

**THE USE OF CLOSED-CIRCUIT TELEVISION IN SOUTH AFRICAN CRIMINAL
COURTS**

By

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Abstract

In the last decade the use of closed-circuit television or similar electronic devices (CCTV) has started to play a significant role in courtrooms, both as a silent witness and as a device through which to receive testimony.

The benefits of optimising the use of CCTV for receiving testimony are numerous. This paper focusses on two, namely easier access to justice through criminal courts, and bridging the gap between the protective measures created by legislation with regard to vulnerable witnesses and the effective implementation of said measures.

The requirements for using CCTV to receive testimony, if interpreted in a reasonable way, does not limit the type of device or facility to be used. It merely stipulates that the facilities at a remote point be overseen by a designated official, and that the device to be used must allow all parties, both at the court point and at the remote point, to hear and see the other parties, and to be able to follow the proceedings.

In recent years technology has advanced to such an extent that audio-visual capable devices are readily available. It is proposed that if the above interpretation is followed, the facilities through which testimony can be given by means of CCTV need not be stationary, it can travel to where it is needed thereby making courts more accessible, and alleviating trauma with regards to vulnerable witnesses who can testify at a designated court and no longer needs to go to court, a place designed to be intimidating.

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Chapter 1

Motive and Methodology

1.1 Introduction

South Africa has many rural areas and informal settlements, which leads to problems when it comes to access to courts.¹ Some of these areas are spread so wide that effective resolution of disputes in a timely manner is nearly impossible. This problem of access to courts is a challenge, even in developed countries like Australia and Britain, and leads to an increasing belief that justice is only for the rich.²

The accusatory nature of South African criminal procedure has, at times, caused unnecessary secondary trauma to (what is commonly referred to throughout caselaw) as ‘vulnerable witnesses’, and has, in some cases, struck witnesses silent, causing them to refrain from testifying because of the intimidation and trauma suffered by seeing an accused in court.

The basis for this dissertation therefore, comes from two established principles in South African law. The first, is the right of access to court as contained in section 34 of the constitution.³ The second, is the protection of vulnerable witnesses, which in most cases consist either of children, or victims of sexual abuse.⁴

¹ Statistics regarding rural population in South Africa is provided in footnote 5 below.

² The Guardian, in Britain, by Nick Cohen on 21 April 2018, “In Britain now, the richer you are, the better your chances of justice”, accessed through: <https://www.google.com/amp/s/amp.theguardian.com/commentisfree/2018/apr/21/in-britain-the-richer-you-are-the-better-your-chance-of-justice> (on 10 October 2019 09:30); The Guardian, in Britain, by Owen Bowcott on 13 September 2019, “77 more courts in England and Wales to close”, accessed through: <https://www.theguardian.com/law/2019/sep/13/77-more-courts-in-england-and-wales-to-close> (on 10 October 2019 09:32) (hereinafter “the courts are closing article”).

³ Section 34 of the Constitution of the Republic of South Africa 1996 provides the following:
‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’.

⁴ Chapter Four below explains that South Africa does not have a codified definition for a vulnerable witness. Therefore, there is a need to look internationally, namely the United Kingdom. According to section 16 and 17(4) of the Youth Justice and Criminal Evidence Act 1999, people automatically falling into the category of “vulnerable witnesses” are children and complainants in sexual offence cases, unless they themselves want to opt out. Any other person wishing to make use of the protective measures afforded to vulnerable witnesses, must prove that they are intimidated, and that the value of their testimony will be impaired if it is given without protection in court.

The possible assistance or use of CCTV might improve the implementation of both the above-mentioned principles. For that reason, this dissertation examines the provisions for the use of closed-circuit television or other electronic devices (hereinafter collectively referred to as “CCTV”).

1.2 Problem statements

The first problem identified, is the fact that a large part of South Africa’s population resides in rural areas.⁵ With large geographical distances between some rural settlements and courts, quick and effective access to justice is a legitimate problem. Circuit courts seek to alleviate this problem, by sitting in some rural areas during specific dates. Still, circuit courts are not a viable alternative to access to courts as required by section 34 of the constitution as they only allow disputes to be resolved by a court on certain dates of the year, and not whenever the dispute occurs. It is therefore imperative that an effective way to allow access to courts for everyone, be established.

The second problem identified, is the fact that although provisions exist that prevent a vulnerable witness from seeing an accused, it is not always the most effective way to deal with the matter. As long as there is a need for witnesses to be physically present at the same location as an accused, accidental meetings of vulnerable witnesses and the accused in their cases, are inevitable. A viable alternative for substituting a witness’s physical presence with an electronic one is required to be able to effectively shield vulnerable witnesses from undergoing further undue trauma created by testifying in criminal proceedings, while not prolonging the matter unduly.⁶

⁵ According to the world bank collection of development indicators and trading economics, in 2016 the rural population in South Africa was 34.7%. In 2016 that amounted to 18.4 million people. Data accessed through: <https://tradingeconomics.com/south-africa/rural-population-percent-of-total-population-wb-data.html> (on 10 October 2019 10:30).

⁶ L Wolhuter & A Hamman “A comparative analysis of protective measures for vulnerable and intimidated victim-witnesses in South African and English law” (2010), *Acta Criminologica: Southern African Journal of Criminology (Special Edition 1)*, page 42-64.

1.3 Research questions

In order for the use of CCTV to be improved, it is firstly necessary to ask the question whether the use of it, will be constitutional with regard to the rights of an accused. For the purposes of answering this question, two South African cases are considered,⁷ as well as articles by scholars in the United States of America (hereinafter referred to as “the USA”).⁸

The second question, is identifying when the use of CCTV should be considered by courts. Should CCTV only be considered at the trial phase, or should CCTV be made available and used during the pre-trial phase as well?

The third question is an inquiry into where the problem lies with regard to the accessibility of CCTV for testimony. The question of why only some courts has access to facilities that allow witness testimony to be given through CCTV, is considered.

1.4 Motives and aim of research subject

Section 185(2) of the Criminal Procedure Act (hereinafter referred to as “CPA”),⁹ states that CCTV may only be used if the required facilities are readily available, and only if amongst others, it would be in the interest of justice or the public.

The first motive of this dissertation is to prove that the use of CCTV will, if requested, in all likelihood always be in the interest of justice or the public, as it would provide better access to courts for individuals, and allow better quality of evidence in the case of vulnerable witnesses.

The number of backlog cases in 2016 was 18.7%.¹⁰ Referring to the United Kingdom, the Criminal court quarterly statistics for England and Wales in 2019 indicated that the average number of days, from the first listing of a case in the magistrates’ court, to

⁷ *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T) (Hereinafter the “Mokoena case”); *DPP Transvaal v Minister for Justice and Constitutional Development* 2009 JOL 23371 (CC) (hereinafter the “DPP case”).

⁸ Articles referred to can be found in Chapter 3 of this dissertation.

⁹ The Criminal Procedure Act 51 of 1977.

¹⁰ The Mail and Guardian, in South Africa, by Phillip de Wet on 16 September 2016, “SA’s justice system is battling”, accessed through: <https://mg.co.za/article/2016-09-16-00-sas-justice-system-is-battling> (on 10 October 2019 09:38).

completion was 178 days.¹¹ According to the new crime statistics for South Africa released on 12 September 2019, the total number of contact crimes (including sexual offences and murder) that is recorded on average per day are 1691 cases, equalling on average to 70 cases every hour. If all those cases go to court, and each case takes 178 days to complete, a procedure that streamlines the process is required to avoid backlog.

The second motive for this dissertation is therefore the belief that legislator's intention for the use of CCTV is unnecessarily hindered by courts, who interpret the provisions regarding the use of CCTV in an extraordinarily narrow manner.¹² This dissertation aims to show that the mechanisms for the use of CCTV can be utilized during a criminal trial in more aspects than it currently is. The more readily CCTV procedures are used, the more the criminal court becomes accessible to the general public, by speeding up the legal procedure, and alleviating some of the backlog of effective finalisation of trials experienced throughout the legal society.¹³

The third motive for this dissertation is the fact that, in sexual offences cases; when a victim eventually testifies in court they have been asked to relay their testimony at least five times.¹⁴ Legislators have noticed that this can lead to increased trauma and have enacted provisions to grant vulnerable witnesses some protection from further undue mental stress. These provisions include the ability of courts to separate a witness from the presence of an accused which has the likelihood of traumatising an already vulnerable individual, through amongst others, the use of CCTV. Yet these provisions are not utilised, because it appears that the facilities for its use, are not always readily obtainable. It is the aim of this dissertation to indicate that the relevant legislation with regard to using CCTV as a tool for receiving testimony is outdated and was last amended over a decade ago.¹⁵ Since then, numerous technological advances have been made, allowing the facilities for the use of CCTV to become more readily

¹¹ Data accessed through: <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2019> (on 10 October 2019 13:06).

¹² H Galgut "Protective Measures: In Camera Hearings, Closed Circuit Television, Support and Vulnerable Witnesses", (hereinafter "H Galgut Article") Para 7. Galgut based her findings amongst others on S v F 1999 (1) SACR 571 (C). Further explanation is found in chapter 5 below.

¹³ The courts are closing article (footnote 2 above).

¹⁴ The *DPP* case (footnote 7 above) para 106.

¹⁵ The Child Justice Act 75 of 2008, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter "Act 32 of 2007").

available than ever before, and that the legal requirement that CCTV facilities must be “readily available”, should no longer be the hurdle it historically was, when a request for the gathering of remote testimony is made.

Therefore, it is the aim of this dissertation to show that the use of CCTV, if applied optimally, can be a reliable protective measure when dealing with vulnerable witnesses testifying in court and can also be used to limit the time spent on legal procedures, reducing huge backlogs of criminal cases in South Africa.

1.5 Purpose of research

Maxfield and Babbie, states that research has many purposes, including but not limited to: exploration, description, and application.¹⁶ Maxfield and Babbie, also point out that a piece of research, can have more than one of these purposes at a single time.

For the purpose of identifying how to optimise the use of CCTV in order to grant greater access to justice as well as better quality of evidence, this dissertation uses a combination of exploratory and descriptive research, and is therefore largely observative in nature.

The role of using CCTV is described through reference to South African caselaw; and the dissertation explores caselaw of other countries like the USA and Australia in order to study its use in more developed countries, and assess the use of technology in the legal profession.

1.6 Nature of research

Welman and Kruger define a research approach as a strategy that a researcher follows for collecting information and examining a research problem.¹⁷ This dissertation uses four research approaches, that once combined, create a qualitative form of research. Strauss describes qualitative research as; research utilising a flexible design, which makes a researcher as much part of the research process as the data that is used. Strauss, explains that a qualitative research approach is more focussed

¹⁶ MG Maxfield & ER Babbie, *Research methods for criminal justice and criminology* (2015), (hereinafter “Research methods by Maxfield”), page 12.

¹⁷ JC Welman & F Kruger, *Research Methodology* (2005), Page 182 – 183.

on the social context of the research problem and seeks to improve social conditions and lead to social justice.¹⁸

1.7 Research approaches

1.7.1 Literature review

The purpose of a literature review is to acknowledge existing information relating to a research question, and to determine where future research on a specific topic should be directed.¹⁹

Hart defines literature review in the following terms:

‘A selection of available documents (both published and unpublished) on the topic which contain information, ideas, data and evidence written from a particular standpoint to fulfill certain aims or express certain views on the nature on the topic and how it is being investigated, and the effective evaluation of these documents in relation to the research being proposed.’²⁰

The literature review in this dissertation, focusses on the critical analysis of a specific procedure through South African law and journal articles; international law and journal articles; and theoretical articles both nationally and internationally. Specific reference is made to Australia and the United Kingdom where a possible future of CCTV can be seen by its use in virtual courts.

1.7.2 Doctrinal and historical approach

Generally, the purpose of a doctrinal approach is to research relevant legislation, journal articles, and caselaw. The historical approach generally allows an analysis of the intention behind the creation of relevant legislation, and a look at whether the implementation of the legislation is in line with this intention.

The combination of these two approaches allows the identification of authority for the use of CCTV as well as identifying where the problem lies regarding implementation.

Using the historical approach will also allow speculation on what the impact will be, if the implementation of the use of CCTV is optimised.

¹⁸ J Corbin & A Strauss, *Basics of qualitative research, techniques and procedures for developing grounded theory* (2015), Chapter 1.

¹⁹ Anonymous “Reviewing the literature: a critical review” (2013), *University of Melbourne*.

²⁰ C Hart, *Doing a literature review: releasing the social science research imagination* (1998), page 13.

1.7.3 Socio-legal approach

Maxfield and Babbie points out that observation and description methods that are grounded in social science tend to be more precise than mere casual observations people make with regard to everyday problems.²¹

The use of this approach entails an understanding of human needs and emotions surrounding criminal trials. Using this approach, the law and the legal research will be situated in a social context, thereby relying on public policy to guide the approach to research and the recommendations made in the conclusion. In turn, this approach will be of assistance in finding a solution for expanding the use of CCTV, that is consistent with the needs of public policy.

1.7.4 Comparative legal analysis approach

Using this approach, comparisons of legislation and caselaw of South Africa, and so-called developed countries, such as Canada, the United Kingdom, the USA, and Australia will take place. Comparing and analysing similar provisions in developed countries provides an insight into the problems they encounter and measures that they have implemented to achieve the purpose of similar provisions, compared to those in South Africa. This approach will assist the research by showing what other countries have done with the obstacles surrounding CCTV during criminal trials, and what the future of CCTV might look like.

1.8 Contribution of dissertation

This dissertation seeks to identify the most appropriate circumstances for the use of CCTV in criminal courts. It seeks to show that the use of CCTV is not optimal and taking examples from Australia and England, through technological advances, the use of CCTV may play a larger role in courts of the future.

This dissertation shows that neither in South African law, nor in international law, anything exists that prevents a witness from testifying from anywhere in the world, and that a vulnerable witness need not accidentally see his/her alleged abuser, by being required to be physically present at the same court as the accused when testifying.

²¹ Research methods by Maxfield (Footnote 16 above), page 13.

1.9 Layout of dissertation

Chapter 1: Motive and methodology

This chapter reviews the background of the study, the problem statements, the aim, and the research methods to be followed. The chapter also discusses the design of the dissertation.

Chapter 2: An introduction to closed-circuit television

This chapter examines where the authority for the use of CCTV originated, and why the provisions for its use was created in the first place.

Chapter 3: Current application of CCTV, through the lens of section 158(3)(d)

This chapter describes how CCTV facilities are used for the purposes of public safety or the interest of justice. This chapter identifies that it is in the interest of justice to make courts accessible to everyone in a timely fashion, and to limit unnecessary expenditure due to lengthy trials.

Chapter 4: Current application of CCTV, through the lens of section 158(3)(e)

This chapter describes how CCTV facilities are being used for the protection of witnesses who would be prejudiced if required to physically appear before court. Whether this prejudice is intimidation, undue stress, or for safety reasons, is explained further in this chapter. This chapter also observes that evidence given from a protected environment is of a higher quality than evidence given while a witness undergoes intimidation.

Chapter 5: Incumbrance to and short comings of the use of closed-circuit television in South African Criminal Courts

This chapter describes the hurdles that must be overcome if the effective use of CCTV has any chance of being optimised, and some shortcomings in the current uses of CCTV procedures, are also discussed.

Chapter 6: Analyses and recommendations

In this chapter some recommendations are made, which may help improve the uses of CCTV. Interantional uses of CCTV procedures are considered, and the concept of a virtual court is described.

Chapter 7 : Conclusion

In this chapter a summary of the findings, as well as guidance for future research is provided.

Chapter 2

An introduction into Closed-Circuit Television

2.1 Introduction

The use of CCTV is to a large extent understood as electronic evidence or as a silent witness, that provides a criminal court audio-visual footage of a crime that has been committed. For the purpose of this dissertation however, another use of CCTV will be examined, namely using CCTV as a means to receive testimony; or for the purposes section 159A-D, as discussed below, as an electronic presence for an accused who cannot physically be in court.

As stated in chapter one, the purpose of this dissertation is to show that the use of CCTV to facilitate testimony or an electronic presence, is not being used optimally. For that reason, it is important to understand when CCTV can be used as a tool for receiving testimony or substituting a physical presence with an electronic one; where the authority for its use comes from; and the requirements that must be complied with before CCTV can be utilised.

In order to establish the authority and requirements for the use of CCTV; legislation, journal articles, and caselaw relating to CCTV is considered. The importance of the requirements comes to the forefront in chapter six, where recommendations are made for the increased utilisation of CCTV, as an aid through which to gather testimony.

After the authority and requirements are examined in this chapter, chapters three and four describe the current uses of CCTV.

2.2 Authority for the use of CCTV in facilitating witness testimony

In 1996, the previous section 158 of the CPA, was substituted for the current section 158, by section 7 of the Criminal Law Amendment Act.²² This substitution made it possible for evidence to be gathered through the assistance of CCTV. The long title of

²² Criminal Law Amendment Act 86 of 1996 (hereinafter “Act 86 of 1996”).

Act 86 of 1996 makes it clear that the Act was created to, amongst other things, make it possible for evidence to be given by means of CCTV.

Before the use of CCTV can be explained, it is important to note that the circumstances in which CCTV can be used, focusses on three separate individuals. Namely the accused, ordinary witnesses, and child witnesses.

In the case of the accused, CCTV is used as an electronic substitute for a physical presence, and the authority emanates from section 153 and 159 of the CPA.

In the case of an ordinary witness, the use of CCTV is the facilitation of testimony, and obtains its authority from section 158 of the CPA.

In the case of a child witness, CCTV is also used to facilitate the gathering of witness testimony, and its authority is also found in section 158 of the CPA, with specific reference to children being found in section 170A(3) of the CPA.

The authority for using CCTV with regards to each section will now be explained in more detail.

2.3 Requirements and conditions for the use of CCTV

As stated in chapter one, CCTV includes closed-circuit television as well as any other similar electronic media. Therefore, not only legislation referring specifically to closed-circuit television will be considered, but also legislation referring to closed-circuit television by any other name.

Section 159A of the CPA, although only referring to procedures with regard to an accused, will be the starting point for this dissertation.

Section 159A(1)(c) gives the following definition for 'audiovisual link':

'a live television link between the court point and the remote point which are both equipped with facilities which will enable all appropriate persons at the court point and the remote point to follow the proceedings and see and hear all the appropriate persons;'

This definition will, for the purpose of this paper, also be attached to CCTV. The definition explains the workings of attaining testimony through the use of CCTV. It also provides the technical requirement for the use of CCTV, namely that both the necessary individuals at the court point and at the remote point, must be able to hear, see, and follow all the proceedings.

In section 158(4) of the CPA, this requirement is explained further:

'The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.'

Section 158(4) explains what the reason is for the public prosecutor, the accused, and the judge to be able to see and hear the witness at the remote point. This requirement is necessary in order to enable the persons at the court point to cross-examine a witness, while being able to observe the demeanour of the witness at the remote point when answering a question, thereby granting the testimony more weight.

Furthermore, section 158(3) of the CPA requires the following:

'A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable'

Section 158(3) states that facilities which are capable of satisfying the requirements of section 159A and section 158(4) above, must be easily or readily obtainable.

The first procedural requirement is forthcoming in section 158(2)(a) of the CPA:

'A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.'

According to this, a court may only order an individual to give evidence via CCTV if that individual consents to it. Therefore, before a court can consider the grounds for which to implement the use of CCTV as stipulated in section 158(3) of the CPA, a court must first enquire from the individuals concerned, whether they are willing to provide evidence through CCTV.

If a witness does not want to make use of the protective provisions, the court need not order that the CCTV facilities should be used. Some victims have a need to face their alleged abusers, as a way of gaining back some of the power they have lost as a result of the abuse they have suffered.²³ A court should refrain from further victimising a witness by not allowing them an opportunity to face their alleged abuser.

²³ H Dancig-Rosenberg & D Pugach "Pain, love and voice: the role of domestic violence victims in sentencing" (2012), *Michigan Journal of Gender & Law* volume 18 issue 2, Page 433.

The second procedural requirement can be found in the second part of section 158(3) of the CPA:

‘A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would -

(a) prevent unreasonable delay;

(b) save costs;

(c) be convenient;

(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.’

Section 158(3) provides the grounds a court must take into account in order to make a discretionary ruling whether or not to allow a witness to provide evidence through the means of CCTV.

The question whether the provisions of section 158(3) must be read conjunctively or disjunctively was first touched on in 1999, three years after the new section 158(3) was introduced into the CPA. The court in *S v F*,²⁴ held that the grounds in section 158(3) had to be read conjunctively, therefore all the grounds must be present, not only some of them.²⁵ In contrast to this finding, was *S v Staggie and another*,²⁶ who found that the grounds must be read disjunctively, therefore the grounds need not all be present, merely some of them. Judge Sarin AJ, rightly so, found:²⁷

‘The linguistic argument obviously is that if (a), (b) and (c) were meant to be read conjunctively, (b) and (c) should have been linked with the conjunctive ‘and’ as opposed to the disjunctive ‘or’ linking (d) and (e) (and by implication also (a) (d)).’

After the *Staggie* case numerous other high courts found in favour of reading section 158(3) disjunctively. Amongst others the *Domingo* case.²⁸ Finally the supreme court of appeal settled the question in the *McLaggan* case.²⁹ The court agreed, that the grounds must be considered disjunctively.³⁰

²⁴ *S v F* 1999 (1) SACR 571 (C) (hereinafter “S v F”).

²⁵ *S v F* (footnote 24 above) page 578.

²⁶ *S v Staggie and another* 2003 (1) SACR 232(C) (hereinafter “Staggie case”).

²⁷ *Staggie* (footnote 26 above) page 248.

²⁸ *S v Domingo* 2005 (1) SACR 193 (C) (hereinafter the “Domingo case”), page 199.

²⁹ *McLaggan v S* 2013 JOL 30559 (SCA); *S v Mclaggan* 2013 JDR 1359 (SCA) (hereinafter “Mclaggan”).

³⁰ *Mclaggan* (footnote 29 above) para 73.

Depending on the specific individual as mentioned in paragraph 2.2 above, in the case of the accused and child witnesses, further specific requirements exist.

In the case of an accused, section 159 of the CPA provides that only in specific types of cases with specific types of accused, an accused's physical presence in court can be substituted with an electronic one through the aid of CCTV. The accused, must be older than 18 years of age, both biologically and mentally, and must be contained in a certain type of correctional facility, namely a prison. The type of case, must be a bail application where the prosecution does not oppose the bail; or a further postponement, where no evidence needs to be presented. The court must also inquire into the accused's mental and physical well-being.

In the case of a child witness, section 170A(3) of the CPA provides that the witness must be below the age of 18, mentally or biologically, and that an intermediary must have been appointed for such witness.

2.4 An accused's rights are not absolute

The use of CCTV both as a medium to substitute an accused's physical presence with that of an electronic one, and as an aid to gather witness testimony, goes against some of an accused's rights as contained in section 35(3) of the constitution. Section 35(3) of the constitution provides an accused with, amongst others, the right to be present when being tried, which section 159 might limit; and to challenge evidence against him/her, which both section 158 and section 170A(3) will limit.

With regards to section 159; section 159A(3) states:

'Any proceedings ... shall be regarded as having been held in the presence of the accused person if, during the proceedings, that person ...
(b) is able to follow the court proceedings and the court is able to see and hear the accused person by means of audiovisual link.'

According to this section, an accused's rights as contained in the constitution are not transgressed if the quality of the CCTV is good enough to fulfil the requirements as stated above in paragraph 2.3.

The same cannot be said of section 158 and section 170A(3) which does in fact limit an accused's rights. It is however accepted that not all the rights of an accused are absolute rights, and section 36 of the constitution plays a vital role in limiting some of the rights of an accused.

S 36(1) provides the following:

‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.’

Section 36(1) has two legs, namely that the limiting provision must be a law of general application, and the limitation must be reasonable and justifiable.

The first leg of the test to overcome is that in this case section 158, and 170A(3) of the CPA must be a “law of general application”. The above-mentioned sections base a court’s discretion on certain categories of cases; therefore, the limitation is not aimed at a certain type of accused, and no unequal treatment of an accused will arise.

Regarding the second leg of the test, the rights granted to the witness in each case are aimed at protecting the witness from the trauma of testifying in a courtroom, and are neither impulsive nor arbitrary. An accused’s rights are limited only to the extent that it is reasonable and justifiable in an open and democratic society to do so. The limitation is not aimed at hindering the defence or limiting the fact-finding process.

Accordingly both legs of the test are satisfied and neither section 158 nor section 170A(3) of the CPA are, in my opinion, unconstitutional.

2.5 Conclusion

From the above, the following requirements can be summarised: firstly, a court must inquire into the willingness of a witness or an accused to give evidence by means of CCTV.

Secondly, facilities enabling appropriate persons both at the court point and the remote point to see, hear, and follow all the proceedings, must be readily available or obtainable.

Thirdly, one or more of the grounds upon which a judge must base his/her discretion, namely those mentioned in section 158(3) must be present.

Lastly in the case of specific persons, in the case of an accused; he/she must be older than 18 years, held in prison, bail must not be opposed by the prosecution, there must not be a need for the presentation of evidence, and a judge must inquire into the accused's mental and physical well-being. In the case of a child witness, an intermediary must have been appointed, and the witness must be below the mentally or biologically age of 18 years.

The current circumstances where courts have used CCTV for the purposes as stated above, is discussed in the chapters three and four.

Chapter three contains circumstances where CCTV is used for conditions mentioned in section 158(3)(a)–(d), including section 159.

Chapter 3

Current application of CCTV, through the lens of section 158(3)(d)

3.1 Introduction

In order to optimise the use of CCTV in criminal proceedings, it is first necessary to identify where CCTV is currently being used during criminal procedures. Once the current usage is identified, only then, can the problem areas be detected. For that reason, chapter three and four focusses on where CCTV is used currently. Section 158(3) of the CPA is used as a guide in order to separate certain circumstances for the use of CCTV that are described in chapter three, from those circumstances described in chapter four.

In the current chapter, attention is drawn to the fourth requirement mentioned in section 158(3) which a judge should consider before ruling that CCTV must be used, namely that it be in the interest of the security of the State or of public safety, or be in the interest of justice.

For the purpose of this dissertation the interest of justice will include provisions that prevent unreasonable costs and delays. The rest of chapter three focusses on the circumstances where the use of CCTV fulfils the above-mentioned requirement.

3.2 Circumstances where CCTV is currently being used as a medium to substitute an accused's physical presence with that of an electronic one.

3.2.1 In the case of a further postponement of a case

Section 159A(2) of the CPA provides that an accused who is not required to provide evidence, and who merely needs to be present for his/her case to be postponed, does not need to be physically brought to the court. Instead an accused can appear before the court via CCTV and be deemed to be present. An accused's right to be present when being tried will not be transgressed, as section 159A(3) provides the following:

'Any proceedings in terms of subsection (2) shall be regarded as having been held in the presence of the accused person...'

Therefore, the substitute of a physical presence for an electronic one, will not be unconstitutional, provided that the quality of the CCTV fulfils the requirements as pointed out in chapter 2.

3.2.2 Bail applications in terms of S159A-D of the CPA

Everyone who is arrested and alleged to have committed an offence has a constitutional right to apply for bail. This right is contained through numerous sections of the bill of rights in the constitution amongst others: section 35(1)(f); section 35(3)(h); and section 12(1)(a).

Bail applications are important in the sense that they allow the judiciary to decide whether or not to limit an accused's liberty. Bail applications are even treated as matters of urgency.³¹

Since 2008 in certain circumstances an accused's physical presence in court for his/her bail hearing can be substituted for an electronic presence, as provided for in sections 159A – D of the CPA.³²

With reference to section 159 A – D there are specific requirements for the type of accused and the type of bail hearing that allows a court to substitute an accused's physical presence with an electronic one.

Section 159A(2) holds:

'An accused person -
 (a) who is over the age of 18 years;
 (b) who is in custody in a correctional facility in respect of an offence;
 (c) who has already appeared before a court;
 (d) whose case has been postponed and who is in custody pending his or her trial; and
 (e) who is required to appear or to be brought before a court in any subsequent proceedings (whether before, during or after the trial or conviction and sentence) for the purpose of
 (i) a further postponement of the case; or
 (ii) consideration of release on bail in terms of section 60, 63, 63A, 307, 308A or 321, where the granting of bail is not opposed by the prosecutor or where the granting of bail does not require the leading of evidence,
 is not required to appear or to be brought physically before the court but may...appear before court by audiovisual link...'

³¹ Twayie v Minister of justice 1986 (2) SA 101 (O); S v Banger 2016 (1) SACR 115 (SCA).

³² Section 159 A-D of the CPA was only inserted through Criminal Procedure Amendment Act 65 of 2008.

The accused must therefore be older than 18 years of age and contained in a correctional facility. Also, the procedure defined in section 159 cannot be followed if evidence is required in the bail application, or if the prosecution opposes the bail.

If the court is satisfied that the case before it fulfil the requirements of section 159A, it must enquire whether section 159B(3) of the CPA will also be satisfied. Section 159B(3) requires that:

‘Both the court point and the remote point in the correctional facility designated in terms of subsection (2) must be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the court referred to in section 159C, allow -
(a) private communication to take place between the accused person and any legal practitioner representing that person in the proceedings at the court point;...’

As a result of this requirement, only certain magisterial districts and certain correctional facilities are able to facilitate an electronic presence. If both these requirements are fulfilled, and a court orders an accused to be present through a CCTV link, the court must always, according to section 159B(4) of the CPA, inquire into the accused’s mental and physical well-being.

Criticism

South Africa has not made use of CCTV bail application procedures for very long. For this reason, international problems with regards to CCTV bail procedures are considered for guidance, specifically the USA. Although South African law, and the law of the USA is not similar in most cases, the USA does have a progressive approach to technology and has answers to some questions South Africa has not even asked yet.

The first point of critique can be found in a journal article entitled: ‘Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions’.³³ The author in this article found that the distance CCTV creates between an accused and the judge will lead to dehumanization of an accused.³⁴ The author used statistics, to show that after studying more than 500 000 cases, instances where an accused had an electronic

³³ SS Diamond et al, “Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions” (2010), *Journal of criminal Law and criminology* volume 100 Issue 3, page 869 - 902 (hereinafter the “Diamond article”).

³⁴ The Diamond article (footnote 33 above) page 879.

presence in a court instead of a physical one, the average amount for bail increased by 51%.³⁵

In another journal article entitled: 'Effective Processing or Assembly Line Justice? The Use of Teleconference in Asylum Removal Hearings',³⁶ the authors found similar results as the Diamond article. Through researching 500 000 cases involving asylum seekers; in the cases involving CCTV, the chances that a negative outcome would have been reached, was double that of cases involving a physical presence. The authors also found that in cases involving an electronic presence, a judge is less likely to consider the life circumstances of an asylum seeker.³⁷ The life circumstances of an accused are an important factor to take into account when considering whether to release an accused on bail or whether to deprive them of their liberty.

It appears that the reason for this discrepancy between cases involving CCTV to facilitate an electronic presence, and cases involving a physical presence is explained in another American article entitled: 'Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research'.³⁸ According to the authors of this article the reason for the discrepancy is that judges feel that an accused, whose presence is seen through CCTV, is less credible. According to the authors, eye contact and pitches in a person's vocal cords conveys emotion and creates a sense of connectedness;³⁹ and through the mechanics of CCTV, eye contact and vocal pitches are partially lost, making an accused seem less credible.⁴⁰

The second point of critique is regarding an accused's right to council. Take the following example: an advocate meets his/her client for the first time on the day of the bail application at the prison to begin the interview. Yet the advocate is expected to be at the court before the accused's docket is called. This does not leave a lot of time for effective counsel. A court in the USA stated that an accused is unfamiliar with court

³⁵ The Diamond article (footnote 33 above) page 897

³⁶ FM Walsh & EM Walsh "Effective Processing or Assembly Line Justice? The Use of Teleconference in Asylum Removal Hearings" (2007 - 2008), *Georgetown immigration law journal* Volume 22, page 259- 269 (hereinafter the "Walsh article").

³⁷ The Walsh article (footnote 36 above) page 269.

³⁸ MT Johnson & EC Wiggins "Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research" (2006), *Law & Policy* Volume 28 issue 2 (hereinafter "the Johnson article").

³⁹ The Johnson article (footnote 38 above), page 222, 268, 269.

⁴⁰ The Johnson article (footnote 38 above), at 222; see also the Walsh article (footnote 36 above), page 216, 268, 269.

proceedings and the rules of evidence, and that an accused requires that council guide him/her through every step of the proceedings against him/her.⁴¹

With regard to the first point of critique. According to South Africa's constitution, section 165(2) provides the following:

'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

Therefore, judges should rule, not with their emotions, but based on fact. Whether or not the use of CCTV limits a personal connection between a judge and an accused should not play a role. Also, the provisions for the use of CCTV during a bail application in South Africa, is only available if bail is not opposed by the prosecution.

With regard to the second point of critique. Section 159A provides that CCTV can only be used in cases where the bail is not opposed by the prosecution. This provision is only available with regard to an accused in the pre-trial phase. The right to council and the degree of advice an accused ought to be given on his/her rights during the pre-trial phase, is not as extensive as the right to council and the degree of advice an accused ought to be given during the trial itself.⁴²

That said and more importantly, as stated above in chapter 2, an accused's rights are not absolute. Section 36 of the constitution can be applied in this regard as well.

Firstly, this limitation allowing CCTV to be used, is based on the conditions of a certain category of case and not the type of accused; it is therefore a law of general application. Secondly, it only limits an accused's right to the extent necessary, and in the interest of justice. As both legs of section 36 are present in this procedure, the use of CCTV to substitute an accused's physical presence with an electronic one is, in my opinion, constitutional.

⁴¹ *Geders v. United States*, 425 U.S. 80, 88–89 (1976) (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

⁴² F Snyckers & J le Roux "Criminal Procedure: Rights of an Arrested, Detained and Accused Person", *Constitutional Law of South Africa* 2nd edition volume 3 (loose-leaf) Chapter 51, page 51 – 57 (hereinafter "the section 35 rights article").

3.3 Current circumstances where CCTV procedures are used instead of evidence by commission procedures

According to section 171 of the CPA, if the attendance of a witness residing in the Republic of South Africa is necessary in the interest of justice and such attendance cannot be obtained, either without undue delay, expense, or inconvenience; a court is entitled to receive the evidence from such witness by way of evidence on commission.

Through evidence by commission, a magistrate in the country where the witness is present is given a set of questions, formulated by both the prosecution and the defence, which the witness should be asked. That magistrate asks the questions, notes the answers, and sends the answers back to the court which requires and assesses the evidence.

It is accepted that evidence on commission, gathered through the provisions of section 171 of the CPA, has less weight than evidence given by a witness present in court, as the court is not granted the opportunity to observe the witness's demeanour.⁴³

Another problem with evidence on commission is the procedure to be followed. In 1996, mister MA Mzizi said that the procedure found in section 171 was too cumbersome, and that it was not easy to obtain evidence from abroad in a speedy and effective manner.⁴⁴

Luckily in recent years, according to South African caselaw, judges have substituted the use of procedures in section 171, for that of section 158 of the CPA, and have allowed evidence from extra-territorial witnesses, to be given by means of CCTV.

Unfortunately, as with most new procedures, there is some controversy over whether or not section 158 is applicable to witnesses in jurisdictions outside South Africa.

Criticism

The *S v F* case,⁴⁵ was one of the first cases that made a remark indicating that section 158 could be used for a witness outside the jurisdiction of South Africa. In an *obiter dictum* the court observed that using CCTV as a medium to facilitate witness testimony

⁴³ PJ Shwikkard & SE van der Merwe, *Principles of evidence (2016)*, page 419.

⁴⁴ Mr MA Mzizi during debates of the National Assembly (Hansard), Third Session First Parliament, 15 January to 7 November 1996.

⁴⁵ *S v F* (footnote 24 above).

from a person in London, that is unable to travel to South Africa, would be a good use for section 158 of the CPA.⁴⁶

However, in the *Lawrence Goldberg* case,⁴⁷ the proverbial wrench was thrown into the works. The high court held the provisions of section 158 does not create a procedure to take evidence across borders by means of CCTV at a local trial.⁴⁸

In an article referencing this case,⁴⁹ the author points out that there is an assumption that a witness called under section 158(2) of the CPA is present in court through a monitor. The author bases this opinion on the case of *S v Ncedani*,⁵⁰ and the fact that a judge administers the oath to the witness or admonishes the witness to speak the truth, and if a witness misconducts him/herself, he/she could be prosecuted for contempt of court. The author also points out that the prosecution for contempt of court will not be possible if a witness does not testify in a court's jurisdiction.

The author in the section 158 article above,⁵¹ had a few points of critique regarding the application of section 158 of the CPA outside the borders of South Africa.

Firstly, the author argues that another Act must be used, namely the International Co-operation in Criminal Matters Act,⁵² (hereinafter "ICCMA"). Section 2(1) of the ICCMA makes provision for a letter of request to be sent to a foreign state. This procedure is similar to that of section 171 of the CPA as discussed above.

Secondly, regarding the wording of section 158 of the CPA, the author pointed out that section 158 does not expressly state that it is applicable outside the borders of South Africa. The author acknowledges that this can be seen as an oversight, but points out that other sections in the CPA do expressly state that they apply to witnesses based abroad.

⁴⁶ S v F (footnote 24 above) para 578.

⁴⁷ *Lawrence Goldberg and another v Magistrate R Boshoff NO and another* Case No 09/53076 (2010-07-30), unreported (hereinafter the "Lawrence case").

⁴⁸ *Lawrence* case (footnote 47 above) para 15 & 16.

⁴⁹ JD Mujuzi "Evidence by means of closed circuit television or similar electronic media in South Africa: Does section 158 of the Criminal Procedure Act have extra-territorial application?" (2015), *De Jure* Volume 48, page 1-16 (hereinafter the "section 158 article").

⁵⁰ *S v Ncedani* 2008 JOL 22342 (Ck) unreported (where a child witness gave evidence through an intermediary and through closed circuit television).

⁵¹ The section 158 article (footnote 49 above).

⁵² International Co-operation in Criminal matters Act 75 of 1996.

With regard to the first point, the ICCM does not expressly exclude any other procedures from being used. The ICCM was enacted with the intention to speed up the process and limit the encumbrances of evidence by commission. It would therefore not make sense for the legislators to exclude a, faster and more accurate procedure, from being used in the interest of justice

Regarding the second point, the mere fact that there are specific instances where mention is made of extraterritorial use with regard to some sections in the CPA, does not preclude that the lack of an express statement regarding extraterritorial use in the case of section 158 of the CPA, might be an oversight. The fact that it is not expressly stated, should also not prevent its use. In the final constitution there is not expressly stated that an accused has a right to representation during bail applications,⁵³ but through common sense and precedence, it has become common practice that an accused should have representation during a bail application. This right to representation can be used as an example for finding authority to using section 158 extraterritorially, even though no right to that effect is expressly stated. The court in *S v Sauls*, stated that the exercising of caution should not exclude the exercise of common sense.⁵⁴

Fortunately, many South African courts have held that the providing of testimony through CCTV under section 158 of the CPA is possible for a witness based abroad. In *S v Mclaggan*,⁵⁵ the high court held expert evidence can be gathered from a witness based in the United Kingdom through CCTV. The judge remarked that if the application for evidence to be given on the bases of section 158 was not granted, it would delay the trial and that if facilities for CCTV is available it would result in a saving of costs. The judge therefore held that it was in the interest of justice that the evidence be given through the aid of CCTV.⁵⁶

⁵³ No right of representation is expressly stated in section 35(1), only section 35(2) and (3) mentions the right to representation. Section 35(2) is applicable to detainees, not accused. There is a difference between an accused and a detainee, therefore the expressed mention to representation in sub-section 2 is not applicable to an accused. Section 35(3) mentions rights applicable to the trial phase, bail applications are pre-trial, therefore the right to representation expressly mentioned in sub-section 3 is not applicable during bail applications. For a full explanation see the section 35 rights article (footnote 42 above).

⁵⁴ *S v Sauls and Others* 1981 (3) SA 172 (A) para 180G.

⁵⁵ *S v McLaggan* (CC70/2011) 2012 (ECGHC) 63 (2012-08-20) (hereinafter the “*Mclaggan* high court case”).

⁵⁶ The *Mclaggan* high court case (footnote 55 above) para 70.

The *Mclaggan* case,⁵⁷ was appealed in 2013, and the supreme court of appeal agreed with the finding of the *Mclaggan* high court.⁵⁸

With the ruling of the SCA,⁵⁹ the confusion was cleared and resulted in judicial authority for the use of CCTV for gathering witness testimony from individuals in foreign countries through the use of section 158 of the CPA. Recent cases using CCTV to receive evidence from witnesses outside of South Africa, include the *URAMIN* case taking place in 2017.⁶⁰

Through the use of CCTV, evidence gathered from witnesses based abroad carries more weight than it would have if the procedure of section 171 was followed.⁶¹ The judge in the *Mclaggan* high court also remarked that if the quality of the CCTV is good enough and an immediate exchange can take place with an appropriate level of interaction, all parties at the court point will be able to confront the witness with cross-examination.⁶²

3.4 Conclusion

From the above the following circumstances regarding the use of CCTV for the purpose of section 158(3)(d) can be summarised: Firstly, postponement of cases where the accused need not present evidence, and an accused uses CCTV to present an electronic presence at court instead of a physical one. Secondly, bail applications where the bail is not opposed by the prosecution. Thirdly the use of CCTV for the purpose of gathering evidence from a witness that cannot be present in South Africa without undue delay, cost, or inconvenience.

It has also been explained that in none of these above-mentioned cases, will the use of CCTV be unconstitutional.

⁵⁷ The *Mclaggan* high court case (footnote 55 above).

⁵⁸ The *Mclaggan* SCA case (footnote 29 above).

⁵⁹ The *Mclaggan* SCA case (footnote 29 above).

⁶⁰ *URAMIN (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ).

⁶¹ K Leader "Closed-Circuit Television Testimony: Liveness and Truth-telling" (2010), *Law Text Culture* Volume 14 Article 18, page 312-336.

⁶² The *Mclaggan* high court case (footnote 55 above) para 77.

The following chapter, chapter four, contains the circumstances where courts have used CCTV for the circumstances contained in section 158(3)(e) and section 170A of the CPA.

Chapter 4

Current application of CCTV, through the lens of section 158(3)(e)

4.1 Introduction

As stated in chapter two, it is necessary to identify the circumstances where CCTV is used at the moment, before the use of CCTV can be optimized.

Section 158(3)(e), as described in chapter 2, allows for the use of CCTV in cases where, in the absence of this procedure, a witness would likely be prejudiced or harmed if they had to give evidence physically in court. Two categories of witnesses can fall into circumstances mentioned in sub-section (e).

The first category of witnesses, is a person in witness protection. Below, the supreme court of appeal case of *Staggie*,⁶³ is used as authority for the use of CCTV as a medium through which to give testimony as provided for by section 158 of the CPA in the case of a person in witness protection.

In the second category of witnesses, the phrase “vulnerable witness” comes to mind. A “vulnerable witness” as described in caselaw, may at first glance appear to indicate a broad group of individuals, as all witnesses feel intimidated while testifying. In reality, it encompasses very specific witnesses of very specific types of crimes.

In this chapter, the development of the protection of vulnerable witnesses and the sources thereof, is investigated. The different types of witnesses that fall into this category, and the current usage of CCTV for the protection of vulnerable witnesses, will also be examined. After the usage for CCTV with regards to vulnerable witnesses are examined, the use of CCTV for persons in witness protection are also discussed.

The rest of chapter 4 focusses on the circumstances where CCTV is used with regard to vulnerable witnesses, and persons in witness protection.

⁶³ S v *Staggie* (2012) (2) SACR 311 (SCA) (hereinafter the “*Staggie* SCA case”).

4.2 Categories of vulnerable witnesses

On 15 September 2003 a submission to the constitutional development committee regarding the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, was made by the Women's Legal Centre of Cape Town. A proposal was made that a definition for vulnerable witnesses should be created. The South African Law Reform Commission recommended that the category of vulnerable witnesses should be recognised. However, the legislature while enacting Act 32 of 2007, chose not to adopt the recommendation.⁶⁴ According to the minutes for the debates of the Portfolio Committee on the vulnerable witness clause in the Sexual Offences Bill, the decision was made to exclude a definition because it would place an unnecessary obligation on courts to declare any child or women in a sexual offence case a vulnerable witness.⁶⁵ For that reason South Africa does not have a codified definition of what a vulnerable witness is.

Fortunately, the term "vulnerable witness" is internationally renowned. Even internationally, the definition is very similar. Considering foreign jurisdictions for guidance on the definition of the term vulnerable witness, Australia and the United Kingdom are of some assistance.

Both countries define a vulnerable witness as falling into one of three categories. These categories are: cases involving children, victims of sexual abuse, and lastly, victims of serious crimes. Although three categories exist, they are not mutually exclusive.

In South African legislation there are two sections that provide protective measures for the above-mentioned categories of witnesses, and allow witnesses to avoid being physically present in the court room if their presence will not be in the interest of justice. These sections are section 158 of the CPA, and section 170A of the CPA.

With specific reference to the above categories of witnesses and the use of CCTV, these protective measures are discussed in detail below.

⁶⁴ Information gathered through - J Gallinetti & D Kassan "Children and sexual offences" (2008), *Should we consent? Rape law reform in South Africa*, page 162 (hereinafter the "should we consent article").

⁶⁵ Should we consent article (Footnote 64 above).

4.3 Cases involving children.

Children being victims of sexual offences, have become a matter of great concern.⁶⁶ It is therefore not surprising that a major motive for this dissertation is the development of procedures, which are both practical and easily obtainable, to assist in the protection of vulnerable witnesses during the course of a criminal trial.

4.3.1 Motivation

As stated in chapter one, by the time a child complainant testifies in criminal proceedings, the child would have reiterated the same story several times, mostly to strangers.⁶⁷

In 1989 the South African Law Commission found that ordinary adversarial trial procedures were insensitive and unfair to child witnesses due to its strong emphasis on cross-examination.⁶⁸ Alleged sexually abused children that had to testify in open court, could be intimidated and humiliated by the traumatic experience of facing the accused again. Even further trauma could occur in cases where the accused did not have legal representation, because the accused themselves could then cross-examine the child witness.

The commission recommended that a procedure needs to be created to eliminate some of the secondary trauma that a child witness might undergo when testifying. It was also recommended that face-to-face confrontation between the child witness and accused should be avoided,⁶⁹ and that this could be achieved through the use of electronic or other devices.

The *DPP* case, almost two decades later, again explained that the atmosphere of courts during criminal proceedings is intended to be intimidating; and that the child witness is alone in the witness stand separated from his/her parents, and in the presence of the alleged abuser.⁷⁰ The court referred to an article, where the effect of this atmosphere is explained with regards to children. The author of this article showed

⁶⁶ Preamble of Act 32 of 2007 (footnote 15 above).

⁶⁷ *DPP* case (footnote 7 above) para 106.

⁶⁸ The South African Law Commission: *The Protection of the Child Witness Project 71* Working paper 28 (1989).

⁶⁹ The South African Law Commission: *The Protection of Child Witnesses Project 71* (1991) (hereinafter "project 71 final").

⁷⁰ The *DPP* case (footnote 7 above) para 101.

that, in some cases, the foreign atmosphere would send a child into a “terrified silence”, and in some cases children have been too frightened to say anything after being exposed to the intimidating atmosphere of criminal proceedings.⁷¹

4.3.2 Section 170A of the CPA

On the basis of the findings and recommendations of the above-mentioned commission, section 170A was inserted into the CPA in 1991 by way of Act 135 of 1991.⁷²

Section 170A(1) specifies that it is only applicable to children, or for the purposes of this chapter the first category of vulnerable witness. Section 170A(1) states the following:

‘Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.’

In South Africa, a child is defined as someone under the mental or biological age of 18 years. The workings of section 170A has, since it came into operation on 30 July 1993, allowed for a child witness to be asked questions through an intermediary in certain circumstances, where testifying at the trial would cause a child undue mental stress or suffering. Section 170A has also made provision that if an intermediary is appointed, the child witness should not hear the original question, only the question as put to him/her by the intermediary.⁷³

S170A (3) provides the following:

‘If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place –
 (a) which is informally arranged to set that witness at ease;
 (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
 (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.’

⁷¹ JJA Key “The Child Witness: The Battle for Justice” (1988), *De Rebus* Issue 241, page 54-55.

⁷² Criminal Law Amendment Act 135 of 1991.

⁷³ Section 170A(3)(b) CPA.

In the case of section 170A(3) it is important to note that the child witness should not be able to hear or see any person that might upset them. For that reason, should CCTV be used as a medium, the remote point should not be able to see, hear, or follow the proceedings at the court point. Section 170A is applicable to all child witnesses in criminal proceedings, not only cases involving sexual offences.

4.3.3 Constitutionality of section 170A(3)

There might be a question regarding the constitutionality of gathering evidence through CCTV from a child witness. To answer that question section 36 is used again and reference is also made to the constitutional court case of *DPP Transvaal v Minister for Justice and Constitutional Development*.⁷⁴

The first test to overcome for section 170A(3)(a) to be constitutional is that it must be a “law of general application”. Section 170A(3)(a) determines that a court may direct that a certain type of witness shall give evidence at any place outside the presence of the accused. It is therefore not aimed at a certain type of accused, and no unequal treatment of an accused will take place.

Regarding the second leg of the test, section 170A(3) is aimed at protecting a child witness from the trauma of testifying in a courtroom, and is neither impulsive nor arbitrary. The limitation is not aimed at hindering the defence or limiting the fact-finding process.

The *DPP* case, held that section 170A(3) is not unconstitutional in as far as it allows the court to order that a child witness gives testimony through CCTV. The court’s reasoning starting with section 28 of the constitution. Section 28(2) states:

‘A child’s best interests are of paramount importance in every matter concerning the child.’

The court held that the best interest requirement demands that a child be shielded from potential trauma that may arise from testifying at criminal proceedings.

⁷⁴ The *DPP* case (footnote 7 above).

Section 170A(3) gives effect to the objective of section 28(2) as it makes an effort to protect a child complainant from exposure to undue stress or suffering by allowing a child who testifies through an intermediary, amongst others via CCTV, to be shielded from this intimidating atmosphere as well as the accused while testifying.⁷⁵

More over the court in *S v M*,⁷⁶ held that legislation:

‘must be interpreted ... in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children’s rights.’

In the case of section 170A(3), the child complainant is not a party to the proceedings in which they testify, but at the same time they have constitutional rights that must be protected.

The constitutional court, in the *DPP* case, has therefore found that the operation of S170A(3) complies with the rights of the accused accorded to him/her through section 35 of the constitution, and that if all parties to the case,⁷⁷ are able to observe the demeanour of the child witness and the behaviour of the intermediary, then section 170A(3) is constitutional.

4.3.4 Section 158(5) of the CPA and national guidelines

Protection for children is not only confined to section 170A. Section 158(5) creates an impression that a rebuttable presumption exists in the case of a child below the age of 14 years. The presumption is that a court must order that CCTV be used for receiving evidence from a child under the age of 14 years, if not, immediate reasons for the refusal must be entered into the record.

In South Africa, the national prosecuting authority’s directives,⁷⁸ give prosecutors guidance regarding when to ask a court to order the use of CCTV. The directives state that, as a rule, a prosecutor should bring an application for the use of section 158 where a complainant or witness is under the biologically or mentally age of 14 years.

⁷⁵ The *DPP* case (footnote 7 above), Para 97.

⁷⁶ *S v M* 2007 (2) SACR 539 (CC) para 15; *S v M* 2008 (3) SA 232 (CC) para 15.

⁷⁷ Parties as described in chapter 2 above.

⁷⁸ Directives issued in terms of section 66(2)(a) and (c) of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007 (hereinafter the “NPA directives”).

4.3.5 International guidelines

Section 39(1) of the constitution states the following:

‘When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.’

Article 3 of the United Nations Convention on the Rights of the Child, is the international guideline considered for the purpose of this section.⁷⁹ The guidelines of article 3 provide that the protection of child complainants in the criminal justice system should include child-friendly procedures and modified court environments, which may allow a child witness to testify out of sight of an accused.⁸⁰

4.4 Victims of sexual abuse and serious crimes

4.4.1 Section 158 of the CPA

The guidelines for the use of CCTV can be found in the NPA directives.⁸¹

NPA directives explain the way that sexual offence cases should be dealt with. In paragraph B, the directives explain that the prosecutors should try, as far as possible to reduce the trauma of a complainant in sexual offence cases. It explains further in paragraph E that witnesses should wait in a victim-friendly environment where contact with an accused can be avoided. In paragraph H the directives give examples of when to use section 158 of the CPA,⁸² and in turn shows that the protection afforded by

⁷⁹ This Convention was adopted by the General-Assembly on 20 November 1989 and entered into force on 2 September 1990.

⁸⁰ Paras 29-31 of the Guidelines.

⁸¹ NPA directives (footnote 78 above).

⁸² The directives give the following examples of when to use section 158:

- ‘The prosecutor should consider this measure in all sexual offence cases...
The circumstances that should be considered when bringing an application in terms of section 158 include, but are not limited to-
- (a) where the witness is unwilling or unable to testify in the presence of the accused due to fear of the accused;
 - (b) where the nature of the offence involved violence;
 - (c) when the complainant is acquainted or related to the accused;
 - (d) where the court room environment intimidates the witness;
 - (e) fear of being intimidated as a witness by the accused and or members of the public;
 - (f) where the witness may be part of a witness protection programme in terms of the Witness Protection Act, 1998 (Act 112 of 1998);

section 158 is broader than that of section 170A, as it is available to assist any traumatized complainant or witness, and not just children.

Furthermore section 158(2)(a) states:

‘A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.’

In chapter three of this dissertation the circumstances for when a court may order, that evidence be given through CCTV as contemplated in section 158(3) was already explained, and the above directives are perfectly in line with those circumstances.

Section 158 therefore includes the protective provisions for both the second category of victims, being victims of sexual abuse; and the third category of victims, being victims of serious crimes.

In *S v Staggie*,⁸³ the court found that if it is determined that one or more of the circumstances mentioned in section 158(3) of the CPA are present, it may order that evidence be given through the aid of CCTV. The court in *S v Domingo*,⁸⁴ strengthened this finding by pointing out that section 158(3) gives broader protection to the people as a whole. It does not only allow for the use of CCTV for witnesses under 18 years, but provides courts the discretion to allow the use of CCTV for receiving evidence from any witness as long as the circumstances of section 158(3) are complied with.

4.4.2 The constitutionality of section 158 in this case

Regarding the Constitutionality of the use of CCTV for witnesses over the mental and biological age of 18 years, the requirement in section 158(4) of the CPA plays a vital role. Section 158(4) requires that the right of all the parties at the court point to question the witness and to observe his/her reaction must be preserved. Because of this provision both the courts in *Staggie*, and in *Domingo*, held that a witness testifying via CCTV is constitutional and does not violate an accused’s right to have a fair trial.

(g) where the impact of the offence is so severe on the witness that he/she is unable to testify in open court;

(h) that the quality of the testimony of the witness would be compromised should he/she testify in the presence of the accused...’.

⁸³ The *Staggie* case (footnote 26 above).

⁸⁴ The *Domingo* case (footnote 28 above).

4.5 Persons in witness protection

As stated above a vulnerable witness is a specific type of individual transgressed by certain types of crimes and therefore not all witnesses fall into this category. Another type of witness that falls into the purview of section 158(3)(e) of the CPA is a person in witness protection.

In the *Staggie* case, both the high court,⁸⁵ and the supreme court of appeal,⁸⁶ found that the provisions for allowing a witness to testify via CCTV, as contained in section 158 of the CPA, are also available to a person in witness protection.

In the *Staggie* case, both the complainant and some of the witnesses were in witness protection. It would have created great risk for them to physically appear in court. For that reason, the high court found that the use of CCTV is made available based on the provisions of section 158. The supreme court of appeal also supported the decision and found that in the case of a person in witness protection requiring to testify, the provisions of section 158 are fulfilled and the use of CCTV can be ordered by court.

Regarding the Constitutionality, the finding for the purpose of using CCTV in the case of witness protection, is the same as any other use of section 158, and the supreme court of appeal,⁸⁷ found that it is not unconstitutional.

4.6 Conclusion

From the above it can be deduced that, with regards to vulnerable witnesses and persons in witness protection, it would most likely lead to prejudice if testimony were to be given in the courtroom itself. In some cases, if a witness were allowed to testify through CCTV rather than being physically present in the courtroom, the quality of evidence would be of a higher standard as well.

It is important to note, as mentioned in chapter two, that some witnesses prefer a face-to-face with the accused, and such a choice should not be taken away by the courts simply because they are described as vulnerable witnesses.

The following chapter, chapter five, identifies where possible problem with regards to the optimal use of CCTV for gathering evidence might arise.

⁸⁵ The *Staggie* case (footnote 26 above).

⁸⁶ *Staggie* SCA case (footnote 63 above).

⁸⁷ *Staggie* SCA case (footnote 63 above).

Chapter 5

Incumbrances to and shortcomings of the use of closed-circuit television in South African Criminal Courts

5.1 Introduction

The intention of this dissertation as mentioned in chapter one, is to identify circumstances where the use of CCTV procedures can be optimised in order to both; improve access to courts, and to act as a protective measure for vulnerable witnesses. Chapters two, three, and four considered legislation for the use of CCTV procedures, and the current applications of CCTV procedures. In this chapter the hurdles to the effective use of CCTV procedures as well as some shortcomings of the current uses are identified.

5.2 Incumbrances to the use of CCTV

As mentioned in chapter one, South Africa is a country that has many informal settlements and rural areas. This leads to problems regarding access to courts. Old age, illness, mobility and transport problems, are all difficulties witnesses in South Africa face, and problems that can lead to a failure of access to justice. When the criminal justice system does not allow everyone equal access to courts due to difficulties for reasons such as these, a lack of faith in the justice system is fostered, and could lead to people taking the law into their own hands. It is exactly for this reason that historically, vigilantism was predominantly found in rural areas.⁸⁸

Even before the interim constitution existed,⁸⁹ courts recognised that the rights of an accused were not absolute, and that the interests of a witness should also be protected.⁹⁰ After the final constitution came into effect in 1996, courts had justification to limit an accused's rights through section 36.

⁸⁸ News24, in South Africa, by C Pieterse on 4 March 2019, "*Vigilantism*", Accessed through: <https://www.news24.com/SouthAfrica/News/vigilantism-20190304-5> (on 10 October 2019 09:40).

⁸⁹ Constitution of the Republic of South Africa Act 200 of 1993.

⁹⁰ *R v Rall* 1982 (1) SA 828 (A).

As explained in previous chapters, the use of CCTV as a medium through which to gather testimony as provided for in the CPA, will not be regarded as unconstitutional. This then begs the question why the provisions that allow complainants, accused, and witnesses to give evidence through CCTV, are not being implemented more readily?

This chapter seeks to answer this question, by firstly looking at the hurdles to CCTV procedures being used.

5.2.1 The limitation on the use of CCTV procedures

In an article discussing the use of CCTV,⁹¹ the author states that although section 158 of the CPA provides for the use of CCTV in certain cases, the section has been subjected to a narrow interpretation by courts, which in turn has frustrated its use.⁹²

The first hurdle identified in this dissertation is the fact that magistrate courts are creatures of statute, and therefore cannot control their own proceedings like higher courts can. If a high court consequently finds that CCTV procedures are not applicable in some cases, the ability of magistrate courts to use CCTV in those cases are taken away.

For example, in 1999 the high court stated that the grounds in section 158(3) of the CPA must be read conjunctively.⁹³ For the next four years, Magistrate courts were limited in their use of CCTV in cases, as they were forced to interpret section 158 in a narrow fashion and consider all the grounds in section 158(3) conjunctively. This was until the 2003 when another high court decided that the grounds in section 158(3) must be read disjunctively as it has been since.⁹⁴

Another example is the question whether CCTV provisions are applicable to cases involving witnesses based abroad. Between 2010 and 2013 there was a discrepancy regarding whether CCTV procedures could be used with regards to witnesses that are based abroad. A conclusive answer only appeared in 2013, when the supreme court of appeal stated that CCTV procedures are applicable extra territorially.⁹⁵

⁹¹ H Galgut Article (footnote 12 above).

⁹² The author refers to S v F (footnote 24 above) to illustrate this point.

⁹³ S v F (footnote 24 above).

⁹⁴ S v Staggie (footnote 26 above).

⁹⁵ S v *Mclaggan* (footnote 29 above).

What makes matters worse is the fact that in the absence of authorization from courts, prosecutors are reluctant to make use of statutes that allow alternative methods of gathering testimony from witnesses. Consequently, prosecutors will in some cases not even ask for the use of CCTV procedures for the gathering of evidence, if a court does not, of its own accord, enquire whether or not it should be used in such particular circumstances.

For the effective use of CCTV procedures for all courts in South Africa, a higher court must first make a ruling that CCTV can be used in a specific way and in specific circumstances. A recommendation for overcoming this hurdle is discussed in chapter six.

5.2.2 Problems with the implementation of CCTV procedures

The second hurdle, and most probably the main incumbrance, is identified through the assistance of the *DDP* case, namely the implementation of the procedures allowing the use of CCTV.⁹⁶

The court in the *DPP* case had some concerns over the availability of sexual offence courts, and in turn the facilities for the use of intermediaries and CCTV. The court showed that between 2005 and 2007 the number of functioning sexual offence courts had declined.⁹⁷ The court quoted statistics showing that out of approximately 450 regional courts in South Africa, only 14% of the courts had the facilities to accommodate intermediaries,⁹⁸ and even fewer had facilities for the use of CCTV. In some courts the equipment was malfunctioning, and in others the equipment never even worked in the first place.⁹⁹

The court in the *DPP* case, used an example of a case where due to the unavailability of an intermediary, a case was postponed for one year. One year later, an intermediary was still not appointed, and the case had to be postponed again.¹⁰⁰ These postponements can be to the detriment of child victims and complainants.¹⁰¹

⁹⁶ *DPP* case (footnote 7 above) para 109.

⁹⁷ *DPP* case (footnote 7 above) para 194.

⁹⁸ *DPP* case (footnote 7 above) para 195.

⁹⁹ *DPP* case (footnote 7 above) para 195, the court referred to the North-West province and the respondents from Lehuruthe.

¹⁰⁰ *DPP* case (footnote 7 above) para 191.

¹⁰¹ Example of detriment can be found in *S v Kasebedile* Case No CC201/05, North West High Court, 4 October 2005, unreported.

An article in 2013 investigated whether sexual offence courts should be re-established.¹⁰² The article found that the decline in the number of sexual offence courts was due to amongst others: the limited physical locations of the sexual offence courts, the cash-flow management policies, and the flow of cases from the lower courts to these specialised courts.¹⁰³ According to the authors of this article, another reason for the decline was the unfortunate belief that sexual offence courts with better resources was a violation of the constitutional rights of other victims that had to attend mainstream courts.¹⁰⁴

The main encumbrance to the effective use of CCTV procedures is therefore the shortage of courts that have access to facilities that are capable of incorporating CCTV technologies. Courts in need of expert evidence from someone with an impossibility of physically being at court due to geographical distance, is incapable of getting that evidence. Courts in need of testimony from someone who, due to a need for self-preservation, is incapable of physically being in the same room as an accused, will have to do without such testimony.

If access to courts is to be optimised, and if the best evidence rule is to be followed, the effective use of CCTV procedure is of the utmost importance, and the creation of CCTV facilities is the first step. Further recommendations are discussed in chapter six.

5.3 Shortcomings in South Africa regarding the use of CCTV

Once the decision has been made by courts that the case before them does fulfil the requirements for the use of CCTV, there are however some shortcomings in its use. These shortcomings are identified in this dissertation with the intention of finding a way to overcome them, thereby optimising the use of CCTV and as a result greater access to our courts.

¹⁰² S Mkhwanazi & G Msungwa “Dedicated courts to help fight sexual offences” (2013), *Justice Today* Volume 4, (hereinafter the “sexual offence court article”), page 8 & 9.

¹⁰³ Sexual offence court article (footnote 102 above) page 9.

¹⁰⁴ Sexual offence court article (footnote 102 above) page 9. (In my opinion, decision makers should focus on creating the same protection procedures for everyone who needs it instead of limiting the protection granted to vulnerable witnesses who is in real need of that protection.

5.3.1 The delayed realisation of the need for CCTV

The court in the *DPP* case found that, at times the need for the protective measures are only identified on the trial date and is something that should already have been established at the social worker assessment.¹⁰⁵ In cases where CCTV should be used, and the facilities are not readily obtainable, the court must order that the criminal proceedings be transferred to another court which does have such facilities.

It will always be costly to have proceedings transferred and such a transfer will normally bring about an “unreasonable delay” as well. This transfer in turn enlarges the current backlog experienced by South African courts, instead of alleviating it.¹⁰⁶

Delay in finalisation of a case is to the detriment of both the accused and complainants as well as the community as a whole. The *DPP* case itself pointed out that these delays are to the detriment of child victims. Studies have also shown that victims only start to rehabilitate after the case is finalised, and not during the period of the trial.

Therefore, the first shortcoming identified is a combination of two problems: That there are courts dealing with cases where the use of CCTV facilities could be required, that do not have such facilities; and that the need for the CCTV facilities, is only belatedly discovered when the trial is already underway. Both of these problems lead to delays that could be avoided if the implementation of CCTV procedures were optimised.

5.3.2 Other types of application

Although section 158 is available to any witness who satisfies the grounds as mentioned in sub-section 3, the NPA directives only expressly state that it is available to children, and witnesses or complainants in sexual offence cases. As a result, most often it is only children, or victims in sexual offences cases that make use of CCTV for testifying.¹⁰⁷ For that reason testimony by CCTV has become common practice in cases involving children, but still remains an exceptional measure when it pertains to adult witnesses and is in the majority of cases, only used in adult sexual offence cases.¹⁰⁸

¹⁰⁵ *DPP* case (footnote 7 above) para 112.

¹⁰⁶ H Galgut Article (footnote 12 above) Para 9.

¹⁰⁷ Should we consent article (Footnote 64 above) page 151.

¹⁰⁸ JM Reynecke & HB Kruger “Sexual offences court: better justice for children?” (2006), *Journal for Juridical Science* Volume 31 Issue 2, page 73 – 107.

Other cases also involve individuals that may be in need of protective measures, for example cases involving human trafficking or abduction. Most witnesses experience trauma and stress specifically if the offence took place in an interfamilial context. These types of witnesses may equally be in need of the protection which testifying by CCTV provides.

The majority of the South African population have some form of cultural belief system, or make use of customary law, as can be seen by the many animal cruelty offences that has been dismissed as cultural practices. In the case of a women that has been asked to testify against their tribal leader, intimidation can take place merely by her being physically present in the same room as the tribal leader. In cases of domestic abuse, a wife testifying against a husband, can be intimidated by the presence of her husband. For that reason, any offence taking place in an interfamilial, or close-knit community context, should (in my opinion) also be considered when the use of CCTV is contemplated.

Other applications of CCTV procedures in addition to the usages as a protective measure, are also available. In 1998, Australia had already used CCTV procedures with regards to expert witnesses. Section 182 of the CPA allows for a witness from prison to provide evidence only if such evidence will not be at the expense of public safety, yet cases where witnesses from prison use CCTV facilities, are virtually non-existent. If witnesses from prison are allowed to use the same facilities or similar facilities to those that an accused utilises for postponements of their cases, courts would not need to weigh the benefit of the evidence against public safety.

5.3.3 Geographical challenges and chance encounters

South Africa has procedures which attempt to avoid contact and conflict between an accused and a vulnerable witness. These include: one-way screens that allow the court to see and hear the witness while the witness is not able to see the accused; allowing the witness to use a different door to enter the court than other individuals; and victim-friendly waiting rooms. However even with procedures like these, confrontation between a witness and an accused cannot always be circumvented if both of them are present at the same venue.

If a witness testifies through CCTV from a room attached to the court, then unanticipated encounters with the accused cannot always be avoided. In a Canadian

article, the author gave examples where children testifying through CCTV from another room in the court, for the purpose of preventing secondary trauma by seeing the accused, still saw the accused on occasion. Examples used include a child victim that saw the accused in their case at the security gate, another child victim saw the accused sitting on a bench outside of the testimony waiting room.¹⁰⁹

For unanticipated encounters between a vulnerable witness and an accused to be avoided completely, the remote point should be completely separated from the court point. This possibility is discussed further in chapter six.

5.3.4 Shortcomings with CCTV technology

As pointed out in chapter 3, with regard to the use of CCTV for an accused; a technology-based model of communication can foster a feeling of distance between the judge and the witness, or the accused. There is a belief that the distance caused by testimony through CCTV may make that evidence less credible.¹¹⁰ Psychosocial studies found that face-to-face interaction is sought, when social judgements are created.¹¹¹

In a paper already published in 1999,¹¹² the author noted that testimony through CCTV might be highly effective, but short audio delays that are inherent in CCTV will prohibit instant interruptions that are common in ordinary conversation. The author also pointed out that rapid movement may not be properly reproduced when technology is utilised.

¹⁰⁹ P Hurley, "The Use of Closed-Circuit Television: The Experiences of Child and Youth Witnesses in Ontario's West Region" (2015), *Victims of crime Research Digest* Issue 8, (hereinafter "the Pamela Hurley Article"), page 5.

¹¹⁰ The Johnson article (footnote 38 above) page 211, 221.

¹¹¹ B Bengtsson et al, *The Impact of Anthropomorphic Interfaces on Influence, Understanding, and Credibility* (1999).
("Normal interaction is comprised of the identities of individuals involved in interaction. Identity creates an impression of the social, which in turn engenders feelings of engagement or connectedness.").

¹¹² FI Lederer "The Road to the Virtual Courtroom? A Consideration of Today's – and Tomorrow's – High Technology Courtrooms" (1999), *Faculty Publication Paper 212 College of William & Mary law school*, page 835.

In an era where ubuntu is a guiding principle,¹¹³ something that limits the courts perception of someone's humanity, whether it is a witness or accused, may not be considered a practical solution to the problem of access to courts.

Solutions to this problem are discussed in chapter six.

5.4 Conclusion

From the above, it is clear that the main problem is the restrictive implementation of the already existing CCTV provisions. It has even been stated as such by the constitutional court in the *DPP* case.

In paragraph 5.3.2 it is also pointed out that the lack of CCTV facilities leads to a strictive use of CCTV procedures, and that better evidence could be gathered if the use of CCTV procedures was used in more cases.

It is also apparent that the implementation is not the only problem as there are some minor shortcomings to the use of CCTV as well. That said, the use of CCTV is still an important tool for advancing access to justice and protecting vulnerable witnesses. CCTV procedures should therefore not be avoided as a whole. The CCTV procedure should merely be improved.

In the next chapter, recommendations for the optimisation of CCTV procedures are examined, and a possible future of virtual courts are described; through articles and information sought from authors from Australian, the United Kingdom, and the USA.

¹¹³ Prof. J Ogude defines ubuntu as an idea of personhood, and that a person is only a person through other persons. More information available at: <https://www.templetonworldcharity.org/projects/meaning-and-value-of-ubuntu-human-and-social-development-africa> (Accessed 10 October 2019 11:55).

Chapter 6

Analysis and recommendations

6.1 Introduction

Chapter one to four has been used to explain why and how CCTV procedures are used, both nationally and internationally. Chapter five identified some of the reasons why CCTV procedures are not used as often as they could be.

This chapter describes possible solutions to the hurdles and shortcomings identified in chapter five by examining the role of CCTV in countries that are more technologically progressive than South Africa. Some observations regarding problems identified in chapter five are also discussed and a brief look is given to the concept of virtual courts.

6.2 International trends regarding CCTV

The use of CCTV procedures can be followed internationally. Advances in the use of CCTV are most noticeable in the USA, Australia, and in the United Kingdom.

In the USA for example, a superior court in a civil case, allowed a witness who was paralysed from the neck down and who had to breathe through the aid of a respirator, to testify and observe the trial from within his apartment in Chicago while his case was being heard in New Jersey.¹¹⁴ This was done through the aid of CCTV procedures. In another case from the USA, the Florida Supreme Court upheld a robbery conviction that was based almost entirely on the two-way video testimony of complainants that testified from Argentina.¹¹⁵

Other developments in the USA include the implementation of so-called “e-courts”. Already in 2013, the superior court in Phoenix Arizona, moved into a new courthouse that made use of e-courtrooms. These courtrooms are equipped throughout with: microphones; flat-screen TVs; two-way videoconferencing facilities,¹¹⁶ allowing court

¹¹⁴ *United States v Gigante*, 971 of 1997.

¹¹⁵ *Harrell v State*, 709 So. 2d 1364 (Fla. 1988).

¹¹⁶ F Weber “Complying with the confrontation clause in the twenty-first century: Guidance for courts and legislatures considering videoconference testimony provisions” (2013) *Temple Law Review* Volume 86 Issue1, page 151.

(The Author explains that videoconference technology enables a witness to testify without being physically present in the courtroom. The ‘videoconference witness’ is ‘virtually present’ through the use of technology, enabling both the witness and the individuals at the court point to interact).

appearances from locations outside the courthouse; evidence display systems, with touch screens, that allow exhibits to be highlighted and explained; and full audio and visual digital recording facilities.¹¹⁷ The USA has even made use of CCTV technology to substitute a physical presence of judges with an electronic one.¹¹⁸

In Australia for example, CCTV procedures are used in a variety of ways. As far back as 1998, the Australian Institute of Judicial Administration Conference in Melbourne, demonstrated a CCTV connection to its forensic laboratory, showing how a doctor in a laboratory setting, could testify without being present in the court itself.

In one case in Australia where a local magistrate was deemed unavailable due to unforeseen circumstances, CCTV was used to bring another magistrate 'on-line' to deal with that day's court roll. Another example is where, judges in Australia, who finish their roll for the day can be linked through CCTV, to a busier courtroom in another district in order to assist in that courtroom's caseload.¹¹⁹

Other uses of similar technology in Australian courts, include the ability of judges to allow child witnesses in cases involving children under the age of 16 years, to make an audio-visual recording of their evidence. The court then uses such a recording to substitute the child witness's obligation to give oral evidence while physically in court.

The United Kingdom has a similar provision in section 27 of the Youth Justice and Criminal Evidence Act.¹²⁰ That section stipulates that audio-visual recorded evidence is a procedure that can be used to protect a vulnerable witness. In the United Kingdom this form of evidence is available as evidence in chief, cross-examination, and in re-examination as well.

¹¹⁷ K Kaplan "Will Virtual Courts Create Courthouse Relics?" (2013), *The Judges' Journal* Volume 52 Issue 2 (hereinafter "the Kaplan article").

¹¹⁸ *United States v Salazar* 44 M.J. 464 (1996), two of the five judges appeared by separate CCTV systems.

¹¹⁹ A Wallace "Virtual Justice in the Bush': The Use of Court Technology in Remote and Regional Australia" (2008), 19 *Journal of Law, Information and Science* 1 (hereinafter the "Wallace article").

¹²⁰ Youth Justice and Criminal Evidence Act of 1999.

In the United Kingdom there has already been a case that has taken place entirely by virtual testimony. In an article in the Guardian,¹²¹ the author described how a civil case was held with a judge in London, lawyers in Belfast, and the claimant at home appearing via his home laptop camera.

From the international trends it is clear that the use of CCTV is something that allows more access to courts, and might in the future be part of every case, whether it be civil or criminal. In the article from the Guardian referred to above,¹²² the author explains that virtual courts might be the future of both civil and criminal trials, and that the “Ministry of Justice modernisation programme” will lead courts into a new era.

6.3 Observations regarding shortcomings mentioned in chapter five

Although the main reason for courts not using CCTV procedures may be due to problems with implementation of the legislation, as explained in chapter five; some observations regarding the shortcomings also mentioned in chapter five, should show that except for the misappropriation and/or dissolution of necessary funds, no other reasons appears to exist for this very implementation problem.

The first observation is a combination of two shortcomings. Firstly, the technological advancements that has been made, making delays in feed and sound of video-conferencing almost non-existent. Secondly, due to advancements of technology, facilities for the use of CCTV is easier and cheaper to find than ever, therefore the delayed realisation for the need of CCTV, should not be a problem, as CCTV facilities would be easily obtainable without undue delay.

Gordon E Moore described a law of technology as far back as 1965, called “Moore’s law”, stating that technological developments will grow exponentially. This “law” has been true for more than half a century now. As technological development increases, the cheaper similar-quality products become. For example, a laptop built in 2013 had the same computing ability as the most powerful computer on earth in the mid-1990.¹²³

¹²¹ The Guardian, in Britain, by Owen Bowcott on 26 March 2018, “First virtual court case held using claimant’s laptop camera”, accessed through: <https://www.google.com/amp/s/amp.theguardian.com/law/2018/mar/26/first-virtual-court-case-held-using-claimant-laptop-camera> (on 10 October 2019 09:45).

¹²² Wallace article (footnote 119 above).

¹²³ M Roser and H Ritchie “Technological progress” (2019), *OurWorldInData.org* (hereinafter the “article on Technological progress”).

The second observation is regarding the shortcoming identified in chapter five that describes the problem of chanced encounters between an accused and vulnerable witnesses in his/her case.

The first and second observation and the uses of technology in other areas of law is briefly described below.

6.3.1 Technological advances

The first reported South African case involving the admissibility of electronic evidence, was heard a quarter of a century before the Electronic Communications and Transactions Act 25 of 2000 was enacted,¹²⁴ and was the *Narlis* case.¹²⁵ Almost 40-years later in the *CMC Woodworking Machinery* case,¹²⁶ the court held:

“Much, however, has happened since 1947. World War II had ended and wireless and telephone technology developed to the extent that the telex was introduced. The fax machine followed thereafter as well as cellphone communication. Computers entered every house and office — to the extent that most courts depend on electronic equipment. For example, proceedings are no longer manually recorded but by a trained stenographer who records them digitally. Changes in the technology of communication have increased exponentially and it is therefore not unreasonable to expect the law to recognise such changes and accommodate them.”

Technology plays a huge role during criminal proceedings. It is used for managing caseloads, publishing information for court users, transferring knowledge within the court, and as explained by the *CMC Woodworking Machinery* case, it is used for recording the proceedings itself and for publishing judgments, it is even used in cases for substitute service of notices by, for example, sending it through Facebook . The next logical step should be extensive implementation of cheap, fast, and working CCTV procedures that are easily obtainable.

Technology has progressed to a stage where the equipment needed for a two-way audio-visual link to be established between the court point and the remote point is no longer complex or unreasonably expensive to obtain.¹²⁷ No reason should exist that some courts do not have access to facilities for the use of CCTV procedures. CCTV

¹²⁴ J Hofman “the meaning of the exclusions in section 4 of the Electronic communications and Transactions Act 25 of 2000” (2007), JUTA Volume 27, page 262.

¹²⁵ *Narlis v South African Bank of Athens* 1976 (2) SA 573 (A).

¹²⁶ *CMC Woodworking Machinery (PTY) LTD v Pieter Odendaal Kitchens* 2012 (5) SA 604 KZD, (hereinafter the “*CMC Woodworking Machinery* case”).
Para 1.

¹²⁷ Refer to the article on Technological progress (Footnote 123 above).

facilities should in all cases where it is needed, be easily accessible or obtainable, and thanks to the advancement of technology, connectivity problems and delays experienced due to huge distances between the two points should no longer be an insurmountable problem.

In 2016 a new term was introduced to the world, namely the “fourth industrial revolution”.¹²⁸ This term represents the extraordinary technological advances that has taken place in the last decade and is set to continue into the future. It is also believed that this “fourth industrial revolution” is an opportunity to help everyone, including people from all levels of income.¹²⁹ Accordingly the term focuses on, amongst others, virtual reality,¹³⁰ which is the direction courts around the world is heading towards with e-courts, and virtual courts.¹³¹

For example, in 2011 a new video conferencing program called “Zoom” was launched. This program allows up to forty individuals to communicate over video conference at a single moment, without the number of delays that is associated with applications like “Skype”. In these circumstances no slight delay in body movements, words or hesitation can negatively affect the outcome of criminal proceedings which was previously described as a hurdle to its use.¹³²

Another example includes how the media has advanced to such an extent that interviews can be held and live-streamed to millions of viewers around the country and even the world, all from an interviewee’s home.

Yet courts, have not made use of newer and better technology in an effort to improve access to justice and protecting vulnerable witnesses and victims. On the contrary, as shown by the *DPP* case, facilities that allow CCTV communication have declined in recent years.¹³³ The problem does not lie with the technology itself but with the inability

¹²⁸ The “Fourth Industrial Revolution” was introduced at the World Economic Forum’s Annual Meeting in 2016 at Davos-Klosters Switzerland.

¹²⁹ <https://www.weforum.org/focus/fourth-industrial-revolution> (Accessed on 10 October 2019 10:10).

¹³⁰ <https://whatis.techtarget.com/definition/fourth-industrial-revolution> (Accessed on 10 October 2019 10:12).

¹³¹ More detail on this trend is provided in para 6.2 above.

¹³² With new fibre connection to the internet, and connecting the device to the internet using a cable instead of through WiFi, delays in body or “image skipping” can be avoided. More information available at: <https://blog.zoom.us/wordpress/2013/08/12/a-guide-to-avoiding-and-fixing-video-meeting-disasters/> (Accessed on 10 October 2019 10:13).

¹³³ *DPP* case (footnote 7 above) Para 194 and 195, stated that only 14% of South African courts

of courts to access the technology, and may more likely be due to misappropriation of funds resulting in a lack of proceeds for such implementation.¹³⁴

“The present Constitution is generally a framework for defending and advancing liberties for all...But realising this constitutional potential presumes actions in good faith by democratically elected leaders and the officials whom they appoint to carry out policies... Instead of using available state resources in order to alleviate their plight, funds and other resources were diverted into the pockets of civil servants...”¹³⁵

If the technology for the use of CCTV procedures are easier to obtain, other witnesses as explained in chapter five will also be able to make use of CCTV procedures more readily. This in turn will lead to better quality of evidence, and better access to courts by all parties concerned.

6.3.2 Other areas of law using technology

The advantages achieved by using technology are numerous. In addition to the administration tasks as mentioned in the *CMC Woodworking Machinery* case, other areas of law have been using technology to broaden the access to justice for individuals.

In 2009, one of the first articles regarding online dispute resolution (hereinafter referred to as “ODR”) appeared.¹³⁶ ODR entails the use of trained online mediators and helps resolve disputes through the internet. The use of ODR has allowed parties from all four corners of the world to resolve disputes without needing to be in each other’s presence. ODR may be used in disputes that stem from either online or real-world activities.¹³⁷ Parties merely need to decide which countries’ jurisdiction to use before the mediation starts, and then proceed to work out their differences without even being in the same country.

¹³⁴ has facilities to accommodate intermediaries, and even fewer has facilities for the use of CCTV. ‘Courts are hampered by a constrained budget’, words in a speech by the DA on 9 May 2018, assessed through:

<https://www.dailymaverick.co.za/article/2019-05-14-the-judiciary-state-capture-and-the-future/> (Accessed on 10 October 2019 11:40).

¹³⁵ The Daily Maverick, in South Africa, by Raymond Suttner on 14 May 2019, “The judiciary, State Capture and the future”, accessed through:

<https://www.dailymaverick.co.za/article/2019-05-14-the-judiciary-state-capture-and-the-future/> (on 10 October 2019 09:49).

¹³⁶ BH Malkawi “Online Alternative Dispute Resolution and Transparency” (2009), *Contemporary Asia Arbitration Journal*, page 101-116.

¹³⁷ F Fowlie “Online Dispute Resolution and Ombudsmanship” (2011), *Journal of International Ombudsman Association* Volume 4 Issue 2, page 50.

Since 2011 ODR has grown into a major franchise, one that improves access to mediation for all individuals.

In the Netherlands a paper by M Gramatikov and L Klaming,¹³⁸ described the experience of 126 individuals who took part in online divorce mediation. In this paper it was found that the parties to the divorce found no substantial difference in the quality of the procedure or the quality of the outcome of the online mediation, compared to real world mediation.

As pointed out above, in countries more progressive than South Africa, technology has advanced access to justice in great strides, and has even allowed judges to make use of CCTV procedures to shorten court roles of other courtrooms. If CCTV can therefore grow in the same way ODR has, virtual courts as discussed below, is definitely a possible future for South African criminal courts.

6.3.3 Casual encounters

Individuals who might be physically and geographically near the court, but whose presence is excluded from court for their own interest, such as vulnerable witnesses, are in most cases still required to be in a separate room that is attached to the court itself. As mentioned in chapter five, this tradition has some disadvantages. The biggest, having accidental contact with the alleged abuser.¹³⁹

Separate rooms might be more victim-friendly, but it is still at court, and courts are designed to be intimidating in themselves. In the Pretoria-North Magistrate court, for example, vulnerable witnesses testify behind a one-way mirror. Although the vulnerable witnesses are allowed visitations to the court to make them more familiar with the court, interviews and play time is held in a waiting room. This procedure has the unfortunate drawback that the moment the witness steps into the witness box, behind the one-way mirror, even if it they are shielded, they are exposed to a new and sometimes cold setting, where they are once again asked questions by strangers. This defeats the very objective of the “protection” given.

¹³⁸ M Gramatikov & L Klaming “Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation” (2011), *TISCO Working Paper Series on Civil Law and Conflict Resolution Systems*.

¹³⁹ The Pamela Hurley Article (footnote 109 above).

In Canada child and youth advocacy centres exist (hereinafter “CYACs”), which provide families with help during the trial. These CYACs are separated from the court grounds and are safe havens for victims of crime. The help offered includes facilities in which to make a video-recorded statement, as well as meetings with social workers and psychologists.¹⁴⁰ This video-recorded statement is not a live communication link, as with CCTV, but it follows a principle that can be adopted for the use of CCTV procedures.¹⁴¹

Throughout sections 170A, 153, 158, and 159 there is not a single requirement that the remote point where the witness is to testify, be in or near the courtroom. By studying caselaw allowing CCTV provisions to be used as an alternative to evidence on commission, and allowing an accused person to use CCTV from prison, it can be stated without uncertainty that the remote point needs not be in proximity to the court room.

For that reason, nothing stands in the way of South Africa following the lead of Canada and creating its own CYACs, which incorporate or are capable of having facilities, for the utilisation of CCTV technology.

South Africa can go even further and following the lead of the United Kingdom and start incorporating elements of virtual courts in its existing courts, by simply making a few minor alterations. The courts in South Africa need only to install microphones, cameras and a flat-screen TV thereby creating a two-way videoconferencing facility. If similar CYACs to that of Canada are created with the same set of equipment as the courts, the two points can communicate wirelessly with each other using CCTV technology.

6.4 Recommendations

Firstly, in the DPP case the courts stated in an *obiter dictum* that the procedure for using an intermediary should become the standard when it comes to child

¹⁴⁰ WA Walsh et al, “How long to prosecute child sexual abuse for a community using a children’s advocacy centre and two comparison communities?” (2008), *Sage journals* Volume 13 Issue 1, page 3-13.

¹⁴¹ Video-recording facilities are available in these CYACs to allow victims of abuse to make video-recorded statements that are can be used for the purpose of evidence-in-chief, or as cross-examine evidence. These video-recordings is then used in court as a substitute for the victims’ physical presence. If instead of video-recording equipment CCTV equipment is installed, it would limit the need for vulnerable witnesses to go to the same courts as the accused in their cases.

complainants in sexual offence cases.¹⁴² It is therefore recommended that the use of CCTV also become the standard procedure for child victims and complainants to testify when it comes to sexual offence cases. This is in line with the recommendations of the South African Law Commission that was already made in 1991, recommending that face-to-face confrontation between a child witness and an accused should be avoided if an intermediary is appointed in that case.¹⁴³

Secondly, regarding the procedure of creating audio-visual recordings that substitute the need of physical presence; it is recommended that it only be used if CCTV procedures are not possible, or if an unrepresented accused desires to cross-examine a vulnerable witness him/herself. Video recordings as a viable method of gathering evidence is not recommended, as it would not carry the same weight as CCTV procedures, and would be subject to the same problem that evidence on commission procedure in section 171 of the CPA has, namely that the demeanour of a witness when being cross-examined would not be seen by the parties in court.

Thirdly, it is recommended that CCTV facilities be installed in the victim-friendly rooms where children are comfortable, instead of rooms where they are not comfortable and not yet familiar with. When social workers ‘play’ with child victims during an interview in a victim-friendly room, it is that same room that must be equipped with CCTV facilities. It is recommended that this be incorporated in centres similar to CYACs, where the court and the CYACs are completely separate.¹⁴⁴

In 1986 already an article entitled “Initial and long-term effects: a review of the research”, the authors D Finkelhor and A Browne, stated that sexual abuse is a hazard to long-term mental health and Briere J and Runtz M, went even further and suggested that males will become more aggressive toward others, while females will become more prone to self-destruction.¹⁴⁵

¹⁴² DPP case (footnote 7 above) para 112.

¹⁴³ Project 71 final (footnote 69).

¹⁴⁴ The first CYACs was created in 1985, for the purpose of reducing trauma created by the justice system and it is believed these centres will reduce the number of interviews and questions a child is asked during both the investigation and pre-trial phase. Currently there are more than 900 CYACs existing in the USA alone; and from the year 2010 to the year 2016, the funding for CYACs in Canada has been increased from \$5.25 Million to \$12.25 Million. More information available at: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd11-rr11/p4.html> (Accessed at 10 October 2019 17:38).

¹⁴⁵ J Briere & M Runtz “Childhood Sexual Abuse Long-term Sequelae and implications for

The CYACs mentioned above will have the initial benefit of allowing children a relief from further trauma, by the justice system, by limiting their contact with an accused and strange places while at the same time allowing victims the opportunity to speak to a social worker and working on their trauma, this in turn will have long-term benefits for the victims, and help in preventing lasting damage that can be caused by the assault.¹⁴⁶

Fourthly, the creation of a portable facility, similar to that of media outlets is recommended. This will enable even circuit courts the opportunity to make use of CCTV procedures. This may be expensive at the onset, but the benefits it would create for the interests of justice and safety of the community will outweigh the costs. In the future, vulnerable witnesses will be able to testify from the comfort of their own homes, or that of a safe haven. No longer will it be necessary for familiarity visits, because the children will be in an environment that they know, while their testimony is given.

6.5 Virtual courts

If portable facilities are created as recommended above, it will be the first step in the direction of virtual courts, as they are already used in the United Kingdom, the USA, and in Australia.

According to Keith Kaplan,¹⁴⁷ in 2013 a virtual court was a conceptual idea where a trial can take place in a court that has no physical presence. A virtual court will still provide the same justice services that are available in normal courtrooms, but at the same time allow remote appearances and testimony. The key element of a virtual courtroom is the ability of judges, lawyers, accused, and witnesses to appear remotely, and provide testimony via CCTV. This allows trials to function with parties that are separated by great geographical distances, but through the assistance of technology, will be able to function as if they are physically in the courtroom.

Psychological Assessment" (1993), *Journal of interpersonal Violence* Volume 8 Issue 3, page 312-330.

¹⁴⁶ There are many different types of CYACs, some help the children and their parents understand the court process, some allow video-recordings to be made for the substitution of a victim physically testifying in court, others allow the children and their parents a chance to talk with a social worker or psychologist in order to work through trauma.

¹⁴⁷ The Kaplan article (footnote 117 above).

As stated above, this trend of having virtual courts make rulings, is currently practiced in more developed countries, and may be the future of both the criminal and civil spheres of law, and if the success of ODR is any indication, it could be a bright future.

6.6 Conclusion

Dr Izette Knoetze, states that the use of technology can improve both the courts, and the public's access to courts. Dr Knoetze further explains that not only will technology allow for better access to courts, but that it can also improve the efficiency of courts that are operating in difficult financial times.¹⁴⁸

It is submitted that the use of CCTV will have the same effect, as it too will improve both access to courts and the efficiency of South Africa's justice system. The use of CCTV will have a similar benefit to traumatised witnesses who, through the help of CCTV, will not need to fear repercussions from an accused, and will be able to provide the court with substantially better evidence as a result.

If recommendations for creating portable CCTV facilities are followed, even the most remote areas of South Africa will be able to make use of procedures that allow better access to courts or protection of witnesses in need of it.¹⁴⁹

Chapter seven below, summarises the findings of this dissertation, explains why further research is required into the concept and workings of virtual courts, and serves as a chapter that ties all the information given together.

¹⁴⁸ I Knoetze "Courtroom of the future – virtual courts, e-courtrooms, videoconferencing and online dispute resolution" (2014), *DeRebus* issue October 2014.

¹⁴⁹ In 2014 the 35.7% of South Africa's population resided in rural areas (footnote 5 above).

Chapter 7

Conclusion

7.1 Response to research questions

There are two research questions guiding this study:

What are the reasons for the frustrations of the use of CCTV in criminal courts of South Africa?

How can expanding the use of CCTV benefit criminal courts, for example with regard to vulnerable witnesses?

This dissertation addressed these questions by evaluating the uses of CCTV facilities in more technologically progressive countries such as the United Kingdom, Australia, Canada, and the USA. This is done to find the importance of using CCTV for the betterment of courts and society as a whole.

7.2 Attainment of research objective

The research questions were answered as follows:

The reason for the frustration of the use of CCTV procedures was found to be the implementation of the procedures, or more specifically, the lack of funds for creating CCTV facilities.

The expanding of CCTV procedures can benefit criminal courts in more than one way. Firstly, CCTV procedures, if implemented properly, can improve the quality of evidence the court is exposed to, by allowing vulnerable or intimidated witnesses, or expert witnesses who, if not for CCTV procedures, would not have given evidence to the courts, to give their evidence. Secondly, if CCTV procedures are implemented as it should be, it would allow more people from across South Africa experiencing problems with their health or travel arrangements access to courts, thereby improving justice for everyone and bettering the community and society as a whole.

7.3 Findings and final comments

The whole world has seen improvements in technology and technology is becoming more and more affordable for everyone. Nothing stands in the way of South Africa following the lead of Canada or the USA and developing its own centres that help

vulnerable witnesses from all backgrounds and ages to see justice done by having them tell their stories in court, while still being protected by distance from their accused. South Africa can go even further, and follow the trends media is generating by creating portable facilities capable of fulfilling CCTV procedures from anywhere in the country, even rural areas.

7.4 Contribution of dissertation

This dissertation was an exploratory study aimed at finding a viable procedure that can both improve access to justice and provide protection for those who need it. The study was mostly descriptive in nature, describing the situations when CCTV procedures can and should be followed. The study looked at the possible future of virtual courts, and also investigated the reasons as to why CCTV is not used more during the trial and pre-trial stages of criminal proceedings.

It is recommended that further studies be conducted on the use of CCTV for the protection of vulnerable witnesses, as well as virtual courts for the betterment of access to courts. Currently, there are not enough real-world information on virtual courts. One of the first reported cases of a virtual court case has taken place in 2018. It is therefore recommended that future studies should include information on the relatively new concept of virtual courts. It might also be of help to look into the benefits of CYACs or similar centres, and whether it would be feasible to develop portable CCTV facilities.

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