

CHAPTER TWO
THE SOUTH AFRICAN LEGAL SYSTEM

2.1 INTRODUCTION

Increasing numbers of children have given evidence about crimes against them, most frequently about child sexual abuse. This is as a result of increasing prosecution of child sexual assault cases. As more and younger children appear before the courts as witnesses, the problems they face in an accusatorial, adult-orientated system become increasingly evident (Louw, 2004a:3).

In this chapter, the historical background of the South African legal system will be discussed briefly. Thereafter the accusatorial system will be explored. Legal instruments such as the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), the Service Charter for Victims of Crime in South Africa, the United Nations Convention on the Rights of the Child as well as other statutory innovations will be examined. Rules of evidence and rules of procedure for cases being brought to trial will be discussed and finally attention will be given to specialized language used in court.

2.2 HISTORICAL BACKGROUND OF THE LEGAL SYSTEM IN SOUTH AFRICA

There are two major legal systems, namely the accusatorial or common law system, which is an Anglo-American system, and the inquisitorial system, which is a system that applied to pre-colonial Africa and presently applies to most European countries, especially France and Germany (Muller & Hollely, 2000:21). None of the systems however exist in a pure form but are hybrids of the above two systems (Dugard, 1977:117; South African Law Commission, 2001:187; Muller, 2002:2).

There are fundamental differences between the accusatorial and inquisitorial systems. The development of these opposing systems started in the 12th century. During this

time the organization of communities changed. The communities no longer consisted of small, self-supporting units. The law had to develop to keep up with these changes.

The accusatorial process originated from the first form of lawsuits in the post-primitive society. Private vengeance made place for verbal confrontation between two parties in public (Snyman, 1975:101; Muller & Hollely, 2000:2). This development was left up to the courts. The United Kingdom and France, for instance, differed greatly in the course of the development they adopted (South African Law Commission, 2002:188). Both the United Kingdom and France however adopted the inquisitorial model, which developed towards the end of the middle ages (Muller & Hollely, 2000:2).

In the early part of the 20th century most research on child witnesses had been conducted in Europe, especially in Germany and France. At this time children were rarely permitted to testify, as the general conclusion was that young children were suggestible and vulnerable to making serious errors in their court testimony (Ovens, Lambrecht & Prinsloo, 2001:25).

Entire legal systems developed, flowing from the differential treatment of the accused. The accusatorial system felt that the accused should not have to incriminate himself by either an oath or information extracted through torture, but should have the right to keep silent. In contrast, the inquisitorial system felt that confession was the essential component (South African Law Commission, 2001:189).

Schwikkard, Skeen and Van der Merwe (1996:6) are of the opinion that all procedural and evidential systems are honest attempts to discover and protect the truth. Therefore there is much common ground in spite of the particular historical origins and ideological preferences each system may have.

Presently, South Africa uses the Anglo-American accusatorial system together with a set of exclusionary rules of evidence. This means the South Africa's legal system does not have a jury and that the common law is Roman-Dutch. Imposed on that, there is the Constitution, 1996, African customary law, and tradition. English law influenced criminal procedure and law of evidence.

2.3 THE ACCUSATORIAL SYSTEM IN SOUTH AFRICA

South Africa is a common law country that follows the accusatorial system of justice (Don Wauchope, 2000:33). South African procedural and evidentiary rules are based upon the accusatorial principles and the (English) common law system of evidence. The opposing parties, and not the court, are in principle responsible for presenting evidence in support of their respective cases. This is done according to procedural principles and exclusionary rules, which promote “morality” and secure “confrontation” (Van der Merwe, 1995:195).

Cross-examination and face-to-face confrontation between the witness and the accused are central features of the accusatorial system. The criminal trial consists of two opposing parties placing evidence before a passive presiding officer who, after hearing the examination-in-chief and observed the cross-examination, makes a decision as to the guilt of the accused (Muller & Hollely, 2000:3). Meintjes-Van der Walt (2002:24) states: “The accusatorial system depends largely on the ability of lawyers to expose the weaknesses in witnesses and their testimony through cross-examination.”

The above creates the perception of a battle. Two opposing parties fighting a battle, with each side calling their own witnesses and attacking the witnesses of the other party throughout cross-examination (Jarman, 1998:34). The central determination or burden of proof is whether the state can, beyond reasonable doubt, prove that the accused is guilty. If the prosecutor cannot do this and there is reasonable doubt in the mind of the presiding officer, the accused must be acquitted (South African Law Commission, 2001:195; Bukau, 2003:165).

The accusatorial system has the following features:

2.3.1 Oral evidence in court

Evidence is normally given orally as little use is made of written evidence because the court values the cross-examination process. The child witness is brought in front of a court that operates in a formal atmosphere, which is intended to be imposing. The

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effect of this atmosphere on the child witness could reduce the child to a state of terrified silence. This fear can result in the child not being able to convey adequately what has happened to him in court. This results in evidentiary requirements not being met and that the offender goes free (Castle, 1997:31).

According to Kleyn and Viljoen (2002:182-183), oral evidence is the most common form of evidence. The weight the court attaches to such evidence depends on the child witness's credibility. In the accusatorial system all the evidence will be presented orally in one continuous presentation. The witness must physically attend court and give oral evidence in front of the presiding officer. The witness will first give evidence-in-chief, then be cross-examined, and then re-examined. The presiding officer may also ask questions to the witness (South African Law Commission, 2001:455). The fundamental assumption is that oral evidence is superior to all other evidence (Spencer & Flin, 1990:67; Muller & Hollely, 2000:7).

2.3.2 Two opposing parties (state prosecutor and defense attorney)

In the accusatorial system there are two parties which each present their case to the presiding officer. Goldstein (1974:1016) explains that both parties play an aggressive role in presenting and examining witnesses. Of the two parties, the prosecutor must prove his case beyond reasonable doubt and the defense only has to create doubt. The prosecutor need not obtain a conviction but must rather present all relevant evidence to the court so that justice can be done. The defense will fight for acquittal. This gives rise to the "contest" atmosphere in court.

2.3.3 Passive presiding officer

Several authors (compare Katz-Levin, 2000:C3, 22; Muller & Hollely, 2000:3) stated the following:

- The role of the presiding officer in the accusatorial system is a passive one;
- The presiding officer must not know the detail of the case beforehand;
- He must remain neutral and see that justice is done;

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- He must listen to the evidence that is presented by both parties present intervening only for clarity;
- He is under a common law duty to prevent irrelevant, repetitive, and intimidating questioning (South African Law Commission, 2001:195);
- The presiding officer must see that the rules of evidence and procedure are adhered to; and
- The presiding officer makes the decision whether the accused is guilty or not, based upon the evidence placed in front of him.

2.3.4 Confrontation

According to Van der Merwe (1995:203) the right to confront in the accusatorial system is a procedural right generally deemed essential for a fair trial.

Confrontation is one of the features of the accusatorial system, which creates the greatest difficulty for children. According to the South African Law Commission, (1989:4) the right that the accused has to confront the witness has the implication that the child, who has to testify against the accused, must do so in the presence of the accused. This creates immense difficulties for the child. Added to this, the child will also be required to relate his evidence in a formal courtroom, which will be alien to the child (Hammond & Hammond, 1987:13).

2.3.5 Cross-examination

The other feature that creates immeasurable difficulties for the child witness in the accusatorial system is cross-examination. Once a witness has given evidence in a trial, the defense or opposing party is allowed to cross-examine the witness. Myers and Perry (1987:181-182) postulate that cross-examining a child is a delicate and difficult process. They further state that the basic purpose of cross-examination is to:

- Elicit testimony which is favourable to the cross-examiner's theory; and
- To undermine the witness's direct testimony by challenging the witness's credibility or testimony.

2.3.6 Rules of evidence

Court proceedings are largely dictated by the rules of evidence, which are designed to ensure fair trials (Castle, 1997:28). According to Muller and Hollely (2000:6) the accusatorial system is characterized by a formal and rigid adherence to the rules of evidence. Emphasis is placed on the admissibility of evidence. Aspects like the competency of the child witness, the cautionary rule, hearsay, the oath, and expert witnesses are ruled by the rules of evidence.

2.4 LEGAL INSTRUMENTS CONCERNING THE CHILD IN SOUTH AFRICA

An increasing number of children are giving evidence, most frequently about sexual abuse against them, in the criminal courts. The child gives evidence both as a victim and as a witness. The problems these young children face in an accusatorial, adult-orientated system have become increasingly evident. These problems include being required to tell a number of strangers what happened to them, having to wait months and even years before the case gets to court, having to face the perpetrator and answering difficult questions asked by the prosecutor, magistrate and especially the attorney who are not used to speaking to children in an age-appropriate language in court (Morgan & Williams, 1993:113; Westcott, Davies & Bull, 2002:203).

In the late 1980's it was recognized that the child witness's immaturity required a more specialized approach than that used with adults in the criminal courts. A number of innovative procedures were introduced. The most radical was the attempt to protect the child from direct confrontation by the accused or his attorney by making use of an intermediary and a closed circuit television whilst the child would sit in another room than the courtroom. These changes accorded special status to child victims in criminal courts (Morgan & Williams, 1993:113).

An essential element of any effective justice system is the protection of the child victim and child witness of crime. Where provision is not made for separate and specialized services for this vulnerable group, they may be further exposed to the

negative effects of the criminal justice system or may even further be victimized by it (Ovens *et al.*, 2001:25).

Various initiatives to address the issues of the child witness have been instituted in South Africa. The Constitution of the Republic of South Africa, 1996, the United Nations Convention on the Rights of the Child, and the Victim's Charter serve as a guide for all South African citizens. These documents can be viewed as a solid foundation for the host of legislation that relates to the lives of all South African children, whether they come into contact with the criminal justice system or not (Child Law Manual for Prosecutors, 2000:A-1).

All the above measures are aimed at empowering and enabling the justice system to ensure the fulfillment of South Africa's international, constitutional and moral obligations to promote the best interest of the child (Ovens *et al.*, 2001:33).

2.4.1 The Constitution of the Republic of South Africa

The South African legal system was constitutionalised on the 27th April 1994 when the interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) came into operation. Parliamentary sovereignty was replaced by the interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993). The Constitution, 1993 (Act 200 of 1993) included a justifiable Bill of Rights. Some of the common law and statutory trial rights of the accused have hardened into constitutional guarantees (Van der Merwe, 1995:195).

The final Constitution was drafted in terms of Chapter Five of the interim Constitution, 1993 (Act 200 of 1993) and was approved by the Constitutional Court on 4 December 1996 and took effect on 4th February 1997.

The Constitution of the Republic of South Africa, 1996, is built on an awareness of the injustice of South Africa's past and is widely regarded as the most progressive in the world, with a strong Bill of Rights (The Constitution of South Africa, 1996, 2005:1).

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All laws and conduct are subject to the Constitution, as the supreme law. No other law or government action can replace the provisions of the Constitution (Blumrick, 2004:19; Constitution of South Africa, 1996:1). The Constitution presents the collective wisdom of the South African people and was arrived at by general agreement. The Bill of Rights is regarded as the cornerstone of democracy in South Africa. It enshrines the rights of all people as well as children in South Africa and affirms the democratic values of human dignity, equality and freedom (The Constitution of the Republic of South Africa, Act 108 of 1996.).

2.4.2 The Constitutional rights of the child and the accused

All the rights in the Bill of Rights apply to all people, including children. All witnesses in a court, including children, have the right to be treated equally before the law, and to have their dignity and privacy respected (Conradie, 2004:5). Section 28 of the Constitution provides for further, very specific rights for children. The rights of the child that are of particular relevance to the child witness are the following:

▪ With respect to the child

Section 28 (1) Every child has the right to:

(d) be protected from maltreatment, neglect, abuse or degradation;

28 (2) A child's best interest are of paramount importance in every matter concerning the child;

28 (3) In this section "child" means a person under the age of 18 years.

Subsection 28(2) is not merely an approach to be considered, but a directive to the courts to treat the child as somebody with attributes, qualities, sensibilities, and vulnerabilities, which make them different from adults (Muller & Tait, 1997:2; King & Piper, 1995:189).

▪ With respect to the accused:

Section 35(3) Every accused person has the right to a fair trial, which includes the right to:

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- (c) a public trial before an ordinary court;
- (e) be present when being tried;
- (f) Choose, and be represented by a legal practitioner, and to be informed of his right promptly; and
- (g) adduce, and challenge evidence.

The above rights of the accused entrench and strengthen the accusatorial features of criminal procedure, for example, confrontation and cross-examination, although none are absolute rights (Muller & Hollely, 2000:8).

When a child is sexually abused, their right to physical and mental integrity, privacy, and human dignity is violated. They should be treated fairly during the criminal proceedings (Bukau, 2003:502).

2.4.3 The Service Charter for Victims of Crime in South Africa

The Victim's Charter together with the Minimum Standards (2005:4) is intended to provide the people of South Africa with information relating to the government's commitment to the improving of services delivery of the victims of crime.

The Minimum Standards of the Victim's Charter aim to explain the services provided for victims of crime. The minimum standards outline basic rights and principles, and supply detailed information for the victim to exercise his rights. It also enables service providers to uphold the victim's rights as explained in the Victim's Charter, by setting out the minimum standards that service providers must adhere to. These minimum standards hold everybody involved in the criminal justice system accountable to ensure that victims receive appropriate assistance and services (Service Charter for Victims of Crime in South Africa, 2005: ii; Victims Charter Approved, 2005:3).

2.4.3.1 Rights of the victim

According to the United Nations Declaration on the Basic Principles of Justice for

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Victims of Crime and Abuse of Power, to which South Africa is a signatory, a victim of crime is defined as a person who has suffered harm, including physical or mental injury, emotional suffering; economic loss; or substantial impairment of his fundamental rights. The term “victim” also includes the immediate family or direct dependants of the victim (Child Law Manual for Prosecutors, 2000:A1-1-21).

The following rights of the victim, including children, as explained in the Victim’s Charter and in accordance with the Constitution and other relevant legislation (Service Charter for Victims of Crime in South Africa, 2005:4) must be upheld:

- The right to be treated fairly, with dignity and with privacy;
- The right to offer information;
- The right to received information;
- The right to protection; and
- The right to assistance:
 - The person with disabilities will be given the necessary support.
 - Cases involving sexual offences will be heard in specialized courts, when available.
 - If under 18 years of age and testifying in an open court causing undue mental stress and suffering, the prosecutor can apply for an intermediary to be appointed and testify through a closed circuit television link.
 - The presiding officer will, if an intermediary is being used, ensure that all questions will be asked through an intermediary.
 - The intermediary will convey the general purport of the questions asked.
 - The case will be finalized without unnecessary delay.
 - Closed circuit television will be used (Service Charter for Victims of Crime in South Africa, 2005:16).

The researcher is of the opinion that the setting out of minimum standards that a child victim can expect from service providers, will contribute to a paradigm shift so that every one involved in the criminal justice system is co-operating to enable victims to access appropriate services.

2.4.4 United Nations Convention on the Rights of the Child

Before the United Nations Convention on the Rights of the Child (hereafter called the Convention), human rights standards applicable to all members of the human family as well as the child had been expressed in various legal instruments such as covenants, conventions and declarations. It was only on 2 September 1990, that the United Nations' General Assembly Resolution 44/25, in accordance with article 49, came into force (Child Law Manual for Prosecutors, 2000: A1-1; The Rights of the Child, 2005:1).

2.4.4.1 Contents of the Convention

The Convention incorporates the full range of human rights including civil and political rights, economic rights, social rights, and cultural rights. It outlines in 41 articles the human rights to be respected and protected for every child under the age of 18 years. The guiding principles of the Convention are:

- Non-discrimination (article 2);
- Best-interest of the child (article 3);
- Maximum survival and development (article 6); and
- Participation of children (article 12).

During the World Conference on Human Rights in 1993, 185 states, including South Africa, ratified the convention on the Rights of the Child. This makes it the most widely and rapidly ratified human rights treaty in history. By mid-2003 only two states had not ratified the Convention.

2.4.4.2 New vision of the child

The Convention on the Rights of Children (Child Law Manual for Prosecutors, 2000:A1-1) reflects a new vision of the child. The child is neither the property of the parent nor is he the helpless object of charity. The child is a human being and is subject to his own rights. The Convention offers a vision of the child as an individual

and as a member of a family and community, with rights and responsibilities appropriate to his age and stage of development.

The Convention has brought to the foreground for the first time the fundamental human dignity of all children and ensuring the emergence of their well-being and development.

2.4.4.3 Strengths of the Convention on the Rights of the Child

The Convention is considered one of the most powerful legal instruments for the recognition and protection of the child's human rights. The Convention (Child Law Manual for Prosecutors, 2000:A1-1-7) draws on the following strengths:

- **It highlights and defends the family's role in the child's life.** In article 5, article 10, and article 18, of the Convention on the Rights of the Child refers to the family as the fundamental group of society and it is the natural environment for the growth and well-being of the child.
- **Seeks respect for the child – but not at the expense of other's human rights or responsibilities.** A child has the right to express his views and have them taken seriously, but the child's views are not the only ones to be considered and a child has the responsibility to respect the right of others, especially those of his parents.
- **Endorse the principle of non-discrimination.** The Convention maintains that the state must identify the most vulnerable and disadvantaged children and ensure that the rights of these children are realized and protected. The child rights standards are nationally binding on states. Endorsement of the Convention makes states publicly and internationally accountable for their actions.

2.5 OTHER STATUTORY INNOVATIONS

Other statutes within the South African criminal justice system also facilitate the protection of the child witness. Section 158 of the Criminal Procedure Act, 1977 (Act 51 of 1977) provides that evidence can be given via closed-circuit television or similar

electronic equipment where such equipment is available and it would be in the interest of justice to do so or it would prevent the likelihood of prejudice or harm that may be experienced by any person testifying at such proceedings (Muller & Tait, 1999b:58).

Section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) provides that witnesses under the age of eighteen, which will include victims of child abuse, to give evidence through an intermediary if approved by the presiding officer. Section 153(3) provides for in camera testimony of a person under 18 years of age (Kriegler & Kruger, 2002:396).

2.5.1 Section 158 of the Criminal Procedures Act 51, 1977 (Act 51 of 1977)

Section 158 of the Criminal Procedure Act, 1977 (Act 51 of 1977) states that:

- (1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
- (2) (a) 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 a closed circuit television or similar electronic media.
(b) A court may make a similar order on the application of an accused or a witness.
- (3) A court may make an order contemplated in subsection (2) only if facilities therefore 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 interest 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.
- (4) The court may, in order to ensure a fair and just trial, make a giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary:

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Provided that the prosecutor and the accused have the right, by means of the procedure, to question a witness and to observe the reaction of that witness.”

The above section gives a court the discretion to allow a witness or an accused to give evidence by means of closed circuit television or similar electronic media. The court can only make such an order if these facilities are readily available or obtainable and subject to section 158 (3) (Muller & Tait, 1999b:58-59).

In addition, subsection (4) has given a wide discretion to impose conditions on the giving of evidence in these circumstances provided that the prosecution and the defense are not deprived of their right to question a witness nor to observe a witness’s demeanor. This discretion must be exercised to ensure a fair and just trial (Muller & Tait, 1999b:59).

A child, especially an older child, can be allowed to give evidence in terms of the above section 158. It can be used to prevent the child, who is a victim of sexual abuse, from testifying in the presence of the accused. This section is ideal for the older child who does not need the assistance of an intermediary, but is afraid to confront the accused in court. The advantage of section 158 is that the application to give evidence via closed-circuit television can be made by the witness himself should he wish to make use of these provisions (Muller & Tait, 1999b:60-61).

In *S v Staggie and Another* 2003 (1) SACR 232 (CPD) the judge held that:

“There would be prejudice to the complainant if she had to testify directly before the court before the court has determined whether or not the case should be heard in camera.”

The researcher, in her experience as intermediary, found that the older witness’s from the age of 15 could testify in this manner if the court did not approve a section 170A application and the child was not too severely traumatized.

2.5.2 Section 170A of the Criminal Procedures Act 51, 1977 (Act 51 of 1977)

Section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) states that:

- “(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of 18 years to undue mental stress and suffering if he testifies at such proceedings, the court may, subject to ss (4) appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.
- (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under ss (1), except examination by the court, shall take place in any manner other than through that intermediary.
- (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
- (3) If a court appoints an intermediary under ss (1) the court may direct that the relevant witness shall give his 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 might 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 necessary proceedings to see and hear, either directly or through the medium of an electronic or other device, that the intermediary as well as the witness during the testimony.”

2.5.2.1 Section 170A and the child witness

The traditional rules of evidence and procedure of the accusatorial legal system causes problems for the child witness. The result is that children who are victims of sexual abuse are not always capable of testifying effectively about what has happened to them. If the child should testify, he will not be able to give evidence in a coherent and trustworthy manner as required by courts, due to his fear, alienation and anxiety. Parents are also reluctant to put their children through the harshness of the confrontation and interrogation in the court (Schwikkard, 1991:44; Davel, 2000:347).

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In April 1989 the South African Law Commission found that the ordinary accusatorial legal system with its intimidating, aggressive, tormenting and humiliating trial procedure and strong emphasis on cross-examination was insensitive and unfair to the child witness (South African Law Commission, 1989:28).

Section 170A was introduced with the purpose of easing the plight of the child witness by removing him from the courtroom and the presence of the accused (Muller & Tait, 1999b:59; Davel, 2000:347).

In terms of section 170A(1) the court has the discretion to allow the appointment of an intermediary. The appointment is therefore not automatic. In practice the state prosecutor will normally apply for a section 170A order. The presiding officer may order that the child witness testifies through an intermediary if the court is satisfied that the witness is under the age of eighteen years and that the child witness will suffer undue mental stress and suffering should he testify in an open court without an intermediary (Schwikkard & Jagwanth, 1996:217).

If the defense objects to this application, evidence must be put before the court, which often will have to be expert testimony. The expert would have to consult with the child and any other person who could supply information relevant to the application. In *S v Stefaans* 1999 (1) SACR 182 (E), Mitchell AJ held that the use of the word “undue” connotes an degree of stress that is greater than ordinary stress to which a witness, including witnesses in complaints of offences of a sexual nature, are subjected (*S v Stefaans* 1999(1) SACR 182(E)).

In terms of section 170A (2)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) no examination, cross-examination or re-examination of any witness in respect of which the court has appointed an intermediary shall take place in any other manner than through an intermediary. This means that the parties involved in the trial may not question the witness directly. Section 170A(2)(b) provides that the intermediary may convey the general purport of any question to the child witness, unless the court directs otherwise. The court may therefore direct the intermediary to put the question to the witness in its original form. In *Klink v Regional Court Magistrate NO and*

Others 1996 (3) BCLR 402 (SE) it was argued that it was in the interest of justice that the child comprehend the question that was being put to him:

“There are sound reasons why the conveyance of the general purport of the question might enable a child witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he or she may answer them properly. Where the witness is a child, there is the possibility that he may not fully comprehend or appreciate the content of a question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying the general purport of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in a language and form understandable to the witness.”

South Africa, Namibia, Hong Kong, and Japan, are presently the only countries in the world that make use of the intermediary system (Muller, 2005; Pretorius, 2005).

2.5.2.2 Section 153(3) and the child witness

The court has discretion in terms of section 153(3) (a) and (b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) to allow a complainant to give evidence behind closed doors where the charge relates to a sexual act and the child is under 18 years of age. Nobody is allowed at such trial so that the child’s privacy can be protected. The child will then give evidence in camera. According section 153(4) the accused, his legal representative, the court personnel and the child’s parents or guardian are permitted to be present (South African Law Commission, 1989:7).

2.5.2.3 Criminal Law (Sexual Offences) Amendment Bill, 2003

The Criminal Law (Sexual Offences) Amendment Bill, 2003, emanating from the South African Law Reform Commission’s report on sexual offences, aims to widen the scope of the crime of rape and to create numerous new offences related to sexual

misconduct. It also addresses aspects of sentencing for sexual offenders and certain evidentiary matters.

Clause 15 of the abovementioned bill deals specifically with the vulnerable witness and is specifically aimed at improving the quality of the evidence given by witnesses, improving witnesses' experience of testifying in court and encouraging witnesses to come forward. A court may determine the protective measures should be applied in respect of a vulnerable witness

2.5.3 Statutory innovations and the child witness: in conclusion

In applying section 170A, the presiding officer must take cognizance of the constitutional provisions of the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), not only regarding the rights of the accused, but also of the rights of children. The Bill of Rights applies to all law and binds the judiciary in terms of section 8(1). In terms of section 39 of the Constitution, the court must, when interpreting the Bill of Rights, promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and when interpreting any legislation, the court must promote the spirit, purport and objects of the Bill of Rights.

Section 28(2) of the Constitution states that a child's best interest is of paramount importance in every matter concerning the child. The court must have regard to the right to human dignity as stated in section 10 of the Constitution. Everyone, including the child witness, has inherent dignity and the right to have their dignity respected and protected. The court must further be mindful that proceedings do not unfairly discriminate against either the accused or any witness, and with regards to the child witness, that the child be treated in a manner that ensures that his dignity is protected and respected.

Article 3(1) of the Convention on the Rights of the Child states that in actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be paramount. Article 12(1) provides that a child who is

capable of forming his own views has the right to express those views freely in all matters affecting the child. These views must be given due weight in accordance with the age and maturity of the child. Article 12(2) provides that for this purpose, the child, being a person under the age of 18 years, should be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Wessels, 2005).

2.5.4 Guidelines for drawing up the desirability report/170A application

It is a cornerstone of the judicial system of South Africa that a criminal trial (with certain exceptions) takes place in the presence of the accused. This entails the physical presence of the accused in court whilst the witness testifies. The appointment of an intermediary to assist the child witness is not automatically so. If a defence attorney objects to the use of an intermediary, the child witness has to be assessed and it must be determined whether the child will experience undue mental stress and suffering should he/she testify in court. A social worker, probation officer, or psychologist does this assessment, as well as the report on the assessment.

At present no literature exists concerning the assessment and compilation of a desirability report. Existing case law was studied and used to compile guidelines on how to assess the child witness for an application to use an intermediary. During the empirical study the magistrates were requested to state what they considered necessary to be included in the assessment report (figure 7.9).

In *K v The Regional Court Magistrate & others* 1996 (1) SA 434 (E) a full bench of the Eastern Cape Division of the High Court held that the physical separation of the complainant from the courtroom did not violate the right to a public trial. The court further held that section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) does not violate the constitutional right of the accused to cross-examine and that the section is not unconstitutional. The court further held that the use of an intermediary does not, in itself, affect the fundamental fairness of the judicial process, as the witness may still be questioned on all aspects of his evidence and the right to

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challenge the evidence is not impaired. On the other hand the intermediary may be able to play a part in balancing the interests of the accused with those of the child witness, by allowing the latter to be integrated into the criminal justice system without disturbing the fundamental fairness of the process.

The court further pointed out that the giving of evidence, particularly in cases involving sexual complaints, exposed complainants to further trauma possibly as severe as the trauma caused by the crime. The court, however, held that it is necessary to balance the rights of the accused on the one hand with the rights of witnesses not to be subject to further traumatizing events in the pursuance of justice on the other. These competing rights must be balanced in such a way as to ensure fairness to both sides.

In *S v Mathebula* 1996 (2) SACR 231 (T) it was stated that the age of the witness in itself would not alone justify the appointment of an intermediary. Stafford R held that the purpose of section 170A must also be considered.

According to Wessels (2005), in deciding whether an intermediary should be appointed, the youthfulness of the witness is therefore not the only factor the court needs to look at. Other factors such as the age and sex of the witness, the intelligence and personality of the witness, as well as the nature of the alleged offence and the nature of the evidence by the witness must also be taken into account. The ability of especially young children to communicate and their language proficiency should also play a roll in deciding whether an intermediary should be appointed, as well as other factors relating to their development.

Wessels (2005) further states that when deciding whether an intermediary should be appointed, the court must be mindful of the purpose of section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977). The decision the court makes, in balancing the different rights, taking into account the different factors and specific facts of each case, must be a decision that will ensure fairness to both the witness and the accused. The decision must further be both in the interest of justice as well as in the best interest of the child, and as such must ensure that the child witness will be able to meaningfully participate and testify in the proceedings before the court.

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It should also be borne in mind what was stated in *S v S* 1995(1) SACR 50 (ZS) by Ebrahim JA regarding the embarrassment likely to be suffered by a little girl (which will also be true for adolescents) on having to relate details regarding the penetration of a rape as required by a court of law, which will be exacerbated particularly in an all male environment, because of the following:

- The discussion of intimate sexual matters in the presence of members of the opposite sex is normally taboo;
- The absence of a female listener means that a female witness who has been sexually abused lacks any substantial sympathetic support. No male person can possibly understand the feelings of a female victim. It is thought probable that even very young complainants feel this almost instinctively; and
- It is likely that a woman or girl who has recently been badly abused will associate, if only subconsciously, all males with her assailant.

In *S v Stefaans* 1999 (1) SACR 182 (CPD) Mitchell AJ laid down some general principals as to how and in what circumstances section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) should be invoked. These guidelines were given in broad terms as it was stated that each case must be dealt with on its own merits. According to Wessels (2005), it is important for the person assessing the child witness and compiling the report to take these guidelines into account.

Some of these guidelines that are relevant are:

- In facing an application the court must be mindful of the dangers inherent in the use of an intermediary that might prejudice the accused's right to a fair trial. These include the fact that cross-examination might be less effective, that an accused has the right to confront his accusers and be confronted by them, as well as the fact that human experience shows that it is easier to lie about someone when not in his presence than to do so when facing him;
- The provisions of section 170A will find application more readily in cases involving a physical or mental trauma or insult to the witness than in other cases.
- The giving of evidence in court is inevitably a stressful experience. In order to find application, section 170A requires the court to be satisfied that such stress will be 'undue', that is, something in excess of ordinary stress. The younger and

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emotionally more immature the witness is, the greater the likelihood that such stress will be 'undue'.

- A witness who is known to the accused and who knows the accused and is still prepared to testify, is less likely to be unduly stressed by the need to testify before the accused than one who is unknown to the accused and may fear intimidation. *S v Abrahams* 2002 (1) SACR 116 (SCA) on 125 a – b, however stated that a family victim may for reasons of loyalty or necessity feel that she must conceal the crime, and may internalise the guilt or blame associated with the crime, with lingeringly injurious effects. It is often more difficult for a witness to testify in the presence of the accused where the accused was someone close and trusted, because of ambivalent feelings. (Compare Mayne & Levett 1997:163.) The researcher, in her experience as an intermediary found that when the accused was a close family member or well known to the child, the child witness was more stressed than when the accused was less well known.
- If the application to invoke the section is not opposed, it may be more readily granted.
- If the application is opposed, the presiding judicial officer should require that appropriate evidence be adduced to enable him to exercise a proper discretion as to whether the section should be invoked or not. Such evidence may, in the case of a younger witness in a matter clearly involving mental or physical trauma, consist of nothing more than evidence of the nature of the charge and the age of the witness. In other matters, evidence of a suitably qualified expert, whether that be a social worker, psychologist or psychiatrist, may be necessary.
- If the section is invoked, the presiding judicial officer should be aware of the risk that the efficacy of cross-examination may be reduced by the intervention of the intermediary. The judicial officer should be alert to this and should be prepared to intervene and insist that the exact question rather than the import thereof, be conveyed to the witness.

In *S v F* 1999 (1) SACR 571 (C) it was held on 583 that the words "it appears to such court" mean nothing less than proof on a balance of probabilities. It must therefore be shown in the facts before the court, on a balance of probabilities, that were the child to testify before the court in the normal course, that is in the presence of the accused, he/she would be exposed to undue mental stress or suffering. The crucial question, as

was stated on 583 - 584, is not whether the child was mentally and emotionally fragile after the alleged rape, but what impact, if any, the testimony by him/her in the presence of the accused is likely to have upon him/her.

The researcher is of the opinion that the above should be kept in mind and used when an application for an intermediary is drawn up and is brought before the court.

2.6 CLASSIFICATIONS OF CRIME

Specific crimes may be classified in different ways, namely according to their degree of seriousness and/or the type of punishment which may be imposed for each. According to Snyman (2002:303) the most popular method is to classify crimes according to the interest, which the law seeks to protect by punishing the particular crime. This is the method that will be adopted for this research.

For the purpose of this research assault, rape, indecent assault and incest will be discussed as these crimes are classified as such according to the interest that the law seeks to protect by punishing the particular crime. Snyman (2002:430) classified these crimes as crimes against bodily integrity and crimes against morality and defined them as follows:

2.6.1 Assault

Assault is the unlawful and intentional applying of force, directly or indirectly; to the person of another or inspiring a belief in another person that force is immediately to be applied to such person.

The elements of the crime (Snyman, 2002:430) are:

- The application of force (or the inspiring of a belief that force is to be applied);
- Unlawfulness; and
- Intention.

2.6.2 Indecent Assault

Indecent assault is the unlawful and intentional assaulting; touching or handling of another in circumstances in which either the act itself or the intent with which it is committed is indecent.

The elements of the crime (Snyman, 2002:436) are:

- An act of either assaulting, touching or otherwise handling another;
- Either the act or X's intention must be indecent;
- Unlawfulness; and
- Intention.

2.6.3 Rape

Rape is when a male has unlawful and intentional sexual intercourse with a female without her consent.

Elements of the crime (Snyman, 2002:445).are:

- Sexual intercourse, meaning the penetration of the female's sexual organ by that of the male. The slightest penetration is sufficient;
- Between a male and a female;
- Without the female's consent;
- Unlawfulness; and
- Intention.

2.6.4 Incest

Incest is the unlawful and intentional intercourse between male and female who are prohibited from marrying each other because they are related within the prohibited degree of consanguinity, affinity or adoptive relationship.

Elements of the crime (Snyman, 2002:355) are:

- Sexual intercourse between;
- Male and female person;

- Who are prohibited from marrying each other;
- Unlawfulness; and
- Intention.

2.7 RULES OF EVIDENCE

An area that causes difficulty for the child witness is that of the outdated and detrimental rules of evidence that apply in the cases brought to trial. Emphasis is placed on the admissibility of evidence (Zieff, 1991:21). There are strict rules, which exclude certain types of evidence. For a child to give evidence, he must be found to be a competent witness. The cautionary rule warns against the dangers of convicting on the evidence a child, and the rule against hearsay requires that evidence that cannot be tested by cross-examination must be excluded. The details of these rules vary from one accusatorial system to another, but are all based on a system which emphasizes admissibility (Muller & Hollely, 2000:7).

Zieff (1991:21) states that the features in South Africa's current law, specifically the cautionary rule, reduce the value of evidence one gets from children. Due weight is not given to the fact that the child, in general, is a competent and credible witness, but is more vulnerable than an adult (Hammond & Hammond, 1987:11; Oates, 2001:64).

Rules of evidence that will be discussed in this chapter are competency, credibility, cautionary rule, hearsay evidence, truth and lies, the oath, and expert evidence.

2.7.1 The competency requirement

The competency of a child to give evidence in a criminal case is governed exclusively by the common law. There is no law that states that a child may not give evidence, even if the child is still very young. Section 192 of the Criminal Procedure Act, 1977 (Act 51 of 1977) provides that everyone is presumed to be a competent and compellable witness. The child must, however, show sufficient intelligence and be capable of understanding the importance of having to tell the truth during the court case in order to be regarded as a competent witness (Davel, 2000:345).

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In South African law a young child is found to be a competent witness if, in the opinion of the court (presiding officer), the child understands what it means to tell the truth. The child may give his evidence sworn or unsworn, depending upon whether, according to the court, the child can understand the nature and religious sanction of the oath (Zeffert, Paizes & Skeen, 2003:671). The sections currently in force are section 164 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and section 41 of the Civil Proceedings Evidence, 1965 (Act 25 of 1965), which reads as follows:

“Any person who, from ignorance arising from youth, defective education, or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation; provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding officer or judicial officer to speak the truth, the whole truth and nothing but the truth.”

The above makes provision for a child who does not understand the nature of the oath, to be admitted to give evidence without taking the oath or making an affirmation (Zieff, 1991:22; Zeffert *et al.*, 2003:671). The presiding officer must go on to inquire whether the child is competent to give unsworn evidence. The basis of giving unsworn evidence is the ability to understand what it means to speak the truth. The child must have the ability to distinguish between truth and lies and must be able to understand that it is wrong to lie (Muller, 2002b:144; Schwikkard, 2004:1).

The way this is determined is by the presiding officers asking the child witness questions that are often totally inappropriate. Prosecutors, too, tend to leave this issue in the hands of the court. Little effort is made to convince the magistrate or even to attempt to call the witness when the witness appears not to be able to convey the incident verbally (Meintjes, 2000c:C4-14).

The researcher is of the opinion that great care should be taken when the presiding officer has to determine whether the child is competent to testify. The tests for competency involves an inquiry into the understanding of the difference between telling the truth and lying, and that there are consequences to lying. As “lying” and

“truth” are abstract concepts, the young child will find it difficult to explain what they mean. Practical examples that take the child’s developmental stage into account should be used to determine whether the child understands these concepts and is competent to testify.

2.7.2 The oath

In all criminal courts in South Africa, evidence must be given under oath. However, no child is permitted to take the oath unless he understands the nature and the meaning thereof. Section 162 of the Criminal Procedure Act, 1977 (Act 51 of 1977) states the general rule that every witness must give evidence under oath or admonition. The oath in a criminal case has to be in the following form, also for the child witness: “ I swear that the evidence I shall give shall be the truth, the whole truth and nothing but the truth, so help me God” (Zeffert *et al.*, 2003:736).

Section 163 and section 164 of the Criminal Procedure Act, 1977 (Act 51 of 1977) requires that the oath, affirmation or admonishment to tell the truth, be administered by the presiding officer and no one else (*S v Jurgens*, RC653/90, 23 November 1990 (unreported)).

Once competency has been determined, the next inquiry is whether the child possesses sufficient intelligence to understand the nature of the oath (Davel, 2000:346). The usual procedure is for the presiding officer to first determine whether the child has knowledge of religion and knows what it means to take the oath. The presiding officer will question the child to determine whether he understands the nature of the oath.

The emphasis is on the religious belief and the child must solemnly promise to tell the truth with reference to God and his religious belief (Muller, 2002b: 138-139). The child must know that the nature of the oath involves understanding the seriousness of the court case and of his duty to speak the truth (Lyon, 2002a:2).

If the child does not understand the oath, it is important that the child must know that negative consequences will emanate from lying. It is sufficient that the child believes

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in punishment. A child will be considered a competent witness, if, in the opinion of the court, he/she understands what it means to tell the truth (Zieff, 1991:22). If the child can understand the nature and religious sanction of the oath, the child may be sworn in.

If the presiding officer is satisfied that the child knows and understands the meaning and the nature of the oath, has no objections to taking the oath, and considers the oath binding on his conscience, the oath will be administered. If the presiding officer is not satisfied that the child understands the nature of the oath, he must go on to inquire whether the child is competent to give unsworn evidence.

While the child does not have to understand the nature or obligation of the oath, in order to testify, he must know the difference between truth and lies and seem honest, intelligent and observant enough to understand the seriousness of testifying in court (Zieff, 1991:22). The child can give evidence provided that the presiding officer is sure that the child knows the difference between truth and lies and knows that there are consequences when lying. The presiding officer admonished the child to speak the truth, the whole truth and nothing but the truth (Don Wauchope, 2000:20).

It is the duty of the presiding officer to determine whether the child knows the difference between truth and lies. If the presiding officer is not convinced that the child can distinguish between truth and lies, the child is not competent to give evidence in a court of law. It is therefore the presiding officer's duty to establish the child's intelligence to determine whether he knows the difference between truth and lies and whether he understands the implications and the danger of telling lies (Davel, 2000:345). In the case *S v L* 1973 (1) SA 344 (C) at 348G-H Van Winsen J said the following:

“Sy getuienis is slegs toelaatbaar waar die regterlike amptenaar hom tevrede gestel het dat die gehalte van die jeugdige se intelligensie sodanig is dat sy getuienis aangehoor kan word en dat hy ‘n besef het van die plig om die waarheid te praat.”

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Age does not determine competency to give evidence. Competency depends on the sense and reason of the young child and whether he understands the danger of falsehood. There are no hard and fast rules on how to determine the above and each case must depend on its own circumstances. The child's answers during the examination will lay the foundation for a finding of his competency and if the court is satisfied that the child is capable of giving a truthful and intelligible account of the incident/s, the court will allow the child to testify (Davel, 2000:345-346).

There is no fixed age at which a child is considered a competent witness. In *S v T* 1973 (3) SA 794 (A) the court found a five year old to be incompetent, whereas in *R v Manda* 1951(3) SA 158 (A) a three year old was found to be competent. In each case the presiding officer must satisfy himself that the child understands what it means to speak the truth. If a child does not have the intelligence to distinguish between what is true and what is not true, and to recognize the danger and wickedness of telling a lie, he cannot be admonished to tell the truth. The child is then deemed to be an incompetent witness (Zieff, 1991:23; Castle, 1997:29). The researcher is of the opinion that the level of the child's moral development plays an important role in being able to understand the importance of telling the truth and not to lie.

The competency examination has given rise to many difficulties. Neither legislatures nor the courts have specified the questions that must be asked in order to ascertain oath-taking competence. Some presiding officers ask questions that appear too difficult, whereas others effectively lead the child through the competency evaluation (Lyon, 2002b:246; Walker, 1999:36; Muller, 2002b:135).

Professionals in child and language development ought to provide guidance to courts seeking the most appropriate means by which young children's competency can be assessed. Research has been done concerning the above but virtually all research examined non-maltreated children from middle class homes. The result of this research may overestimate the competence of the child who appears in court (compare Louw, 2004:3-15; Lyon, 2002b:246.) The researcher is of the opinion that the effect of trauma and emotional regression of the child that takes place, were not taken into account either.

2.7.3 Oral evidence

Oral evidence is the most common form of evidence. It comprises a witness's oral or verbal statements about the incident. Oral evidence in court entails the following:

- Taking the oath;
- Examination-in-chief;
- Cross-examination; and
- Re-examination.

The weight that the court attaches to such evidence depends on:

- The cautionary rule; and
- The credibility of the child witness.

2.7.3.1 Cautionary rule

The cautionary rules have developed in South Africa's criminal practice in the course of decades. The effect of these rules is that the court must, in certain cases where falsehood or untrustworthiness is, according to general human experience, extremely great, be careful in evaluating such evidence (Zieff, 1991:28).

The purpose of the cautionary rule is to assist the court in deciding whether or not guilt has been proven beyond reasonable doubt. The rules exist only to guide the answering of the above question. These rules were developed to remind the court to view the evidence with care as practice has shown that in certain circumstances evidence could be unreliable (Castle, 1997:30; Schwikkard, 2004:3).

The evidence of the child witness is as a rule viewed with caution. This was stated in *S v Manda* 1951 (3) SA 158 (A): "The imaginativeness and suggestibility of children are only two of a number of reasons why the evidence of children should be scrutinized with care, amounting perhaps to suspicion."

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The above is a general rule and applies to civil cases as well. The South African Law Commission (2001:472) is of the opinion that the underlying need for the cautionary approach is based on the court's fear that the child can make up the story or fabricate details in an act of abuse which the child could not remember.

According to Zieff (1991:28) no statutory requirements exist in South Africa currently whereby the child's evidence must be corroborated. Yet it is accepted that the child's evidence must be treated with caution, especially in cases of sexual abuse. Generally, the incidence and degree of caution applied depends on the circumstances of the case. Until recently it was believed that the child had a poor memory, was untrustworthy and was incapable of distinguishing fact from fantasy (Zieff, 1991:29).

Zeffert *et al.* (2003:806) state that children are competent witnesses if the presiding officer considers that they are old enough to know what it means to tell the truth. The child's evidence should however be scrutinized with great care. In *Woji v Santam Insurance Company Co Ltd* 1981 (1) SA 1020 (A) at 1028A-E, Diemont J A states:

“The question which the trial court must ask itself is whether the young witness's evidence is trustworthy. Trustworthiness depends on factors such as the child's power of observation, his power of recollection and his power of narration on the specific matter to be testified...”

Myers and Perry (1987:459) state that the child must be able to demonstrate retention of material by recognition, reconstruction and recall from his memory (see 3.6.3). Research has shown that children have relatively little difficulty distinguishing memories of something they have actually said from something someone else said, or memories of one actual event from memories of another actual event. The researcher is thus of the opinion that the child can therefore be a reliable witness.

2.7.4 Credibility

Credibility is determined after the court has evaluated all the evidence that was admitted during the course of the trial. The court must further draw inferences and

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consider probabilities and improbabilities from the said evidence. Credibility is one of the factors, which will determine the outcome of the case (Struwig, 2001:599).

Schwikkard, Skeen and Van der Merwe (1996:370) quoted extensively from *Onassis v Vergottis* where Lord Pearce said the following with regard to credibility:

“Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the story as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others?”

Keeping the above in mind, it must be said that children who combine lies, jokes, and mistakes can nevertheless appreciate the importance of truthfulness when testifying (Lyon, in Westcott *et al.*, 2002:246). Lyon, (in Westcott *et al.*, 2002:247) compared different meanings of assessing children’s understanding of the basic differences between the truth and lies with 96 four to seven year old children awaiting a court appearance. The children were given three tasks:

- An identification task;
- A difference task; and
- A definition task.

The children performed best on the identification task, 60% failed on the difference task and 70% failed the definition task. The above experiment indicates that most five-year old, maltreated children had a good understanding of the meaning of the truth and lies, despite serious delays in vocabulary. It can thus be said that a large number of children who do in fact have a good understanding of the distinction between truth and lies and untruthful statements, will fail the task of defining the concepts (Lyon, in Westcott *et al.*, 2002:248).

The researcher is of the opinion that the child's testimony should be evaluated, taking into account the child's cognitive and language development. From this, as well as all the other evidence placed in front of the presiding officer, he/she can make an informed decision about the child's credibility after considering the shortcomings, defects, contradictions, merits and demerits of the case.

2.8 RULES OF THE TRIAL

This section is concerned with the mechanics of presenting evidence to the court. It deals with the rules governing the order in which parties present their evidence. Examination-in-chief, cross-examination, re-examination, the calling of the expert witness by the state and *in camera* trials will be discussed.

2.8.1 The order of evidence

In a criminal trial the prosecution is required by section 150(2) of the Criminal Procedure Act, 1977 (Act 51 of 1977), to lead its evidence first. There will usually be at least one issue on which the burden is upon the prosecution. The Act does not make any exceptions for the possible situation in which the burden on all issues is on the defense (Zeffert *et al.*, 2003:736).

2.8.2 Examination-in-chief

In the majority of sexual abuse cases which come to trial, the child victim is the crucial witness for the state prosecution. The state is often faced with the difficult task of obtaining a conviction (Davel, 2000:350).

The purpose of examination-in-chief is to enable the party who has called a witness, to put his evidence before the court. The method used is that of oral question-and-answer. This method gives the prosecutor control of what the witness says, which makes for order and relevance, but places the prosecutor under pressure as he has to present evidence in a fair and complete manner (Zeffert *et al.*, 2003:738).

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Appearing in court as a witness is a traumatic experience for a young child. The external appearance of the court results in the child being afraid, uncertain and confused (Davel, 2000:350). Zieff (1991:34) expresses the following opinion:

“In any sexual abuse case which comes to trial, the child victim, if he or she can be induced to speak, will be taken through the evidence by the prosecutor. The prosecution may not ask leading questions, which suggest the answer, which he/she expects the child to, give. The questioning of a child witness is a very skilled task and not many prosecutors are trained for this. It must be accepted as fact that the public prosecutors did not prepare the child witness for trial to the same extent as the defense witness. Many children do not understand what the roles of the various professionals involved in the trial are. The prosecutor’s heavy court programme is usually the reason for inadequate consultation with the witness and the inevitable result is that there are contradictions, lacunae and uncertainties in the child’s testimony which create the impression of untrustworthiness.”

There are three aspects, which call for special mention in connection with examination-in-chief:

2.8.2.1 Preparing the child for trial by the prosecutor

Prior consultation by the prosecutor with the child is essential in order to reassure the child and to establish the level of communication that will allow the prosecutor to get the best evidence from the child. Preparing the child for the trial does, however, not mean that the truth should be threatened. The main object should be to win the confidence of the child witness. The different role players and the sequence of the trial should be explained to the child witness. Where an intermediary is to be used, this should also be explained to the child witness.

The child’s memory can also be refreshed as to what the child had previously said or what the child said in his statement to the police, provided that it is done objectively. Additional facts that were gathered from other evidential material in possession of the

prosecutor to those contained in the statements made by the child witness should not be given to the child (Davel, 2000:351).

2.8.2.2 Avoiding leading questions during examination-in-chief

The general rule is that the child witness may not be asked leading questions by the prosecution during testimony-in-chief (Zieff, 1991:34). Questions framed in such a way that they suggest the answer, are improper and should be avoided. The reason for this rule arises out of the risk that the witness may think that such questions are an invitation, suggestion, or instruction to him to answer the question. The child might feel he has to answer the question causing him to possibly be biased and untruthful because it is a question favoring the party that has called him.

The test whether a question is leading or not is whether it can be answered by a simple yes or no. This is often true, but not always. A question like, “Did you notice anything unusual?” is not a leading question, but the answer must be yes or no (Zeffert *et al.*, 2003:740).

There are exceptions to the rule during examination-in-chief. Leading questions may be asked to elicit introductory or undisputed matters. The presiding officer has the right to question a witness at any stage of the proceedings and the rule against leading questions does not apply (South African Law Commission, 2001:612).

2.8.2.3 Leading the child witness’ evidence in chief

When leading the child witness, care should be taken at how the questions are asked. Attention should be paid to the following:

- Leading questions on matters that are crucial to proving the case should be avoided as not much reliance can be placed on such evidence;
- The prosecutor should try and stay with the way the preliminary interview with the child witness was conducted. The child might feel more comfortable;

- The prosecutor should not ask multifaceted questions that leave too many options as the child might simply choose the easiest way out and answer only the last part of the questions. Questions should be short and simple; and
- The child witness's demeanor should be watched in case he becomes tired and needs a break (Meintjes, 2000c:C4-18).

2.8.3 Cross-examination

At the conclusion of a witness's evidence-in-chief he or she may be cross-examined by all other parties to the trial. This cross-examination is conducted either by the accused or by his legal representative. When the witness is questioned by a party who did not call him as a witness, it is known as cross-examination. Cross-examination is seen as the cornerstone of the right to challenge the accuser. The underlying assumption of the accusatorial system is that cross-examination of a witness in the presence of the accused is the best way to arrive at the truth. It is argued that this assumption is however incorrect when it involves a child witness (Zieff, 1991:34).

In South African law, the conduct of cross-examination is governed by a combination of legislation, ethical rules and case law. Section 166 of the Criminal Procedure Act, 1977 (Act 51 of 1977) sets out the rights of the accused and the State in relation to examination of witnesses. It provides that both the accused and the State may cross-examine any party called by the other side, including witnesses called by the court. Subsection (3) empowers the court to limit cross-examination if it is being unreasonably prolonged (South African Law Commission, 2001:612).

2.8.3.1 The Purpose of cross-examination

The purpose of cross-examination is to elicit favorable evidence which supports the party cross-examining the witness or to challenge the truth or accuracy of the evidence and to undermine the witness's direct testimony by casting a shadow of doubt upon the evidence given for the opposing party and therefore challenging the witness's credibility or his testimony (Myers & Perry, 1987:182; South African Law Commission, 2001:611; Zeffert *et al.*, 2003:752; Davies, 1993:3). Cross-examination may be directed either to the facts relevant to the issue, or facts relevant to the

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witness's credibility. Brennan and Brennan (1988:3) postulate that cross-examination is aimed at upsetting the child's credibility. This is done primarily through questions that are aimed at causing confusion and obtaining contradictory responses to questions.

This purpose of cross-examination was accepted by the courts in *S v Gidi and Another* 1984(4) S A 537 (C) where Judge Rose-Innes said the following:

“In the case of many a witness it calls for no skills to intimidate or confuse or distress a witness who does not have the resources of intellect, language or personality to defend himself against a bullying prosecutor.”

Questions, which are not relevant, whether to the issue or to credibility are not allowed (Zeffert *et al.*, 2003:752).

The state, the accused and the court have the right to cross-examine witnesses they have not called, that is witnesses testifying for the other party. The presiding officer has a limited role and may ask questions of a witness, but may not compromise his impartiality and descend into the arena (South African Law Commission, 2001:611).

The specific goals of cross-examination vary from child to child. There are however basic objectives underpinning most cross-examinations:

- The defense attorney may commit the child to a specific version of the facts so that the child can be accused of prior inconsistent statements or contradictions (Myers & Perry, 1987:182);
- The attorney may highlight inconsistencies in the child's testimony. Such inconsistencies may indicate that the testimony is mistaken or deliberately falsified, or that the child is confused, uncertain, highly suggestive, or lacking in personal knowledge of the facts (Myers & Perry, 1987:183);
- The defense may try to show that the child is coached or that the testimony was memorized; and

- To demonstrate that the child lacks the capacity to observe, remember, or communicate (Myers & Perry, 1987:183).

Researchers such as Key and Hammond (Zieff, 1991:34) described cross-examination of a child as “nothing short of brutal”.

2.8.3.2 Questioning techniques during cross-examination

Normal conversation consists of questions, explanations, descriptions and narratives. During cross-examination in the accusatorial system only one of these forms is used, namely questions are asked and the child must answer. These questions are controlled by a established procedure and the child cannot negotiate these boundaries (Brennan & Brennan 1988:59).

▪ Leading questions

Leading questions are avoided by other professions but adopted by the defense attorney for the same reason, namely for its suggestive potential. Leading questions are used both to elicit specific information and to avoid other unfavorable disclosures (Henderson in Westcott *et al.*, 2002:284).

Leading questions that are asked during cross-examination create difficulties as the child struggles to comprehend them (Muller & Tait, 1997:523). A leading question will suggest a reply to the child. Leading questions can distort the evidence. The inconsistency that is created is that leading questions are not allowed during testimony-in-chief as they may imply the answer but can be used when the child is under cross-examination (Spencer & Flin, 1990:223).

Research on suggestibility and the child witness has shown that a child is more likely to produce unreliable information during the trial than the adult, when suggestive or leading questions are asked (Dent & Flin, 1992:8). Leading questions are further particularly effective with people who are unassertive. This will therefore affect the child witness when being cross-examined in an accusatorial environment (Carson, 1995:6).

▪ **Repeating questions**

Non-legal interviewers regard repeating questions as bad practice. Several studies have shown that by repeating questions to the child witness, inaccurate reports can be generated because the child witness will think that the repeating of the questions means that the first answer he has given is not correct (Henderson, in Westcott et al., 2002:284; Spencer & Flin, 1990:37). This technique is not aimed at eliciting accurate information but to induce agreement. The researcher is of the opinion that the child witness should be informed of this technique to prepare him to understand why the question is being repeated and not feel compelled to give a different answer because he thinks the first answer was incorrect.

▪ **Avoiding disclosures**

Leading questions are used by attorneys to control or avoid certain disclosures as evidence. If forcefully led from one point to another by asking specific leading questions, the attorney is keeping maximum control over the child and what he testifies, with the view of excluding unwanted and harmful statements for the defense. The witness should not be given a chance to qualify or retract what he has said (Henderson in Westcott, 2002:285).

▪ **Use of negatives**

According to Brennan and Brennan (1988:64), negatives are often placed in unusual positions to fragment questions during cross-examination. Children have difficulty comprehending questions, which contain negatives (see 4.5.1.1). Difficulties that children experience are:

- A negative phrase is placed between two pieces of information;
- The negative is used as a rhetorical device in the courtroom; and
- Multiple negatives are features of language the attorney uses. Negative words like “deny” and “dispute” are particular to court dialogue and pose problems for children (Brennan & Brennan, 1988:64).

- **Multifaceted questions**

Multifaceted questions are long and complicated questions that offer certain options. The child may be confused by the choice available, especially if the selection does not include what really happened. The child can also only answer 'yes' or 'no' which causes problems if the child does not agree or disagree with the options (Brennan & Brennan, 1988:67).

- **Specialized language**

The cross-examiner is a skilled language user and during cross-examination he will be able to move rapidly from one style of questioning to another (Muller, 2002b:174). Brennan and Brennan (1988:55) found that the examiner will repeat words the child has used during cross-examination and then contrast these terms with long, complicated questions. The child finds it difficult to keep up with these rapid changes.

Children do not understand that, during cross-examination, their answers to questions will be analyzed in detail and their choice of words criticised. The questions are asked so that their responses can be manipulated for the benefit of the opposing party (Brennan & Brennan, 1988:56).

As regards to the witness, there are no specific rights in regard to cross-examination (South African Law Commission, 2001:613) except:

- The right to privacy, as long as it is in the interest of justice;
- The right to have their inherent dignity respected;
- The right not to be treated in a cruel, inhuman or degrading way; and
- The right to bodily and psychological integrity.

2.8.3.3 Constitutionality of section 170 A of the Criminal Procedure Act, 1977 (Act 51 of 1977) and the intermediary

The use of an intermediary to convey the general purport of questions raised the issue as to the constitutionality of section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977). In *K v The Regional Court Magistrate NO, and Others* 1996 (1) SACR 434 (E) (Schwikkard & Jagwanth, 1996: 215-220) it was held that nothing in this section (section 170A) hinders an accused from representing himself or from having the right to legal counsel. Nor is an accused person, either personally or where represented through counsel, prevented from asking questions in cross-examination. When section 170A is applied, the intermediary puts the cross-examiner's questions to the witness. The court held that this does not appear to be a limitation of the right to cross-examine. The intermediary acts, in a sense, as an interpreter, and interpreters are widely used in all of the trial courts in this country. For the sake of completeness and seeing that this judgement has bearing on many aspects concerning the intermediary, large parts of the judgment will be quoted. The court stated as follows:

“It is true that it is not only the content of the questions that forms part of the armoury of the cross-examiner. The successful cross-examiner may employ intonations of voice and nuances of expression to drive his point home and, perhaps, to cause discomfort to the witness. It is therefore possible that the forcefulness and effect of cross-examination may, to some extent, be blunted when an intermediary is interposed between the questioner and the witness. But this does not mean that the accused is denied the right to a fair trial, for in deciding whether his rights have been violated it is also necessary to take into account the interest of the child witness.”

The Judge added at 251 that:

“In my view the use of an intermediary does not, in itself, affect the fundamental fairness of the judicial process. For the witness may still be questioned on all aspects of his evidence and the right to challenge the evidence is not impaired. On the other hand the intermediary may be able to play a part in balancing the interests of the accused with those of a child

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witness, by allowing the latter to be integrated into the criminal justice system without disturbing the fundamental fairness of the process.”

There is also the question of whether an intermediary's right to convey the 'general purport' of any question may result in such unfairness to an accused person that it impinges on his fundamental rights. Mr Buchanan submitted that s (2)(b) of s 170A, in particular, constituted an unreasonable restriction on the part of an accused to cross-examine a witness and that its application results in a gross interference with the right to a fair trial. He argued that the cross-examiner has the right to decide how he wishes to phrase his questions and that if an intermediary is permitted to 'filter' the questions it may completely frustrate and derail a planned line of cross-examination. These submissions require serious consideration.

There are sound reasons why the conveyance of the general purport of the question might enable a child witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he may answer them properly (see *S v Gidi* (supra at 540E)). Where the witness is a child, there is the possibility that he may not fully comprehend or appreciate the content of a question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying 'the general purport' of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in a language and form understandable to the witness. From the articles and the evidence put before us it is quite apparent that it is in the interests of justice for questions to be posed to children in a way that is appropriate to their development. This furthers the truth-seeking function of the trial court without depriving the accused of his right to cross-examine. Moreover the Judge or magistrate who presides at the trial controls the proceedings and is able to see to it that the intermediary carries out his function properly and without prejudice to the accused.

Furthermore the court has the power to direct that the intermediary should convey the actual question and not merely its general purport.

'The impact of s 170A(2)(b) will be at its greatest in respect of the cross-examiner. And it is submitted that a court should be very careful not to allow an intermediary to frustrate the fundamental purpose of cross-examination, namely, to give an accused an opportunity to present his defence and to do so through pertinent and probing questions of those who testify against him. At the same time it is equally true that the Legislature has sanctioned the use of intermediaries and certain latitude must be allowed in order to give effect to s 170A(2)(b). In the final analysis, however, the right to a fair trial should be the controlling factor.

2.9 Re-examination

The main purpose of re-examination is to enable the witness to explain matters of which his answers in cross-examination are thought to have left a misleading impression. When re-examining the questions have to be confined to matters arising from the cross-examination. The witness can be re-examined on any part of his testimony already made but not on any other parts that are unconnected to his previous testimony (Zeffert *et al.*, 2003:763).

2.10 SUMMARY

There are two major legal systems, namely the accusatorial and the inquisitorial system. The accusatorial system is applied in South Africa. In this chapter the aspects of the accusatorial system were explored. From these aspects it can be seen that the system causes difficulties for the child witness.

The magistrate, who is impartial, two opposing parties, oral evidence in court, face-to-face confrontation, and cross-examination are the central features of the accusatorial system. The face-to-face confrontation and cross-examination are the features causing the most problems for the child witness.

The courtroom is a foreboding place for many children. Increasing attention is being directed to practices and procedures, which make the courtroom less intimidating.

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Proof of this is the Victim's Charter, the Constitution of the Republic of South Africa, and the United Nations Conventions on the Rights of Children. The implementation of section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) 14 years ago is also proof of attempts to accommodate the child victim in the justice system. Notice must also be taken of the rights of the accused and care must be taken not to violate these rights.

Specific crimes, such as assault, indecent assault, rape, and incest are classified in different ways according to the seriousness of the crimes and the type of punishment, which may be imposed. As South Africa has an accusatorial legal system, certain rules and procedures have to be adhered to. Competency requirements must be met, the oath must be understood and taken, oral evidence must be given, the cautionary rule must be adhered to, a credibility finding must be made, and the order of evidence must be followed. These are not always child friendly and can therefore cause secondary trauma for the child. Cross-examination takes place during which the defense lawyer can ask leading questions which lead to confusion in the child. Other questioning techniques used during cross-examination such as repeating questions, using negatives, using multifaceted questions and special legalese also contributes to the traumatic court experience of the child. After cross-examination, re-examination can take place to clarify misleading evidence of the witness.

It is clear that the legal system has high expectations of a child witness without taking the child's developmental and communicative shortcomings into account. The intermediary can play an important role in this process. To be able to do this, she must be properly trained in all areas of child development and well as the legal system of South Africa.