THE RECOGNITION OF VICTIMS RIGHTS OF SEXUAL OFFENCES

by

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“Indeed in rape cases it is the victim who is most often placed on trial rather than the perpetrator, accused of having ulterior motives and subjected to degrading questions with often pornographic overtones. Prosecutors might fail to adequately address the victims needs and all too often, information is either intentionally or unintentionally withheld from victims.”¹

The victims of sexual offences have to face not only the consequences of the sexual crime that was perpetrated upon them, but they also have to deal with the effects of the criminal justice system. Victims who take part in the criminal justice system should not be exposed to unnecessary distress and trauma.

The victims of sexual offences must not be re-victimised by the criminal justice system. Re-victimisation has been coined to describe the experience where victims are subjected to further victimisation by the very state organs to whom they turn for assistance. This has the effect that the victim is victimised twice, first by the offender and then by the criminal justice system.²

It is therefore the duty of the law to protect this group of witnesses from such a traumatic and damaging experience.

The question that needs to be answered in this research is whether the Sexual Offences and Related Matters Amendment³ has made any difference in respect of protection of victims sexual crimes.

It was concluded that the Sexual Offences Act is indeed a step in the right direction to protect the rights of victims of sexual offences but that it could have afforded more protection.

CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION

Chapter 2 of the Constitution of the Republic of South Africa, 1996, enshrines the rights of all the people in the Republic. Amongst many these include the right to dignity, the right to privacy, the right to equality, the right to freedom and security of the person, which incorporates the right to be free from all form of violence, including sexual violence such as rape. Recently the idea of “victims rights” has come to feature prominently in political, criminological and legal discourse, as well as being subject to regular media comment. The concept nevertheless remains inherently elusive, and there is still considerable ambiguity as to the origin and substance of such rights.

After life, the most important interest of human beings are the safety, health and well being of their person. These interests are not confined to the physical person but includes the element of personhood known as personality, which includes dignity, reputation and privacy. A person who is a survivor of sexual violence has not only been violated sexually, but his or her fundamental interests have been grossly violated. The recognition of a distinct interest of person and personality can be traced to the Roman law.

The South African law has inherited the *injuriae* concept from the Roman and Roman Dutch law. Although *injuriae* are principally redressed as civil wrongs, certain instances of violation of interest of a person are considered to be so gross as to require the penal sanction of the criminal law. In *Charmichele v Minister of Safety*

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4 Act 108 of 1996.
and Security\textsuperscript{9} it was held that where the state failed to protect the survivor of sexual violence from further violence delictual liability would ensue. The court cited with approval from \textit{S v Ferreira}\textsuperscript{10} that, “sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women”.

Not only women but also men are victims of sexual violence. This does not only pose threat to their manhood and dignity but to their well being as individuals.

Rape and other crimes of sexual violence loom small in social histories and in histories of crime sex written by man. A sexual violence crime generally leaves its stain on the historical record only if it comes to trial and the analogy of today’s experience suggest that only a fraction (but how small a fraction) ever reached court and even those cases, the evidence that survives is far from the whole story.\textsuperscript{11} Of greater importance is that the Sexual Offences and Related Matters Amendment Act\textsuperscript{12} must aim to expedite the finalisation of sexual offence cases, to punish offenders of certain sexual crimes appropriately and to avoid secondary victimisation of victims. Such secondary victimisation, \textit{inter alia}, occurs when vulnerable witnesses have to repeat their testimony on numerous occasions.

The Sexual Offences Act, contained very narrow interpretation of the different sexual crimes. This Act retained the common law position and provided no special treatment or protection for the victims of sexual offences. Over the past 10 years feminists, human rights activists as well as civil society organisations have advocated for the creation of new laws, policies and practices in relation to the treatment of rape survivors and the punishment of sexual offenders.\textsuperscript{13}

In an attempt to make the criminal law and the criminal justice process more responsive to the needs and experiences of rape survivors, as well as to introduce more appropriate procedural measures to correct historically discordant approaches

\textsuperscript{9} 2001 4 SA 938 (CC).
\textsuperscript{10} 2004 SACR 257(SCA) para 40.
\textsuperscript{11} Tomasselli & Porter \textit{Rape} (1986) 216.
\textsuperscript{12} Act 32 of 2007. Hereinafter referred to as “the Sexual Offences Act”.
\textsuperscript{13} Lartz & Smythe \textit{Should We Consent? Rape Reform in South Africa} (2008) 1.
to the management of rape cases, an exhaustive process was initiated in 1998 to change the law on sexual offences. After reforms the Sexual Offences Act came into force. The Sexual Offences Act codifies all crimes relating to sexual matters. The common law offences of rape and indecent assault have been replaced with a substantially broader range of statutory offences. It provided for neutral terminology that would for the first time render both genders liable for these crimes.

1.2 STATEMENT OF THE PROBLEM

In this research the question whether the Sexual Offences Act, has had a significant impact in improving the position of victims of sexual offences together with processes and procedures underpinning our criminal justice system will be addressed.

The question that should be borne in mind is whether the Sexual Offences Act encourages the victims of sexual crimes to approach our criminal justice system confident that our law shall deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of the sexual offence.

In practice large numbers of victims of sexual crimes do not report the crimes out of fear that the trials will take too long, that they will suffer secondary victimisation from the courts and they will be treated without humanity or respect by certain stakeholders of the criminal justice system, this indeed is a grave indictment of the criminal justice system. 14

There needs to be a balance between the victims’ rights and interests and that of the offender. Currently the scale seems to be more tilted on the accused side therefore there is a need to re-balance the system in favour of the victims. References were made to the obstacles in the existing legal system confronting the victims and two bills (first and second draft) of the Sexual Offences Act were drafted to deal with these shortcomings. However certain provisions in those Bills protecting the

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vulnerable witness *ie* victims extensive as they were remained paper law and were not implemented.\textsuperscript{15}

### 1.3 PURPOSE OF THE DISSERTATION

This research will investigate the current position of victims in our criminal justice system. The law in regard to victims of sexual offences in other countries, whereafter this study will concentrate on the changes brought about by the Sexual Offences Act. Reference will also be made to aspects not addressed by the Sexual Offences Act. As well as how can the position of these victims be improved in light of their human rights. To highlight the inadequacies of the law as it is. Also to make recommendations to the South African government on more legislative measures to protect victims.

### 1.4 AIM OF THE STUDY

This treatise will attempt to investigate to which extent the Sexual Offences Related Act incorporate a victim’s rights centred approach in light of international legal instruments, the Constitution and other legislations including the Criminal Procedure Act.\textsuperscript{16}

### 1.5 METHODOLOGY

This treatise places emphasis on an analysis of the relevant available literature on the subject namely, the Criminal Procedure Act,\textsuperscript{17} the Sexual Offences Act,\textsuperscript{18} the impact of the Constitution and case law had on the Sexual Offences and Related Matters Act. This study also places considerable reliance on secondary sources including books and academic articles.

\textsuperscript{15} Lartz & Smythe *Should We Consent? Rape Law Reform In South Africa* 7.

\textsuperscript{16} Act 51 of 1977.

\textsuperscript{17} Act 51 of 1977.

\textsuperscript{18} Act 32 of 2007.
1.6  STRUCTURE OF THE STUDY

Chapter 1 introduces the study, its aims approach and scope.

Chapter 2 will be focusing on the challenges present in a trial involving sexual crimes.

Chapter 3 deals with the exclusion of the vulnerable witness provision from the Sexual Offences and Related Matters Amendment Act. This chapter focuses on the positive impact the non-included provisions would have had in a sexual crime trial for the victims.

In Chapter 4 a comparative analysis is made between South Africa’s current position in the relevant subject and the impact of international instruments.

In Chapter 5 the concept of victim’s rights is discussed in light of the Constitution.

Chapter 6 contains a summation of the conclusions reached on the various issues dealt with in the dissertation.

1.7  CONCLUSION

This research will also look at the nature and scope of the rights of victims of crime against the backdrop of an emerging international consensus on how victims ought to be treated and the role they ought to play. Of all the crimes, sex related crimes are the most violating and humiliating. The alarming rise of sexual assault in South Africa represents a major criminal justice problem. One of the aims of the Sexual Offences Act\(^\text{19}\) is to provide better service to the victims of sexual offences. The question remains, whether the Sexual Offences Act provides protection from secondary victimisation for those who choose to enter the criminal justice system. Whether a survivor of sexual violence will be able to stand up and say, “I have confidence in our system”.

\(^{19}\) Act 32 of 2007.
CHAPTER 2
CHALLENGES IN SEXUAL OFFENCES TRIALS

2.1 INTRODUCTION

Rape or any other sexual violence is in itself very traumatic to the survivor, even more so when they enter a court room that does not protect their rights. Those who have been through the experience of sexual violence either have no faith that the law would protect them or that justice will not be served due to their unpleasant experiences in the court room. Victims should be the heart of our criminal justice system.

In this chapter the different challenges faced by victims in the court room and the manner in which the state should conduct its case and how legislation seeks to redress such challenges, will also be discussed.

2.2 SECONDARY VICTIMISATION OF SEXUAL OFFENCES SURVIVORS

Secondary victimisation refers to the attitudes, processes, actions and omissions that intentionally or unintentionally contribute to the revictimisation of a person who has experienced a traumatic incident as a victim through, failure to treat that person with respect and dignity, disbelief of the persons account.\(^{20}\)

Secondary victimisation is also defined as a failure to treat victims with dignity, respect and understanding the dynamics of offences.\(^ {21}\) This definition presupposes that everyone involved in providing assistance to sexual violence survivors within the criminal justice system, including the courts, must have an understanding of the dynamics of these offences. Secondary victimisation is an encounter that occurs

\(^{20}\) Geldenhuis “Revictimisation of Sexual Abuse Victims” Servamus (2009).

\(^{21}\) South African Victims Charter.
when the sexual violence survivor interacts with the investigation of the offence and the legal system in general.

Usually devaluation and silencing follows when the experiences of victims experiences are misunderstood, re-cast or wrongly interpreted. When the court for example reaches a conclusion that the complainant consented to sexual intercourse while she did not.22 Such consent would be derived from the way that victim reacted during the rape or how he or she was dressed before being raped. After a verdict of “not guilty” in the Zuma case the Cabinet approved the new version of the Sexual Offences Bill. The question is whether it would have made a difference in the outcome of the Zuma trial if the Bill had been enacted and was in operation at the time of the trial.23 The resulting sense of outrage was clearly expressed by the complainant in the matter between S v Zuma24 when she spoke after the verdict was handed down:

“I see myself being described and defined by others, the media, the defence, the judge. I am not mad. I am not incapable of understanding the differences between consensual and non-consensual sex. The fact that I have been raped multiple times does not make me mad. It means there is something very wrong with our world and our society.”25

The Sexual Offences and Community Affairs Unit has also realised that there are alarming numbers of silent victims who do not even enter the criminal justice system because of the fear of secondary victimisation. As a result of this fear perpetrators are able to continue with their criminal acts and get away with them.26 Therefore victim assistance in reducing secondary victimisation is very important. Despite the potential value that victims of crime offer to the criminal justice system and law enforcement agencies, it is well-known that in an effort to ensure effective prosecution and punishment, the specific requirements and needs of victims are often neglected.27

22 Ibid.
23 Art & Smythe Should We Consent? Rape Reform in South Africa 263.
24 2006 2 SACR 191 (W).
The Sexual Offences Act has been implemented to eliminate the secondary victimisation of sexual violence victims or survivors. However the Sexual Offences Act does not provide enough protective measures for the sexual violence survivor who has to give his/her side of the story in the court room, whether young or grown up.

Academics and many non-government organisations dealing with sexual violence survivors are of the view that the reforms enacted focused more on the creation of new sexual offences, instead of also focusing on the improvement of specific procedural mechanisms to reduce secondary victimisation and address the arbitrary application of measures designed to protect victims.\(^{28}\)

The final outcome of the Sexual Offences Act,\(^ {29}\) is reflective of a particular and complex interplay between social expectation, the reformist imperatives of rights building and political inclination.\(^ {30}\) Thus in some respect then Sexual Offences Act is seen by many as a legislative compromise.\(^ {31}\) Many of the protective measures in our law provide protection to a certain extent for the child witness in sexual violence cases but little is said about the adult witness who has went through a similar ordeal of sexual violence.

### 2.3 THE CHILD WITNESS IN A SEXUAL OFFENCES TRIAL

Currently in the Criminal Procedure Act\(^ {32}\) there is no provision dealing with vulnerable witnesses. Despite this the vulnerability for children has led to a variety of changes in court practises and procedures aimed at making it easier for such witnesses to give evidence.\(^ {33}\) The Law Commission proposed that a category of vulnerable

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\(^{28}\) Lartz & Smythe *Should We Consent? Rape Reform in South Africa* 2.

\(^{29}\) No 32 of 2007.

\(^{30}\) Lartz & Smythe *Should We Consent? Rape Reform in South Africa* 2.


\(^{32}\) Act 51 of 1977.

witnesses be created, including children and victims of sexual offence. These would add to the existing protective measures contained the Criminal Procedure Act.³⁴

Sexual violence such as rape is a very traumatic experience. Victims of child rape have to overcome many obstacles following the occurrence of the incident, one of such obstacles is having to give evidence during a trial. The traumatic effect of the court room confrontation on children has been accepted by a number of courts in South Africa.³⁵ In S v Basil Simons,³⁶ Wilson J comments as follows:

“I propose for a moment to distress and to state that it appears to me that it is time that urgent consideration is given to change in the manner of conducting criminal trials arising out of the sexual abuse of young children ... it appears to me that it would be eminently desirable to evolve a system that when a child is called upon to give evidence that child is not required to do so in a large austere looking court room before judicial officers sitting on a bench above them. In other words in circumstances that are completely strange to the child, and must cause a great deal of stress and tension.”

The Sexual Offences Act endeavours to recognise the rights of the victims of sexual offences and it is supplemented by the Criminal Procedure Act, however there is much room for improvement.

In response many difficulties experienced by children and victims of sexual crimes in the court room, the legislature introduced section 170A, section 158 and section 153(3) of the Criminal Procedure Act.

Section 170A of the Criminal Procedure Act, enables a child to give evidence via an intermediary where the child would experience undue mental stress or suffering to do so.³⁷ Section 170A of the CPA provides that:

“Whenever criminal proceedings are pending before any court and it appears to such court that the proceedings would expose any witness under the biological and mental age of eighteen years to undue mental stress and suffering if he or she testifies at such proceedings, the court may appoint an intermediary in order to enable such witness to give his or her evidence through that intermediary.”

³⁴ Ibid.
³⁵ Muller An Inquisitorial Approach to the Evidence of Children.
³⁶ DCLD 84/88, 13 June 1988(unreported).
³⁷ Act 51 of 1977.
The biological age can be easily defined as the real age of the victim but more specifically section 1 of the Children’s Act\textsuperscript{38} provides that any person under the age of 18 years old is a child. Mental age on the other side has and continues to present its challenges as there is yet to be a decision on its definition. As it often happens that sexual victims are also persons living with mental a handicap that despite their biological age, such persons do not understand the concept of sexual intercourse and is unable to consent to it due to the mental development stage.

The appointment of an intermediary is enacted in section 170A(4)(a) of the Criminal Procedure Act to further ensure that trained and skilled persons are so appointed to avoid secondary victimisation. The legislature went further with the promulgation of section 158 of the Criminal Procedure Act,\textsuperscript{39} in terms whereof a witness can give evidence by means of a closed circuit television or similar electronic media. The court may on its own initiative order that witnesses give evidence through such means. The prosecutor may make an application to the court for the use of either of sections or both. If the prosecutor does not make such an application and the court is of the opinion that the child will experience undue mental stress or suffering if he or she testifies under the normal adversarial court system, the court may order that section 170A and or section 158 of the CPA be used. Therefore these protective measures for the child witness are not automatically applied.

It is argued that the adversarial application of section 170A gives rise to problems since it views those children who testify via closed circuit television as being the exception\textsuperscript{40} rather than the norm. In the case of \textit{S v Mokoena; S v Phaswane}\textsuperscript{41} Bertelsmann J held that section 170A(1) was unconstitutional on account of the provisions of section 28(2) of the Constitution.

Section 28(2) of the Constitution states that a child’s best interests are of paramount importance in every matter concerning a child.

\textsuperscript{38} Act 38 of 2005.
\textsuperscript{39} 51 of 1977.
\textsuperscript{40} Muller \textit{An Inquisitorial Approach to the Evidence of Children} Sabinet Online.
\textsuperscript{41} 2008 2 SACR 216 (T).
In terms of section 28(3) of the Constitution a child is for the purposes of section 28(2), a person under the age of eighteen years. Bertelsmann J held that section 28 of the Constitution “demands that a child should be exposed to as little stress and mental anguish as possible”, especially a victim of sexual attack. Having noted that it is difficult to understand why the legislature should insist that the child witness exposed to undue mental stress or suffering before the court may consider appointing an intermediary. However, the Constitutional Court did not confirm the finding by Bertelsmann J. In Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, Ngcobo J held that the provisions of section 164(1) of the Act does not violate section 28(2) of the Constitution and the striking out of the provision was not confirmed. It was submitted that section 170A(1) read with section 170A(3) contemplates that in every trial in which a child is to testify, the court will enquire into the desirability of appointing an intermediary.

In S v Stefaans, the complainant was sixteen and a half years old at the time of the trial. The accused was charged with rape and the trial Court had granted the state’s application that section 170A be invoked. On appeal the judge noted that section 170A(1) refers to “undue mental stress” and not unnecessary stress as the trial Court seemed to have assumed. It was concluded that the trial Court had erred. The court set out general principles which govern the appointment of an intermediary in terms of section 170A(1) of the CPA. Mitchell AJ held that:

“Where a regional magistrate presiding in a rape trial directed that the intermediary procedure should be adopted merely because the complainant would be subjected to ‘unnecessary’ stress in open court rather than undue stress and because he failed to conduct an investigation sufficient to establish whether factors were present which justified the application of the section.”

The accused conviction was set aside.

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44 2009 4 SA (CC) 166.
45 1999 1 SACR 182 (C).
46 Schwikkard & Van Der Merwe Principles of Evidence 387.
In *S v F*, a seventeen year old was the complainant in charges of assault with intent to do grievous bodily harm, abduction and rape. The complainant was fifteen years old at the time of the alleged offences. It was part of the state’s argument that the complainant was well able to give her evidence unassisted by an intermediary, provided she could testify in the absence of the accused. The state’s application that that the complainant be permitted to testify without an intermediary but by means of circuit television system as provided for in section 158(2)(a) of the Criminal Procedure Act, was unsuccessful. The state called two witnesses H, the mother of the complainant and Dr Teggin a practising psychiatrist. The judge commented on the evidence of the doctor and held:

“He testified as already adverted to, that because of the mental state of the complainant the very questioning of her regarding the alleged rape could prove very distressing to her, causing her to cry, to the extent that she might not be able to proceed with her evidence. It is most significant that he did not say that mere presence of the accused would bring about this distress, although he did admittedly testify that the accused presence might very well aggravate the distressful state.”

The court had a problem with the evidence of the doctor because according to the court it did not satisfy the test that the complainant would be exposed to undue mental stress or suffering. The court made a unanimous conclusion that there is very little, if any, difference between the complainant testifying before the court in open proceedings and testifying through the medium of an intermediary.

The court saw no difference whether the complainant testified in an open court or by means of a closed circuit television. While each case must be dealt with on its own merits the court could have laid down general guidelines to govern the application of this section.

The court held that if on the available evidence, the recalling and narrating of events in the presence of the accused would be as stressful as doing so through an

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47 1999 1 SACR 571 (C).
48 Schwikkard & Van Der Merwe *Principles of Evidence* 388.
49 Ibid.
50 Ibid.
intermediary, then there is no room for a finding that testifying in the normal course would expose the complainant to undue mental stress or suffering.\textsuperscript{51}

Although section 170A has provided some relief for children who are entitled to use it, it does not address the adversarial nature of the trial as the whole.\textsuperscript{52} Muller argues that section 170A amounts to a plaster that is being used to cover cracks of a system that is not capable of dealing with child witness. Section 170A and section 158 of the Criminal Procedure Act are a going in the right direction, however the legislature needs to revisit these sections in order to ensure that equality before the law is maintained and that every section is interpreted and read in light of what is in the best interest of the children.

\textbf{2.4 THE USE OF THE CAUTIONARY RULE IN SEXUAL OFFENCE CASES}

When dealing with the evidence of complainants in sexual violence cases courts approach their evidence with caution. This cautionary rule is not only applied in cases involving children but also in sexual violence cases no matter the age of the complainant. The absence of the rational basis for the exercise of this rule in sexual offence cases brings forth the discriminatory nature of the rule.\textsuperscript{53}

Traditional arguments in support of the cautionary rule assert that it must be applied to the complainant in sexual offence cases because sexual offences frequently occur in private and leave no outward traces, making it very difficult to refute an assertion that there was no consent.\textsuperscript{54} All arguments supporting the use of cautionary rule other than arguments pertaining to the dangers of single witness testimony are based on a misogynic assumption that women are duplicitous and deceitful.\textsuperscript{55}

In the case of \textit{S v M}\textsuperscript{56} two questions were asked by the court with regard to the application of the cautionary rule in sexual offence cases. The questions were,

\begin{flushleft}
\textsuperscript{51} Schwikkard & Van Der Merwe \textit{Principles of Evidence} 392.
\textsuperscript{52} Muller \textit{An Inquisitorial Approach to the Evidence of Children} Sabinet online.
\textsuperscript{54} \textit{Ibid}.
\textsuperscript{55} \textit{Ibid}.
\textsuperscript{56} 1997 2 \textit{SACR} 682 (C).
\end{flushleft}
whether the cautionary rule can be applied without running foul of the constitutional commitment to equality, and if not does the court have jurisdiction to strike down this pernicious rule?"

Section 9(1) of the Constitution, provides that “everyone is equal before the law and has the equal protection and benefit of the law”. This is the underlying objective of the rule of law. The Commission noted that the cautionary rule in sexual offences theoretically applies to the evidence of female as well as male complainants in sexual cases however practise seems to show that it is aimed more at the evidence of female victims of sexual offences.57

The cautionary rule applicable in sexual offence cases make a distinction between complainants in sexual offence cases and complainants in other cases.58 This clearly differentiate between categories of people. Such differentiation amounts to discrimination.

It is quite clear that the cautionary rule applicable in sexual offences impairs the victim’s constitutional right to equal protection and benefit of the law as well as the right not to be discriminated against unfairly, it also undermines the victim’s right to dignity.59 A question asked by many academics is, whether the cautionary rule can be saved by the limitation clause section 36 of the Constitution.60 According to section 36 of the Constitution the court needs to take a number of factors into consideration in determining whether the limitation to the complainant’s rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Section 18 of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill provided a safeguard against such discrimination by providing the following:

“Despite the provisions of the common law or any other law or any rule of practices, a court shall not treat the evidence of a witness in criminal proceedings

58 Ibid.
59 Jagwanth & Schikkard “An Unconstitutional Cautionary Rule” 89.
60 Ibid.
pending before that court with caution and must not call for corroboration of evidence solely on account of the fact that the witness is-
(a) The complainant of a sexual offence or a child.”

The above provision was amended and included in the new Sexual Offences Act. It is now section 60 of the Sexual Offences Act and it reads as follows:

“Notwithstanding any other law, a court may not treat the evidence of the complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution on account of the nature of the offence.”

The cautionary rule applying to the evidence of complainants in sexual offences cases was dealt with by the Supreme Court of Appeal in the case of *S v Jackson*, Olivier JA held that the use of cautionary rule in sexual offence cases is outdated in our law and it should not be applied generally. However he further held that the evidence in a particular case may call for a cautionary approach. This case provides a guide with regards to the application of the cautionary rule and though courts may interpret the decision in *Jackson* in different ways the Sexual Offences Act has provided a way forward in this regard.

The legislature has not mentioned abolishing the use of the cautionary rule to the evidence of children. The approach of using the cautionary rule when evaluating the evidence of children is based in the notion that children are inherently unreliable, and that the child witness is easily influenced and that the child witness is unable to give to provide a correct account of the facts of the incident. As is evident in *S v S*, it was assumed that children are incapable of distinguishing fact from fantasy, thereby bringing into question the truthfulness of the children’s testimony. Repeated extension of the cautionary rule by the courts to the evidence of all children especially victims of rape, without considering their level of intellectual maturity results in children being discriminated against.

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63 1995 1 SACR 50.
64 Chetty “Testimonies of Child Rape Victims in South African Courts” 34 Sabinet online.
When launching his Children’s Fund in 1995, former President Nelson Mandela stated the following.\(^{65}\)

“There can be no keener revelation of society’s soul than the way it treats its children. It would be no exaggeration to speak of a national abuse of a generation by a society, which it should have been able to trust. As we set about building the new South Africa, one of our highest priorities should be our children. The vision of the new society which guides us should manifest in the steps we take to address done to our youth and to prepare for the future. Our actions and policies and the institutions we create, should be eloquent with care, respect and love.”

The above statement is founded in the Constitution,\(^ {66}\) namely section 28(1)

“Section 28(1): Every child has the right - to be protected from maltreatment, neglect, abuse, degradation.

Section 28(2): The child’s best interests are of paramount importance in all matters concerning the child.”

This right must be unconditionally upheld by all the role players including the criminal justice system.\(^ {67}\) It is not at all clear that the cautionary rule applicable to the evidence of children can withstand the test of social science evidence.\(^ {68}\) The legal system’s distrust of the children’s evidence has a discriminatory effect on an extremely vulnerable group. In the absence of a clear rationale it is difficult to justify the cautionary rule’s inconsistency with South Africa’s commitment to equality.\(^ {69}\) As it was proposed in the Sexual Offences Bill it would have made much more sense to get rid of this rule and require as articulated in Jackson's case, that any cautionary approach to a witness must have an evidential basis with a clear proviso that the age or gender of the witness cannot provide the requisite evidential base.\(^ {70}\)

It is submitted that the Sexual Offences Act is a step in the right direction towards protecting the rights of victims although it did not go far enough.

\(^{65}\) Ibid.

\(^{66}\) Act 108 of 1996.

\(^{67}\) Chetty “Testimonies of Child Rape Victims in South African Courts” 34 Sabinet online.

\(^{68}\) Lartz & Smythe Should We Consent? Rape law Reform in South Africa 146.

\(^{69}\) Lartz & Smythe Should We Consent? Rape law Reform in South Africa 79.

\(^{70}\) Ibid.
In *Mtunzi Leve and The State*, Jones J dealt with an appeal where a 5 year old boy was raped. Satisfaction of the cautionary rule was sought by the trial court and found to be present on consideration of the totality of evidence. In this case Jones J held that:

“In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (section 208 of the Criminal Procedure Act No 52 of 1977). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and to assist the courts in determining whether the onus is discharged they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution. This means that the courts must be alive to the danger of relying on the evidence of only one witness because it cannot be checked against other evidence. Similarly, the Courts have developed a cautionary rule which is to be applied to the evidence of small children.”

The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity. Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness.

The court here applied the cautionary rule because it was a single witness and a child witness not on basis that it was a sexual offence.

In *S v Dyira*, the complainant was a 8 year old girl, who had delayed reporting the alleged rape for 17 to 18 weeks. The court dealt with the appeal on conviction and sentence. Jones J submitted that more than one cautionary rule applies to the complainant as a witness. She was both a single witness and a child witness. The references:

71 CC34/2008 Unreported Eastern Cape High Court.
72 2010 (1) SACR 78 (ECG).
court held that it must have proper regard to the danger of an uncritical acceptance of the evidence of the evidence of both a single witness and a child witness.

In *S v MG*, the appellant was convicted of raping a 12 year-old girl and sentenced to 18 years imprisonment. Jones J, referred to the same principle applied in the case of *Dyira*. The court held that it must be alive to the danger of relying on the evidence of one witness, because it cannot be checked against other evidence. Further that the courts have developed a cautionary rule which is to be applied to the evidence of small children.

Jones J submitted that, although corroboration is not a prerequisite for a conviction. A court will sometimes in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt.

In *S v Hanekom*, the appellant was convicted in the Regional Court on one count of indecent assault and was sentenced. The complainant was his 8 year old daughter who was 5 years old the time of the incident. Saner AJ, held that the trial Court failed to have sufficient regard to the two cautionary rules applicable in the case. The complainant was both a single witness and a child witness. It was submitted that cautionary rules were a “red flag”, warning a court to bear a number of factors in mind when evaluating evidence.

In the above cases the cautionary rule was applied because the complainants were single witnesses and child witnesses, not on basis they were sexual offence cases.

### 2.5 RECOMMENDATIONS

There are many substantive and procedural issues which contribute to the unpleasant experience of a sexual offence trial to the sexual offence complainant. The following may improve the shortcomings which are not addressed by the new Sexual Offences Act:

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73 2010 (2) SACR 66 (ECG).

74 2011 (1) SACR 430 (WCC).
2.5.1 Sexual Offences Courts: The creation of these courts has to a certain extent improved the handling of sexual offence cases. However there is still much room for improvement in order to eliminate secondary victimisation of survivors. As these courts are different to other courts, the proceedings should be different to the normal adversarial system not only for children in sexual offence cases but for survivors of all age groups. Sexual Offences Courts must be victim friendly. Examples of structural changes include the location of the courts and the availability of separate waiting rooms. Prosecutors often use their offices for consultation processes this hinders a proper confidential consultation with the witness. As opposed to using an office where the phone will be ringing and there would be other interruptions the ideal remains a private, victim friendly room which is specifically designated for consulting confidentiality with witnesses.  

2.5.2 The application of section 170A should not be discretionary.

2.5.3 The intermediary should play a more active role in the proceedings.

2.5.4 Cross-examination is very stressful to any survivor of sexual violence because the aim of the defence is to destroy the witness' credibility. Cross-examination by the defence can take very long as the defence council will try and look for inconsistencies when there is none. In order to avoid such undue stress to the survivor, the defence should disclose the basis of their defence in the beginning of the trial. One may argue that this limits the right if the accused to silence. This limitation would be reasonable and justifiable as it would not only limit the facts in dispute but it will also ensure that the trials do not drag on for a long time therefore it would be in the interest of justice.

2.5.5 In the South African law there is no provision on the use of victim impact statements. The victim impact statement is a statement made by the victim

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75 Reyneke & Kruger “Sexual Offences Courts: Better Justice for Children"
and addressed to the presiding officer to be considered in the sentencing decisions. The victim impact statement consist of the description of the harm in terms of the economical, psychological, social and the effect the crime will have on his or her future. There are no legal rules precluding the acceptance of the statement. Such evidence can be submitted in terms of section 274 of the Criminal Procedure Act if the court deems it appropriate in order to inform itself as to the proper sentence to be passed. This measure should have been included in the Sexual Offences Act.

2.6 CONCLUSION

The primary objective of the Sexual Offences Act is to ensure that complainants of sexual offences are afforded the maximum and least–traumatising protection that the law can provide. A protective approach to victims of sexual crimes is long overdue and the Sexual Offences Act endeavours to curtail the shortcomings however there is still room for improvement. The enactment of the recommendations made by the Law Commission in Project 107 of 2002 on the Sexual Offences Report would have made a significant difference in the Sexual Offences Act in regard to the protection of victims of sexual offences.

77 Lartz & Smythe Should We Consent? Rape Law Reform in South Africa 146.
3.1 INTRODUCTION

For many witnesses and victims of sexual offences their first exposure to crime is also their first experience of the criminal justice system. Apart from the original trauma of the sexual crime, the experience of the exposure to the criminal justice system can be a frightening experience to many victims.

In this chapter we will outline the provisions which were recommended by the Law Commission as protective measures to the victims of sexual offences will be discussed. The issue at whether the adversarial nature of the criminal trial has an impact in the unpleasant experience of victims in the court room will be addressed.

The Criminal law (Sexual Offences and Related Matters) Amendment Bill was introduced in the National Assembly and published in the government Gazette on 2003-07-30. The Law Commission envisioned a Bill that was innovative and progressive. The report on sexual offences, specifically stated that the intention of rape law reform is:

“to encourage the victims of sexual violence to approach the system for assistance and to improve the experiences of those victims who choose to enter

79 B50 of 2003.
81 Lartz & Smythe Should We Consent? Rape Law Reform in South Africa 7.
the criminal justice system, whilst at the same time giving due regard to the rights accorded to the alleged perpetrators of sexual offences.\textsuperscript{83}

In August 2003, the Portfolio Committee on Justice and Constitutional Development (the Portfolio Committee) was briefed by the Law Commission on the Proposed Sexual Offences Bill and a cabinet debate was held on the Bill.\textsuperscript{84} The 2003 version of the Bill dramatically departed from what the Law Commission has recommended. A number of provisions had been removed from the Bill on the basis that they would be “too costly” to implement.\textsuperscript{85} Parliament demanded a costing framework prior to considering their re-inclusion into the Bill. One of the major exclusions and that which is supposed to be the heart of the Bill related to the protective measures for vulnerable witnesses.

At present there are no provisions in the Criminal Procedure Act for different categories of witnesses. The proposals made by the Law Commission regarding the protection measures for victims could have been good provisions for protection of victims of sexual offences but they remained recommendations on paper and were not implemented. The excluded provisions were to introduce a shift from the strict adversarial system in the South African courts to a criminal procedure which is more inquisitorial. It is submitted that the shift failed because costs were of paramount importance to those in power than the protection to those who need it the most.

3.2 THE NATURE OF THE ADVERSARIAL AND INQUISITORIAL MODELS IN THE SOUTH AFRICAN CRIMINAL PROCEDURE

The South African Criminal procedure is mainly adversarial. The adversarial nature of criminal proceedings in sexual offence cases is impedes the objective of protecting victims of sexual offences and creates a very unpleasant experience for complainants of sexual offence cases.

Accusatorial models of criminal procedure are found in Anglo American legal systems, whilst inquisitorial systems are common in the Continental legal systems. It

\textsuperscript{83} Ibid.
\textsuperscript{84} Lartz & Smythe \textit{Should We Consent? Rape Law Reform in South Africa} 7.
\textsuperscript{85} Ibid.
is furthermore accepted that in South African that criminal procedure system is accusatory in nature.\textsuperscript{86} Accusatorial system is also described as an adversarial system where the pre-trial procedures and trial procedures are designed to facilitate an equal and open confrontation between the accuser (the state or prosecutor) and the accused.\textsuperscript{87} According to this system the only function of the presiding officer is to ensure in an objective and passive way that the confrontation process takes place within the determined rules. It is not the task of the presiding officer to subpoena witnesses and to question them - this is the duty of the two parties to the confrontation. After hearing the entire evidence the presiding officer is expected to make a decision. The presiding officer should be impartial and should judge a case based on the evidence which has been tendered by the parties before the court.\textsuperscript{88} In the accusatorial system the prosecutor is the opponent of the accused, although it is not the duty of the prosecutor to secure a conviction.

In the case of an inquisitorial model, the role of the presiding officer is important. During the trial the presiding officer plays a very active role. The presiding officer calls witnesses, examines them and makes a finding on the evidence available. In contrast to the accusatorial model, the accused is viewed as a valuable source of information.\textsuperscript{89}

In adversarial proceedings the objective of truth finding is in most cases defeated because the complainants of sexual offences are unable to give a satisfactory account of events in the court room due to the nature of the adversarial proceedings. This is a system that is party driven, if the prosecutor cannot adequately engage in the process of proof or represents the state’s case poorly due to inexperience and or other factors this is to the prejudice of the complainant. More fundamentally, in a well matched contest the truth may not emerge because of the partisan approach to evidence production.\textsuperscript{90} The presiding officer cannot do anything about this problem,

\textsuperscript{86} Erasmus \textit{Criminal Law (Sexual Offences) Amendment Bill and Vulnerable Witnesses: A Missed Opportunity} 509.
\textsuperscript{87} Ibid.
\textsuperscript{88} Erasmus \textit{Criminal Law (Sexual Offences) Amendment Bill and Vulnerable Witnesses: A Missed Opportunity} 510.
\textsuperscript{89} Ibid.
\textsuperscript{90} Steytler \textit{Making South African Criminal Procedure More Inquisitorial}. 
because he or she plays a passive role and must remain impartial. His or her main duty is to listen to both sides then arrive at a decision based on the evidence that has been presented before him or her.

Although the South African Criminal procedure is mainly adversarial it also reflects some elements of an inquisitorial model. For instance chapter 9 of the Criminal Procedure Act regulates the institution of bail in our criminal justice system. It has been emphasised by our courts that a presiding officer is not to act as a passive empire during bail proceedings. If neither of the parties raises the issue of bail, the court must do so *meru moto*. The proposed provisions dealing with protective measures for the vulnerable witnesses entailed inquisitorial elements which would ensure a individualistic response. The South African legal system is hybrid in nature meaning that it is not purely adversarial or entirely inquisitorial.

It is the adversarial nature of the criminal trial that may be viewed as undermining the recognition of victims’ rights of sexual offences. Usually victims have to answer questions put to them in a harsh manner and in an adversarial environment, such may be paralysing to the victim of sexual crimes. A more inquisitorial approach to trials involving sexual offences improve the experiences of victims in court.

### 3.3 PROVISIONS EXCLUDED FROM THE NEW SEXUAL OFFENCES ACT

The Criminal Procedure Act provides certain protective measures for witnesses and the Sexual Offences Act in section 60 affords some of protection to victims in respect of the cautionary rule. However, the need for rape reform was not only to redefine certain sexual crimes but also to provide adequate protection to those who are victims of such crimes. Chapter 20 of the Law Commissions Report emphasised the necessity of creating a special category of witnesses to whom automatic protective measures should apply. The recommendations were however not implemented.

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91 Erasmus *Criminal Law (Sexual Offences) Amendment Bill and Vulnerable Witnesses: A Missed Opportunity* 510.
92 Ibid.
At a briefing held on the 6 August 2003 the inclusion of clause 15 relating to vulnerable witnesses was questioned, as the former Chairperson of the Committee felt that adequate protection was available in the present Criminal Procedure Act. It has been proven by research that it is a traumatic experience for witnesses to testify in an accusatorial environment more specifically witnesses in sexual offence cases.  

In Discussion Paper 102 it was suggested that section 166 of the Criminal Procedure Act dealing with cross-examination should be amended by the addition of the following subsection:

“If it appears to a court that any cross examination contemplated in this section is scandalous, vilifying, insulting, unduly repetitive, needlessly annoying, intimidating or offensive, the Court may on its own initiative or upon objection from a witness, the prosecution or the defence forbid the cross examiner from pursuing such line of examination, in that form relates to a fact or facts in issue or to matters that require revelation in order to determine the existence or absence of a fact or facts in issue.”

In Project 107 it was recommended that the above proposed amendment should read:

“If it appears to a court that any cross examination contemplated in this section or the manner in which it is conducted is scandalous or unduly repetitive or is intended to vilify, insult, annoy, intimidate or offend, or is inappropriate given the level of development of the witness being cross examined, the court may, on its own initiative or upon objection from any witness, the prosecution or the defence, forbid the cross examiner from pursuing such line of examination unless the examination in that form relates to a fact or the facts in issue or to matters that require revelation in order to determine the existence or absence of a fact or the facts in issue.”

According to Erasmus there are not many differences in the two proposed amendments. The above proposed amendments serve to be very valuable because they enable the court to exclude any cross examination which is inappropriate given

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94 Muller An Inquisitorial Approach to the Evidence of Children.
the level of development of the witness being cross examined.\textsuperscript{99} It is submitted that the proposed provisions would protect the child witness especially those who are unable to understand the different concepts put to it in cross examination. It is submitted that these proposed amendments would have afforded extended protection to victims of sexual offences in that it would have empowered the presiding officer to forbid the cross examiner from pursuing a particular line of questioning of their own accord.\textsuperscript{100}

As it has been discussed above, in an adversarial system the prosecutor could stand and object to inappropriate cross-examination by the cross-examiner however this has its shortcomings as if the prosecutor is inexperienced then the witness will be exposed answering unwarranted questions. This also hinders truth finding by the court.

It was also suggested that an undefended accused should not put the questions directly to the witness, but put the questions through the presiding officer. This was another good protective mechanism for sexual offence victims as they will not have to communicate directly with the offender. It is unfortunate that none of the above amendments were included in the Sexual Offences Bill.

The Sexual Offences Bill contained the following provisions which would have led to a shift which was more protective to victims of sexual offences.\textsuperscript{101}

- In terms of section 15(2) the court may, on its own initiative declare a witness other than the accuse a vulnerable witness if in the opinion of the court the witness is likely to be vulnerable on account of the following factors: age, trauma, the possibility of intimidation, the subject matter of the evidence, intellectual, psychological or physical impairment it is not a closed list. The court may if it has doubt whether to declare a person a vulnerable witness,

\textsuperscript{99} Ibid.
\textsuperscript{100} Erasmus Criminal Law (Sexual Offences) Amendment Bill and Vulnerable Witnesses: A Missed Opportunity 514.
\textsuperscript{101} Ibid.
summon any knowledgeable person to appear before and advise the court on the vulnerability of that witness.

- In terms of section 14 the witness has to be informed of the possibility that they may be declared a vulnerable witness in terms of section 15. The court had the duty to enquire from the prosecutor whether the witness has been informed of the measures. If not, the court had the duty to inform the witness.

- Although many of the protective measures covered by the vulnerable witness clause are already contained in the Criminal Procedure Act (for example giving evidence through CCTV or the use of the intermediary) the declaration of sexual violence survivors would mean automatic conferral of one or more of the protective mechanisms irrespective of the qualifying criteria in respect of those mechanisms presently contained in the Criminal procedure Act.

All the above provisions are not included in the Sexual Offences Act. While the need for equality and non discrimination against victims of sexual offences is one which is necessary, the unique nature and consequences for victims of sexual offences have still not been internalised or appreciated.\(^{102}\)

3.4 CONCLUSION

The provision on vulnerable witnesses which was omitted in the Sexual Offences Bill could have provided a better experience for sexual violence survivors in the court room. These amendments and proposals could have eliminated secondary victimisation. The non-inclusion of the vulnerable witness provision and other proposed amendments undermine the legitimate interest of the victim in a sexual offence trial. The implementation of the discussed protective provisions of the Sexual offences Bill should be looked at in light of the general rights in the Constitution and also in the interests of victims’ rights. It is no doubt that the Criminal

\(^{102}\) Lartz & Smythe *Should We Consent? Rape Reform in South Africa* 163.
Procedure Act does provide assistance to victims however there is still a need for improvement.
4.1 INTRODUCTION

“If the criminal justice of the world were private companies, they would all go out of business, because half of their main customers that is the victims of crime are dissatisfied with their services.”

The issue of sexual violence affects every country and each country sees the necessity to develop protective measures for victims of sexual offences.

It is apparent that improper and degrading cross examination unnecessarily adds to the trauma of testifying in rape cases and it impacts negatively upon the complainants to present their best evidence in court. The main mechanism in place to regulate cross-examination in criminal trials is the presiding officer’s common law duty to restrain unnecessary, improper or oppressive questions. However the fear of appearing impartial and compromising the ability of lawyers to present the defendants version of events renders the judicial officers discretion an ineffective tool against inappropriate cross-examination.

In this chapter we will outline victims’ rights in other countries and how such rights are protected. We will also look at the present position in South Africa and whether these international instruments have influenced the development of victims’ rights and the protection of victims of sexual offences.

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104 Cassim Evaluation of Prejudices with a View Towards Achieving a Balancing of Interests 103.
105 Ibid.
4.2 THE UNITED STATES OF AMERICA

Until the mid 1970’s and early 1980’s, evidence pertaining to a complainant’s prior sexual conduct was admissible in sexual assault trials in both the United States and Canada. However rape shield statutes were introduced in the United States in the early 1980’s.\(^{106}\) The aim of the shield legislation is to protect rape complainants from the psychological trauma associated with the public disclosure of the rape complainant’s prior sexual activities and propensity for unchaste behaviour.\(^{107}\) The aim of the rape victim shield laws is thus to eliminate a common defence strategy of putting the complainant on trial rather than the defendant. The rape shield law has many prohibitions which are applicable during a sexual offence trial in an attempt to protect the complainants. The rape shield law also prohibits the questioning of rape victims about their past sexual history.\(^{108}\)

Victims of offences in the United States of America are afforded the following rights:\(^{109}\)

- The right to be reasonably protected from the accused.
- The right to reasonable, accurate, and timely notice of any public proceeding involving the crime or any release or escape of the accused.
- The right not to be excluded from any such public proceedings.
- The right to be heard at any public proceedings involving realise, plea, or sentencing.
- The right to confer with the attorney for the Government in the case.

\(^{106}\) Ibid.
\(^{107}\) Ibid.
\(^{108}\) S 412(a) Federal Rules of Evidence (United States of America).
• The right to full and timely restitution as provided in law.

• The right to proceedings free from unreasonable delay.

Some of the rights afforded to victims in USA are also adopted by the victims’ charter of South Africa. This indicates that international instruments do influence law reforms in South African to a certain extent.

4.3 CANADA

Historically the criminal justice system consisted of two parties, the offender and the victim. Today the crime is considered to have been committed to the state not the victim. While no one wants to return to the days where the victim was the judge, jury and executioner victims do want their role in the system to be recognised. They want their voices to be heard and opinions considered. They want the system and its players to recognise that they are important and they do have a stake not only in the outcome of the case but also in the processes that lead to the outcome thereof.110

The Canadian Courts have found a compelling state interest in the protecting of interest of women and victims of sexual assault.111 Article 14(3) of the International Covenant on Civil and Political Rights provides that everyone charged with a crime has the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

In the case of R v Seaboyer,112 the Canadian Court held that the accused’s right was violated by a statutory provision, namely section 276 of the Criminal Code, which prohibited the accused from cross-examining a sexual assault complainant about her sexual contact with other people other than the accused apart from the incident in question.113 Thus the evidence pertaining to the complainants past sexual conduct may be admitted if it is considered relevant by the presiding officer for some issue

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111 Cassim Evaluation of Prejudices With a View Towards Achieving a Balancing of Interests 103.
112 1991 2 SCR 577.
113 Ibid.
other than the determination of the complainants credibility or consent and if its prejudicial value does not overweigh its probative value.\textsuperscript{114}

In \textit{R v Darrach},\textsuperscript{115} the Supreme Court of Appeal upheld the country’s rape shield law and found that all rape shield provisions in the Criminal Code are constitutional.\textsuperscript{116} The court held that forcing the complainant to give evidence would invade her privacy and would discourage the reporting of crimes of sexual violence. This decision stressed the woman’s right to keep her sexual history out of sexual assault cases.

Much of the contact victims have with the criminal justice system is determined by the provinces. Provinces have enacted legislations governing victims’ rights.\textsuperscript{117}

\section*{4.4 UNITED KINGDOM}

In common law, the sexual activity of the witness was regarded as an indication of lack of truthfulness or reliably as a witness. The criticism in \textit{DPP v Morgan},\textsuperscript{118} led to the Heibron Committees Report, which led to the Sexual Offences (Amendment) Act of 1976.\textsuperscript{119} The report criticised the use of sexual history evidence in rape trials and the way a complainants sexual past was subject to cross examination and found that it was frequently used to prejudice the jury against the victim.\textsuperscript{120} Section 2 of the Sexual Offences Amendment Act of 1976 states that the other evidence of a previous sexual relationship with the defendant, sexual history evidence should not be admitted save where it would be unfair to the defendant to exclude it. This section was enacted to end some of the harassment of rape complainants in court. The Youth Justice and Criminal Evidence Act,\textsuperscript{121} radically changed the orthodox adversarial trial model for the reception of evidence from child and other vulnerable witnesses.\textsuperscript{122} Section 29 provides for the use of intermediaries in criminal trials to

\begin{footnotesize}
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\item \textsuperscript{114} Ibid.
\item \textsuperscript{115} 2000 2 SCR 443.
\item \textsuperscript{116} Cassim \textit{Evaluation of Prejudices With a View Towards Achieving a Balancing of Interests} 103.
\item \textsuperscript{117} Victims’ Rights in Canada Canadian Resource Centre for Victims of Crime.
\item \textsuperscript{118} 1976 AC 182.
\item \textsuperscript{119} Cassim \textit{Evaluation of Prejudices With a View Towards Achieving a Balancing of Interests} 103.
\item \textsuperscript{120} Ibid.
\item \textsuperscript{121} The Youth Justice and Criminal Evidence Act of 1999. Hereinafter the YJCEA.
\item \textsuperscript{122} Ibid.
\end{enumerate}
\end{footnotesize}
assist vulnerable witnesses with communication difficulties to give their best evidence in court.\textsuperscript{123}

The range of measures available to adult rape complainants includes the use of screens and the ability to give evidence through a live television link. The protection that is given to complainants is limited by a continuing dependence on the need of oral evidence and conventional adversarial methods. Victims of Sexual Offences will benefit from the availability of screens and CCTV.\textsuperscript{124}

\section*{4.5 SOUTH AFRICAN LAW}

Despite the substantial reforms in rape laws, especially those governing character evidence there are still factors in our courts which predict a successful prosecution. For example the victims sexual inexperience, her respectability, absence of consensual contact with the accused before the assault, resistance and early complaint.\textsuperscript{125} The complainant may be cross-examined regarding her credibility or lack thereof if she testifies in court.\textsuperscript{126} However the right to cross-examine is not absolute as the possibility exists that the right to cross-examination can be abused in a system which requires the judicial officer to play a passive role.\textsuperscript{127}

According to section 227(2) of the Criminal Procedure Act,\textsuperscript{128} evidence regarding the character and sexual history of a women may not be adduced and such female shall not be questioned regarding her previous sexual history except , with the leave of the court which shall not be granted unless the court is satisfied that such evidence or questioning is relevant. It is submitted that section 227(2) of the Criminal Procedure Act is similar to section 2(1) of the Canadian Criminal Code, because these sections prohibit the admission of evidence pertaining to the complainants past sexual history.

\begin{itemize}
\item \textsuperscript{123} Ibid.
\item \textsuperscript{124} Ibid.
\item \textsuperscript{125} Smythe \textit{Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Rape}.
\item \textsuperscript{126} S 166 Criminal Procedure Act 51 of 1977: Right to cross-examine.
\item \textsuperscript{127} Cassim \textit{Evaluation of Prejudices With a View Towards Achieving a Balancing of Interests} 110.
\item \textsuperscript{128} Criminal procedure Act 51 of 1977.
\end{itemize}
unless such evidence is relevant to the case in issue.\textsuperscript{129} It should be note that section 227 of the Criminal Procedure Act applies to both males and females. In \textit{S v May},\textsuperscript{130} the court identified certain factors which it found relevant regarding a section 227(2) inquiry. The court identified the following factors:

- The interest of justice including the right of the accused to make a defence;
- society’s interest in encouraging the reporting of sexual assault offences;
- whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case;
- the need to remove any discriminatory belief or bias from the fact-finding process;
- the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility;
- the potential prejudice to the complainants personal dignity and the right to privacy;
- the right of the complainant and every individual to personal security and to the full protection and the benefit of the law; and
- any other factor the presiding officer considers relevant.

The use of the term “relevant” is highly subjective as it follows the defence to ask unnecessary, prejudicial and intrusive questions. Although the amendment to section 227 of the Criminal Procedure Act is lauded it nevertheless fails to

\textsuperscript{129} Cassim \textit{Evaluation of Prejudices With a View Towards Achieving a Balancing of Interests} 111. 2003 1 SA 354 (SCA).

\textsuperscript{130}
adequately protect the victim’s privacy and dignity in a rape case.\textsuperscript{131} The discretion that is given to the presiding officer is rather too wide, thus a certain criteria should be followed in order for the presiding officer to remain objective.

In the case of \textit{S v Zuma},\textsuperscript{132} the accused was charged with rape of a 31 year old woman. At the end of the complainant’s evidence in chief the State applied for leave to ask a question concerning the last time she had sexual intercourse with a man. Leave was granted. Before cross-examination the defence made an application in terms of section 227(2) of the Criminal Procedure Act for leave to question the complainant about her past sexual history and lead evidence in this regard. Leave was granted.

Van Der Merwe J held that:

\textit{“the purpose of the cross-examination and the evidence which the defence wished to lead about the complainant's sexual history was not to show that she had misbehaved with other men. Rather, it aimed to show that she had accused man falsely in the past. The cross-examination was accordingly relevant to the issue of consent in the present matter, as well as to motive and credibility it was aimed at investigation of the real issues and was fundamental to the accused's defence.”}\textsuperscript{133}

Although the honourable Court motivated its decision on allowing for the sexual history of the complainant to be led in the previous case. It clearly indicates how section 227(2) fails to protect the victim’s rights and interests. This trial exposed all faultiness in the South African criminal justice system. It is this type of evidence that is traumatic and damaging to the complainant.

South Africa has a Charter for Victim’s rights and it will be discussed in detail in Chapter 5.

\textsuperscript{131} Cassim \textit{Evaluation of Prejudices With a View Towards Achieving a Balancing of Interests} 116.
\textsuperscript{132} 2006 (2) SACR 191 (W).
\textsuperscript{133} \textit{S v Zuma} 2006 (2) SACR 194 (W) h-j.
4.6 LEGAL REPRESENTATION FOR VICTIMS OF SEXUAL OFFENCES

4.6.1 INTRODUCTION

In a South African system, as it is an adversarial system, a sexual offence is also seen a crime against the state and not against the victim. The effect of this is that the victim becomes nothing more than a witness for the state and is not entitled to separate legal representation.

The person that represents the state in criminal proceedings is the prosecutor and the role of the prosecutor is to assist the court in arriving at a just decision and to prove the guilt of the accused beyond reasonable doubt. The defence council on the other hand represents the accused whose interests are predominant. For instance there is no reciprocal duty on the defence council to disclose the evidence which could potentially be favourable to the prosecution. Therefore, there is need for victims to have separate legal representatives who will look after their interests.

The representative would be a person who can effectively represent the rights and interest of the victims. One of the more radical innovations mooted at various times by scholars concerned with the relative failure of rape law reform to substantially improve the position of rape victims in the criminal justice system, is that victims be allowed legal representation throughout or at specific points in the process. Many civil law countries provide for victims of, especially sexual offences to be legally represented in some measure. Although the civil law approach has not found general favour, the underlying rationale for adopting some form of representation for victims of sexual offences has been more widely accepted. For example the Australian Law Reform Commission rejected that legal representation be provided to victims throughout the rape trial process, it acknowledged the urgent need for some sort of intermediary in victims interactions with the system. As a result specially

135 Ibid.
136 Smythe Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Rape.
137 Ibid. (For example Spain, France, Germany, Italy etc).
trained sexual offences workers have been introduced in various Australian states to assist the victim during the trial stage.\textsuperscript{138}

According to the Danish criminal justice system, legal representation is state funded and lawyers are drawn from a list of those who are willing to provide such representation. The system kicks in at the time a complaint is made at the police.\textsuperscript{139} Before the rape survivor makes a statement the police have the duty to inform the survivor of his/her right to legal representation.\textsuperscript{140} This is a similar right to one of the rights which the accused in South Africa is entitled to, as embraced by the right to a fair trial. This is a good example of a balanced rights and interest between the victim and the accused.

At trial, the victims representative may only be heard on matters directly affecting the victim. This legal representative has a right to present at the trial while the victim is giving evidence. At this stage he/she may object to the questions put to the victim by both the defence and the prosecutor and the victims lawyer can ask for the victim to give evidence in camera.\textsuperscript{141} At sentencing stage the victims lawyer can call witnesses to testify on the impact the crime has had on the victim and the issue of compensation. This approach is more inquisitorial.

It can be said that the victims lawyer act as the second prosecutor, who concerns himself or herself not much with the issues of guilt, innocence or sentence but is much concerned about the rights and interest of the victim.

The victims lawyer does not only ensure that the victims interests and rights are given due consideration but it also restores the integrity of the criminal justice system and encourages other sexual violence survivors to report sexual violence and seek help knowing that they are protected by the criminal justice system.

\textsuperscript{138} Smythe \textit{Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Rape}.
\textsuperscript{139} \textit{Ibid}.
\textsuperscript{140} \textit{Ibid}.
\textsuperscript{141} \textit{Ibid}.
4.7 CONCLUSION

When looking at the rape reform of other countries it is clear that the countries have to a large extent provided much more protection to the victims of sexual offences and took into account their rights and protected them against potential re-victimisation experienced in the criminal justice system. It is without say that South Africa has much to improve if compared to other international instruments in respect of protection of victims of sexual offences. As stated previously the main task of the prosecutor is to prove the guilt of the accused beyond reasonable doubt. The prosecutor represents the state and the interests of the state are different from those of the victim. It is therefore necessary to ensure that the interests of the victims are properly protected.\footnote{South African Law Commission Report. Discussion Paper 102 Project 107 (2002) 284.}
5.1 INTRODUCTION

The South African criminal justice system and fair trial rights aim to protect the accused more than victims of crime. Victims have no entrenched rights in the Constitution that protected them when they enter the criminal justice system other than the general rights that afforded to all South Africans. In a criminal trial the perpetrator seems to be more protected by the Constitution\textsuperscript{143} than the victim of the offence. All accused person have a right to a fair trial as enshrined in the Constitution, the main question is whether this right of the accused is in a balance with the protection measures that are afforded to the victims especially in sexual offence cases.

A Charter for Victims was recently adopted, which contains rights for victims of criminal offences in South Africa. However these rights are not sufficient to render the protection required by victims more in particular in sexual offences cases. The question is whether victim’s rights are protected by the Sexual Offences Act to a sufficient extent.

In this chapter the rights afforded to the arrested persons or offenders compared to the rights of victims will be set out. It will be argued that there is an over emphasis on the right of the accused to a fair trial and under emphasis on the importance of the rights of the victims.

Schwikkard correctly points out that the scope of the right to a fair trial is not infinitely elastic and that it applies only to persons who are accused in criminal trials. Indeed

\textsuperscript{143} Act 108 of 1996 hereinafter the Constitution.
the right to a fair trial as envisaged in s35 if the Constitution is defined and applied narrowly.\footnote{Currie and De Waal \textit{The Bill of Rights Handbook} (2005) 724.}

\section*{5.2 VICTIMS RIGHTS DEFINED}

The term victims’ rights is used very broadly and not always with regard to precision of legal definition.\footnote{Lartz & Smythe \textit{Should We Consent? Rape Reform in South Africa} 163.} The general rights in the Bill of Rights,\footnote{Constitution of Republic of South Africa Act 108 of 1996.} such as the rights to dignity, equality, privacy, and specifically the right to freedom from all kinds of violence, include the victim within their ambit. In the case of \textit{Masiya v Director of Public Prosecutions},\footnote{2007 5 SA 30 (CC).} it was held that the contemporary conceptualisation of the offence of rape owes its existence to the recognition of women’s legal personhood and right to equal protection.\footnote{Lartz & Smythe \textit{Should We Consent? Rape Reform in South Africa} 265.} This protection extends to victims. It is expected that the right to equal protection afforded to the victim would limit the right of the accused to a fail trial however in practise this does not carry much weight. Usually courts over emphasise the right of the accused to a fair trial at the expense of those general rights enjoyed by victims.

It has been submitted that considerable attention has been paid to ensuring due process for the offender who is threatened with State imposed punishment and who is afforded all possibilities of establishing his or her innocence. It is for that reason there are constitutionally guaranteed rights given to arrested, detained and accused persons.\footnote{South African Law Commission Report. Discussion Paper 102 Project 107 (2002) 652.} However similar attention has not been afforded to the victim.

\section*{5.3 THE RIGHTS OF THE ACCUSED PERSON}

\subsection*{5.3.1 THE RIGHT TO A FAIR TRIAL}

Every accused has a right to a fair trial, which includes the right to remain silent, the right to be presumed innocent, the right to legal representation and the right not to
testify during proceedings.\textsuperscript{150} The constitutional right to be presumed innocent is specified in relation to the right to a fair trial.\textsuperscript{151} These rights therefore does not apply to proceedings outside the definition of a criminal trial.

The scope of section 35 of the Constitution\textsuperscript{152} received some clarification in \textit{S v Dzukuda, S v Tshilo}.\textsuperscript{153} The court held that the accused's liberty and security were not extinguish. The question was whether the drawing of a negative inference from silence infringes the right to remain silent or the presumption of innocence. In so far as the presumption of innocence determines the incidence of the burden of proof, any shift of an evidential burden to the accused prior to the prosecution establishing a \textit{prima facie} case will constitute an infringement of the presumption of innocence.

Consequently, an inference drawn from silence, before the prosecution has discharged its duty of establishing a \textit{prima facie} case will infringe the presumption of innocence. During sentencing phase of the trial, these were reduced in that the presumption of innocence was no longer applicable. However, Ackerman J held that the accused right to remain silent and not to testify during proceedings were still applicable at the sentencing phase.

The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights.\textsuperscript{154} The realisation of this right depend on the existence of certain conditions and is impede by certain practices.\textsuperscript{155} These include: rule of law and democracy; independence and impartiality of the judiciary; victims of crime; legal aid and many other factors.

\section*{5.4 THE RIGHTS OF VICTIMS}

Apart from the general rights to equality, dignity, privacy and freedom from any violence the victims of crime have other rights contained in the Victims Charter. One

\begin{itemize}
\item \textsuperscript{150} \textit{S 35 Constitution of the Republic of South Africa, Act 108 of 1996.}
\item \textsuperscript{151} \textit{South African Law Commission Report, Project 101 2001.}
\item \textsuperscript{152} \textit{S 35 Constitution of the Republic of South Africa, Act 108 of 1996.}
\item \textsuperscript{153} 2000 2 SACR 443 (CC).
\item \textsuperscript{154} Dakar Declaration and Recommendations.
\item \textsuperscript{155} \textit{Ibid.}
\end{itemize}
of the objectives of the service charter for victims of crime in South Africa as stated in the preamble is to eliminate secondary victimisation in the criminal justice process and to ensure that victims remain central to the criminal justice process. These objectives have not yet been achieved.

The rights of victims can be summarised as follows:¹⁵⁶

- **Right to be treated with fairness and with respect for dignity and privacy.** The police during investigations, the prosecutors and court officials during preparation for and during trial proceedings as well as other service providers will take measures to minimise any inconvenience to the victim and conduct interviews in the language of the victim. The protective measures mentioned in this provision are not stipulated what they really are.

- **Right to information.** This is the right to give further statements to the police, submit a written input to the parole board and give any contribution the victim wishes to make in the investigation, prosecution and parole hearing.

- **Right to receive information.** This would entail being informed of the status of the case as the victim, getting a notification to attend court, getting information on witness fees, ask for your rights and for them to be explained how they can be exercised and the victim can request the prosecutor to inform his/her employer of any proceedings which will necessitate his/her absence from work.

- **Right to protection.** This is the right to be free from intimidation, harassment, fear, tampering, bribery, corruption, and abuse. This right is very narrow and it is silent on part of protection during the trial itself.

- **Right to assistance.** Victims have the right to request assistance and where relevant have access to available social, health, counselling services as well

as legal assistance which is responsive to the needs of the victims. That is
the main problem that this right is attempting to address, legal assistance that
is responsive to the needs of the victims. Much is said about this but little is
done to address the problem.

- **Right to compensation.** This is the right to receive compensation for loss or
damage of property suffered as a result of a crime being committed against
the victim. This hardly applies in sexual offence cases because if the
accused is found guilty it is more likely that he/she will go to prison and
therefore would not even be able to compensate for pain and suffering of the
victim. Although that claim is not catered for in the criminal justice system, it
constituted a civil claim.

- **Right to restitution.** The victim has restitution right where he has been
disposed of property or where his property has been damaged unlawfully.
This does not help a sexual offence at all.

Summarised above are the rights of the victims. However, in practise they do not
amount to concrete rights. A recommendation was made by the law commission on
the sexual offences report that, the constitution needs to be amended to include a
section on victim’s rights. However that recommendation like many others was not
implemented. The Charter for Victim’s rights is not the source as rights entrench
in the Constitution.

It has been pointed out that one consequence of South Africa’s predominantly
adversarial criminal justice system is to exclude the sexual assault victim from
participation as a party in the criminal trial. The role of the victim is limited to that
of a state witness and has no procedural rights. This means that she is not entitled
to representation, and may not challenge any interlocutory decisions and may not
even appeal an acquittal.

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157 Lartz & Smythe *Should We Consent? Rape Law Reform in South Africa* 265.
If a victim felt dissatisfied with the courts ruling allowing the defence to cross-examine her on her previous sexual history, she would have no procedural recourse within the ambit of the trial. Once her evidence has been finalised, she would be able to bring an administrative complainant against the prosecutor, if she felt that she or he did not object vociferously enough on her behalf against the admission of such evidence. However in terms of refusal to submit to the offensive cross-examination she does have many options.\textsuperscript{159} If the accused is acquitted the prospect of an appeal against such outcome lies with the prosecutor who may appeal on the courts findings on the law and not against factual findings.

The right to a fair trial would be meaningless unless victims of crime and abuse of power have access to the courts and to an effective remedy.\textsuperscript{160} Fair trial standards and national laws and procedures do not adequately protect the rights and interests of such victims who are entitled to judicial procedures that are fair and which protect their wellbeing and dignity.\textsuperscript{161}

The secondary victimisation experienced by victims of sexual offences does not begin in the court room, it begins from the moment the victims elects to report the incident that has taken place. Complaints are often handled by young inexperienced members who are not equal to the task and complainants are investigated by them although it is suppose to be the policy of the South African Police that only older and experienced persons should handle the complainants.\textsuperscript{162}

Once the perpetrator has been apprehended the issue of bail for the accused has to be considered. In the case of Carmichele \textit{v} Minister of Safety and Security,\textsuperscript{163} a women was brutally attacked by a man who had been granted bail because the police and the prosecution failed to notify the court that he was awaiting trial on charges of attempted rape and other numerous cases. This case is one of many cases where the rights of the complainant have been completely disregarded during

\textsuperscript{159} \textit{Ibid}.
\textsuperscript{160} Dakar Declaration and Recommendations.
\textsuperscript{161} \textit{Ibid}.
\textsuperscript{163} 2001 4 SA 938 (CC).
bail proceedings. Women speak over and again of their shock at being confronted in street by their rapist, not having being informed of his release on bail. This is another issue that is not given proper consideration. It does not had to the introduction of totally new rights for victims, but an improvement in what is already available in South African law and an effective protection of rights which already exist.

5.5 CONCLUSION

Advocates of victims rights, as well as other groups, tried to have special constitutional guarantees entrenched but these efforts failed. However the call for the inclusion of victim’s rights in the Constitution still continues.

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CHAPTER 6
CONCLUSION

The United Nations General Assembly’s Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power, admonishes states parties that victims should be treated with compassion and respect for their dignity within a responsive criminal justice by keeping victims informed of the progress and disposition of their case, allowing the views and concerns of the victims to be heard during proceedings and providing proper assistance to victims throughout the legal process.\textsuperscript{166}

It is not only domestic standards but also international standards that call for effective protection of the victims interests and rights throughout the criminal proceedings of sexual offence cases. South African is one of the countries in the world that has the highest rate of sexual offences against women and children.\textsuperscript{167} The society as the whole has been crying for improvements in rape law and the different role players within the criminal justice system have responded. One of the responses was the implementation of the Sexual Offences Act. One of the objectives of the Act is to eradicate the high incidence of sexual offences by protecting the complainants in sexual offence cases and their families from secondary victimisation by establishing a co-operative response between all government departments involved in implementing an effective criminal justice system in relation to sexual offences and promoting the spirit of the \textit{batho pele} or the people first. The Sexual Offences Act however has focused more on defining many sexual offences and has paid less attention to the effective protection for victims of these offences. Recommendations which are good were made in the reports of the Law Commission on Sexual Offences in both bills of the Criminal Law (Sexual Offences and Related Matters) Amendment Act however they remained “paper law”.

\textsuperscript{166} Smythe Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Rape 178.

\textsuperscript{167} Quantitive research findings on Rape in South Africa. Statistics South Africa. Pretoria 2000.
The rights of the victims need to be given recognition both legislatively and in practise. Some are still critical of the victims role within the criminal justice system. These critics should keep in mind that victims do not choose to be victims, whereas criminals choose to commit crime.\(^{168}\) The accused is afforded so many rights within the right to a fair trial and many say that this right if the accused is the cornerstone of a criminal trial. These advocates negate the right of the victim to a fair trial. It is only fair that equal attention be paid to the victims’ rights, interests and needs. The Sexual Offences Act was indeed a “missed opportunity”.\(^ {169}\) The rights in the Victim’s Charter should be constitutionalised.

\(^{168}\) Canadian Resource Centre for Victims of Crime.\(\text{www.crcvc.ca/docs/vicrights.pdf.}\)

\(^{169}\) Erasmus *Criminal Law (Sexual Offences) Amendment Bill and Vulnerable Witnesses: A Missed Opportunity* 508.
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