1995. Die klagte is eers in 1996 gemaak nadat daar tugtiging op een van die klaagsters uitgeoefen is. Die beginsel is dat die klaagster in 'n seksuele misdryf by die eerste geleentheid wat dit redelikerwyse van haar verwag kan word, haar klagte behoort te opper. Hoe langer die tydsverloop hoe groter die moontlikheid dat die verhaal 'n versinsel is. Trouens, die feit dat die klaagsters eers na verloop van 'n lang tydperk en 'n aantal vorige geleenthede daartoe kla kan juis die teenoorgestelde effek as die normale hê, naamlik dit kan dien as bewys van die onbetroubaarheid van die klaagsters. Die rede wat die klaagsters aanvoer vir die vertraging, is die beweerde dreigement met die vuurwapen waarmee so pas gehandel is. Soos reeds gemeld, is dit nie bewese nie.¹⁹”

It should further be noted that had Sexual Offence Trauma Syndrome expert evidence been led by the State in relation to the complex reasons why women wait before reporting sexual assault and the effects on women then perhaps a very different conclusion would have been reached.²⁰ The Court also placed undue weight on the fact that there were inconsistency's in relation to each complainant's version to the police and the version in Court as to the circumstances surrounding the rape and their ability to remember same.

The writer is of the view that this aspect may well have been clarified had expert evidence been led. The subsequent acquittal of the accused (notwithstanding an initial confession in relation to what was later averred to have been a different rape some time earlier) displays the inadequate evidentiary rules in place currently and the need for intervention on the part of the Legislature.

8. RECOMMENDATION

¹⁹ at 306 A-D

²⁰ See discussion regarding this aspect above at pages 5-10

The Law Commission has included a provision in Clause 19 of the Draft Bill prohibiting the Court from drawing any inference from the length of delay between the commission of the sexual offence and the laying of the complaint. The provision is welcomed for the above reasons and should be included in the final draft.