

**BRIDGING THE JUSTICE GAP IN THE
PROSECUTION OF ACQUAINTANCE CHILD
SEXUAL ABUSE: A CASE OF SOUTH AFRICA AND
UGANDA**

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SUMMARY

This thesis addresses the problem of acquaintance child sexual abuse (ACSA) in South Africa and Uganda. The deficit between incidence and conviction (consistently termed the justice gap) in child sexual offending is demonstrated. Early in the thesis, it is demonstrated that unlike child sexual offending by strangers, ACSA has unique characteristics that merit special measures in the prosecution process if the justice gap is to be effectively bridged. The study propounds three prerequisites for the successful prosecution of ACSA. These are:

- evidence sufficient to prove ACSA against the odds of meagre medical evidence,
- mechanisms cognisant of the traumatic nature of ACSA, and
- sentencing mechanisms that take account of the 'costs' of prosecuting ACSA.

Three mechanisms are proposed to satisfy the criteria postulated as prerequisites to secure a satisfactory ACSA conviction rate:

- Behavioural science evidence (BSE),
- protective measures, and
- restorative justice.

The thesis demonstrates that application of these mechanisms has been honoured in the breach rather than the observance, particularly in the case of Uganda, hence the justice gap has not been reduced. The thesis therefore contextually places these three mechanisms within the realm of ACSA prosecutions. Considered together, because these three mechanisms continue to provoke difficulties in understanding and application, this thesis gives guidance on how they should be applied with a view of bridging the justice gap in ACSA prosecutions in South Africa and Uganda.

Key words: acquaintance child sexual abuse, South Africa, Uganda, behavioural science evidence, protective measures, restorative justice.

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CHAPTER ONE: INTRODUCTION AND PROBLEM STATEMENT

1 Background

Child sexual abuse (CSA) became a public issue as far back as the period between 1970 and 1980.¹ Prior to this period, CSA remained secretive and socially a closed subject, too shameful to be aired in public.² Despite the greater awareness of CSA in the period subsequent to 1980, the tendency to deny the existence of CSA by acquaintances remained strong. Child sexual offences were almost exclusively regarded as offences committed by strangers.³ This assumption is increasingly being displaced by statistics and studies demonstrating that the major suspects in CSA cases are in fact acquaintances or persons in positions of trust with children.⁴ The home, previously thought to be a safe haven for children, is increasingly becoming unsafe in light of the overwhelming number of child sexual offences committed by adults within homes.⁵

¹ D Finkelhor 'Current information on the scope and nature of child sexual abuse' (1994)4 *The Future of Children* 31; D Finkelhor 'The international epidemiology of child sexual abuse' (1994)18 *Child Abuse Research & Neglect* 409; D Younts 'Evaluating and admitting expert testimony in child sexual abuse prosecutions' (1995)41 *Duke Law Journal* 693-694.

² *Ibid.*

³ R Wazir & N Oudenhoven 'context' in R Wazir & N Oudenhoven (eds) *Child sexual abuse: What can governments do?* (1998)1.

⁴ DEH Russell 'The incidence of intrafamilial and extrafamilial sexual abuse of female children' (1983)7 *Child Abuse & Neglect* 135-139. Russell's empirical research found that only 15% of the perpetrators of CSA were strangers, 42% were acquaintances and 41% had a close and intimate relationship with the child victim. Russell adds that up to 40% of acquaintance and intimate CSA involved an authoritative figure, with 90% of perpetrators being men; D Finkelhor (1994) *supra* note 1, 46. Finkelhor, however, argues that although men constitute the bigger percentage of abusers, there is no question that women sexually abuse children and that much of this abuse goes undetected. Finkelhor notes that female perpetrators of child sexual abuse in recent years include adolescent girls particularly in baby-sitting situations, lonely and isolated single-parent mothers with children and some women who develop romantic relationships with adolescent boys; V Serrato 'Expert evidence in child sexual abuse prosecutions: A spectrum of uses' (1988)68 *Boston University Law Review* 158.

⁵ GE Wyatt *et al.* 'The prevalence and circumstances of child sexual abuse: Changes across a decade' (1999)23 *Child Abuse & Neglect* 56. Findings reported in Wyatt *et al.* reveal that most female victims reported that sexual molestation suffered in childhood occurred close to or in the home of either the victim herself, or of the alleged perpetrator; RC Summit 'The Child Sexual Abuse Accommodation Syndrome' (1983) *Child Abuse & Neglect* 190. Summit notes that although intrafamilial sexual abuse is not a new phenomenon, what is changing in society today is the sensitivity to recognise sexual abuse, to identify the blatant iniquities among otherwise apparently adequate families. Perhaps it is time for a targeted phylogenetic study by paleo-anthropologists to look for a genetic predisposition and to discover that such incidents significantly impact children's response to abuse; Russell *supra* note 4, 138. Russell established that up to 40% of CSA cases occur within families, parents and siblings being major perpetrators; HN Snyder *Sexual assault of young children as reported to law enforcement: Victim, incident and offender characteristics* (2000)10. Snyder reported that 42% of offenders who sexually assaulted

Currently, CSA committed by acquaintances is one of the most prevalent forms of abuse against children.⁶ The consequences of CSA have indeed been appalling, to the extent that some children have lost their lives in the process,⁷ thus emphasising the urgency of successful criminal prosecution of suspects. While criminal-justice systems have shown that they are more than willing to rise to the challenge to increase the conviction rate in CSA cases, many justice systems are tripped up by the difficulties of holding acquaintance child sexual abuse (ACSA) suspects to account.⁸ Reforms concerning the prosecution of child sexual offences have continued apace in most justice systems, in token of which ACSA cases are being increasingly reported to law enforcement authorities, but without significant impact on the conviction rate. It is the stubborn gap, the virtually immovable discrepancy between reports and convictions that has become known as the justice gap in the process of seeking to raise ACSA convictions.

children aged 6-11, and 24% who assaulted children aged 12-17 were family members; E Gray *Unequal justice: The prosecution of child sexual abuse* (1993)83. Gray established that 45.2% of child sexual abusers were adult family members.

⁶ G van Bueren 'Child sexual abuse and exploitation: A suggested human rights approach' (1994)2 *International Journal of Children's Rights* 45. van Bueren observes that children are generally more vulnerable to sexual abuse than adults owing to their subordinate status; FW Putman 'Ten-year research update review: Child sexual abuse' (2003)42 *Journal of American Academic & Child Adolescent Psychiatry* 258-364; Finkelhor (1994) *supra* note 1, 46-49. Finkelhor's research indicates that girls are three times more likely than boys to suffer sexual abuse. Finkelhor adds that children who live apart from their parents for extended periods of time are exposed to heightened risk of being subjected to sexual abuse. Likewise, children with alcoholic, drug abusing, or emotionally unstable parents are at increased risk; H Westcott & D Jones 'Annotation: The abuse of disabled children' (1999)40 *Journal Child Psychol Psychiatry* 497-506. Westcott & Jones note that physical disabilities, especially those that are perceived to impair a child's credibility, such as blindness, deafness, and mental retardation, are considered to be at heightened risk. This is precisely owing to dependency, institutional care, and communication difficulties.

⁷ RJR Levesque 'Sexual use, abuse and exploitation of children: Challenges in implementing children's human rights' (1994-1995)30 *Brooklyn Law Review* 962. Levesque, for instance, notes that CSA violates children's right to dignity, privacy, freedom from maltreatment and places their health at risk; A Spyrelis 'Our children in crisis: An analysis of cases at the Sunlight Safe House in Gauteng' (2013)14 *Child Abuse Research: A South African Journal* 19. Spyrelis observes that child maltreatment is a serious concern in South Africa and significantly undermines children's development and well-being; I Yahaya *et al.* 'A comparative study of the socio-economic factors associated with childhood sexual abuse in sub-Saharan Africa' (2012) *Pan Africa Media Journal* 2. These authors observe that sexual abuse of children is a major health hazard with negative long-term effects that vary from child to child.

⁸ JY Parker 'The rights of child witnesses: Is the court a protector or perpetrator?' (1981-1982)17 *New England Law Review* 647. Parker rightly notes that the judicial process in many criminal-justice systems has not been geared to handle cases in which children are involved as victims of sexual abuse.

Child sexual offences tend to be hard to prosecute.⁹ When the prosecution is confronted with CSA cases, it has to grapple with challenges including lack of medical evidence, absence of eye witnesses and limitations arising from the child victim's tender age.¹⁰ Chances of securing a conviction become increasingly elusive when the sexual offence is perpetrated by an acquaintance because, the prosecution then has to contend with the child victim's unusual behaviour as a result of the added trauma of the breach of trust eventuating from the violation perpetrated by a known person or persons (e.g. primary caregiver(s)),¹¹ which often undermines the ACSA victim's credibility if the case is prosecuted. Thus the prosecution has to contend with both the radical nature of the offence and the breach of trust resulting from commission by a known person.¹²

- ⁹ G Davies *et al.* *Psychology, law & criminal justice* (1996)170; A Cossins 'Complaints of child sexual abuse: Too easy to make or too difficult to prove?' (2001)34 *The Australian & New Zealand Journal of Criminology* 149-168; L Frohmann 'Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections' (1991)38 *Social Problems* 213. Frohmann notes that while prosecutors decide which cases will go on to adjudication, many child sexual assault cases do not go beyond this stage in the criminal-justice process; SP Mele 'Major evidentiary issues in prosecutions of family abuse cases' (1984)11 *Ohio Northern University Law Review* 245; KM Burke 'Evidentiary problems of proof in child abuse cases: Why family and juvenile courts fail' (1973-1974)13 *Journal of Family Law* 831; South African Police Service (SAPS) Annual Crimes Report 2011/2012 'An Analysis of the national crimes statistics: Addendum to the annual report 2011/2012' (2012) 5, 6 & 20. Available at www.saps.gov.za/.../annual_report/...2012/saps_crime_stats_report_%20(accessed 18 June 2013). SAPS acknowledged that most contact crimes, including sexual crimes, occur between people known to each other. The police acknowledge their inability to prevent crimes of this nature because prior information about such crimes is usually not available, and further, that these crimes mainly occur in private where direct policing does not occur. The report established that in terms of these crimes, the role of policing is usually limited; J Bulkey 'Legal proceedings, reforms and emerging issues in child sexual abuse' (1988)6 *Behavioural Science & the Law* 154-157; J Temkin *Rape and the legal process* (2005)237. Temkin observes that sexual offences should be treated differently, given their unique problems, particularly in gathering evidence.
- ¹⁰ A Heger *et al.* 'Children referred for investigation of possible sexual abuse: Medical findings in 2384 children' (2002)26 *Child Abuse & Neglect* 645-659; JA Adams 'Medical evaluation of suspected child sexual abuse: 2011 update' (2011) *Journal of Child Sexual Abuse* 588; WA Walsh *et al.* 'Prosecuting child sexual abuse: The importance of evidence type' (2010)56 *Crime & Delinquency* 438-439. The empirical research done by these authors established that the more diversified the types of supporting evidence adduced in CSA cases, the better the chances of securing a conviction; KD Brewer *et al.* 'Factors related to prosecution of child sexual abuse cases' (1997)6 *Journal of Child Sexual Abuse* 92. Brewer *et al.* established that medical evidence was the likeliest to lead to effective prosecution, unlike the absence of such evidence; DJ Fote 'Child witnesses in sexual abuse criminal proceedings: Their capabilities, special problems, and proposals for reform' (1985-1986)13 *Pepperdine Law Review* 157.
- ¹¹ Summit *supra* note 5, 177; JW Spears & CC Spohn 'The effect of evidence factors and victim characteristics on prosecutors' charging decisions in sexual assault cases' (1997)14 *Justice Quarterly* 501. The unusual behaviours identified by these authors include delay in reporting the offence and continued interaction with the suspect. Such conduct tends to undermine the certainty of prosecution.
- ¹² JH Beitchman *et al.* 'A review of short-term effects of child sexual abuse' (1991)15 *Child Abuse & Neglect* 552. The empirical sample produced in this instance established that intrafamilial CSA is generally associated with greater trauma to the child owing to the breach of a relationship of

Such commission especially complicates prosecution because it is difficult for the prosecuting authority to strike a proper balance between holding the accused to account and ensuring that the welfare of the ACSA victim is not compromised.¹³ These challenges are met by an interpretation of the rules of evidence and procedure which sometimes fails to take account of the distinctiveness of ACSA.¹⁴ Confronted by so many challenges, it is a common occurrence for accused persons in ACSA cases to be unjustifiably acquitted despite the prosecution's ostensible commitment to securing convictions.

2 The problem of ACSA in Uganda

CSA in Uganda has spiked in recent years and is currently the most prevalent form of child abuse in that country.¹⁵ The *African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN)*, an organisation that seeks to distribute data on the status of child abuse and neglect, reports that sexual offences are reported virtually on a daily basis in Uganda.¹⁶ Between January and March 2013 ANPPCAN reported 67 cases distributed over ten districts,¹⁷ 742 cases over the previous year (i.e. effectively 2 each day)¹⁸ and 22 614 cases from 2009 to 2011,¹⁹ which amounts to at least 628 children per month, or 145 per week or at least 21 per day.²⁰ Moreover, the latest police records indicate that CSA cases continue to rise.²¹ *Raising Voices*, another children's rights organisation in Uganda reports that over 75% of children in Uganda have experienced

trust; C Adams-Tucker 'Proximate effects of child abuse in childhood: A report of 28 children' (1982)139 *American Journal of Psychiatry* 1252-1256. Adams-Tucker's sample established that 50% of children who were sexually abused by persons within the confines of the family were most affected by subsequent depression and withdrawal, and symptoms were more severe in 65% of children who were not supported by their parents upon being told of the violation.

¹³ Brewer *et al. supra* note 10, 92, established that the criminal-justice system was more likely to prosecute offences committed by strangers than those committed by acquaintances.

¹⁴ Some of these rules include the ultimate issue rule, the cautionary rules applicable to children's testimony, amongst others. A detailed discussion of these rules will be provided in chapter five of the study.

¹⁵ ANPPCAN-Uganda Chapter *A situation analysis of child abuse and neglect in Uganda* (2011)16. See also K Ssembatya *Child sexual abuse prevalence in Uganda* (2012)1-10.

¹⁶ *Ibid.*, 7.

¹⁷ ANPPCAN-Uganda Chapter *Concern over increasing cases of defilement in the country* (2013). Available at http://www.annpcanug.org/wp-content/upload/press_release/PR_statement_on_th_increasing_cases.pdf (accessed 20 December 2013).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

some form of sexual abuse ranging from less severe offences to offences involving penetration.²² Cross-cutting in all CSA reports are findings that more than half the reported child sexual offences are committed in schools and in victims' own homes. Equally disquieting are findings that suspects are often fathers, mothers, grandmothers, grandfathers, stepfathers, mothers' boyfriends, family friends, aunts, uncles, teachers, and other adults with ready access to children.²³ These statistics are the mere tip of the iceberg as many cases go unreported.²⁴

Article 34(7) of the Constitution of Uganda expressly underscores the need to provide protection for vulnerable children.²⁵ Broadly interpreted, this provision imposes a primary obligation on the criminal-justice system to hold suspects to account. Unfortunately, despite the high incidence of child sexual offending, these cases are very far from being matched by conviction rates. For example, according to the Uganda Police Annual Crime report of 2009, out of 7360 reported cases, 4433 suspects were arrested and prosecuted, but only 467 of these were convicted, thus amounting to a conviction rate of only 6.3% of reported cases.²⁶ The major gap between reported cases and convictions is thus clearly evident. A cautionary concern to mention here is that a sizeable proportion of reported CSA cases could be false. The fact remains, however, that the yawning gap between reported cases and convictions certainly does exist, even despite genuine acquittals.

The justice gap in ACSA prosecutions in Uganda could be attributable to a number of factors. First, in Uganda proof of child sexual offences is largely dependent on medical evidence,²⁷ failing which a decision against the prosecution usually ensues. Secondly, when testifying in court, hearings *in camera* are the only protective measure

²² Raising Voices *Violence against children: The voices of Ugandan children and adults* (2005)26.

²³ ANPPCAN-Uganda Chapter 'Relatives biggest perpetrators of defilement.' Available at <http://ugandaradionetwork.com/a/story.php?s=50918> (accessed 20 December 2013). According to ANPPCAN, in Uganda, 90% of all the child sexual offences are perpetrated by close relatives.

²⁴ See e.g. ANPPCAN report *supra* note 15, 2; Raising Voices report *supra* note 22.

²⁵ Article 34(7) of the Constitution of the Republic of Uganda, 1995.

²⁶ Uganda Police annual crime report (2009)11.

Available at http://www.Uganda+Police+annual+Crime+report+of+2009+&oq=+Uganda+Police+annual+Crime+report+of+2009+&gs_l=serp (accessed 10 June 2013).

²⁷ Decisions to charge and prosecute in Uganda are largely informed by medical evidence. See chapter three for a further and more concrete discussion in this regard.

available to child complainants in Uganda.²⁸ Consequently, while the public is sometimes excluded from the trial, the child victim has to be directly confronted by the accused. The limited protection afforded to ACSA victims not only traumatises child witnesses, but actually deprives courts of vital evidence to prove the occurrence of the offence. Thirdly, the Ugandan criminal-justice system derives directly from the colonial system, in that upon independence, the pre-existing common-law system re-enacted colonial provisions, except that the sovereignty of the Ugandan Parliament supplanted the colonial dispensation. The potentially retributive nature of the Ugandan system as an outgrowth of the colonial system indirectly contributes to the gap as it ignores the relationship of trust between the suspect (a primary caregiver in some instances) and the ACSA victim, which erodes the chances of offences being brought to the attention of the justice system.

Studies conducted in Uganda indicate that the lack of innovation in the criminal-justice system has made prosecution of sexual offences vapid.²⁹ ANPPCAN has consistently called for a review of the existing mechanisms for prosecuting child sexual offences so as to change the status quo.³⁰ However, presently no substantive reforms can be cited. It seems fair comment that the time has come for Uganda's criminal-justice system to give greater weight to mechanisms that have the potential to address the distinctive dynamics of ACSA offending to an extent that closes the justice gap in ACSA prosecutions.

3 The problem of ACSA in South Africa

Reportedly the incidence of CSA in South Africa is among the highest in the world.³¹ Childline, a children's rights organisation in South Africa, has made it known that children in South Africa are subjected to various forms of sexual abuse perpetrated by a sexual aggressor (e.g. less severe forms such as fondling of genitals or breasts, persuading or coercing the child to perform such fondling acts on the aggressor's or another's person, attempted rape, more severe forms such as oral rape, anal rape, finger

²⁸ See article 28 of the Constitution of Uganda, 1995. Under this provision, the press and public can be excluded from criminal hearings.

²⁹ Agency for Cooperation and Research in Development (ACORD) *Making the law count: A synthesis of legal practice on sexual violence in Uganda* (2010)15-31.

³⁰ ANPPCAN-Uganda Chapter *supra* note 15, 2.

³¹ Finkelhor *supra* note 1, 410; Y Scheepers & M Zway 'Adolescents' constructions of gender and sexuality' (2012)8 *New Voices in Psychology* 23.

penetration, penetration with objects and outright or conventional rape).³² According to the South African Police Service (SAPS) Annual Report of 2012, sexual offences committed against children, mostly by acquaintances, account for 40% of the total.³³ The foregoing information is confirmed by Muller and Hollely.³⁴ According to Childline the split between acquaintances and strangers is 80% and 20% respectively, so the vast majority, surprisingly, are attributable to the former.³⁵ In 2009 it was found that child rapes to the tune of 530 per day (i.e. one every three minutes) accounted for 45% of all rapes,³⁶ and counting (i.e. the rate is rising). The SAPS Crime Report of 2010/2011 indicated an increase of 2,6% in the 2006/2007 – 2010/2011 period measured in financial years.³⁷ Worst of all, however, is that the quoted figures are virtually insignificant compared to the number of unreported cases.³⁸ It is therefore less of a surprise that child sexual offending has been described by some as a ‘silent epidemic’³⁹ and a ‘cancer’⁴⁰ in South Africa’s society.

The Constitution of South Africa expressly guarantees children’s right to be protected from all forms of abuse, including CSA.⁴¹ Plainly, therefore, it is incumbent on the justice system to ensure that suspects of sexual misconduct against children are brought to book. The SAPS is specifically mandated to perform this task as part of its general obligation to enforce the law by prosecuting suspects in criminal acts.⁴² However, the conviction rate in ACSA cases, as noted above, remains unacceptably low.

³² J van Niekerk ‘At the coalface: The Childline experience’ in L Richter *et al.* (eds) *Sexual abuse of young children in Southern Africa* (2004)268; Childline South Africa ‘Recognising child abuse.’ Available at <http://www.childline.org.za/index.php...for.../197-recognising-child-abuse> (accessed 20 December 2013); Childline KZN ‘Myth and facts about child abuse.’ Available at <http://www.childlinekzn.org.za/mythshhtml> (accessed 20 December 2013).

³³ SAPS Report (2012) *supra* note 9, 5, 6 & 20.

³⁴ K Muller & K Hollely *Introducing the child witness* (2009)132; A Spyrelis *supra* note 7, 21. Spyrelis observes that a considerable number of the CSA cases reported to Sunlight Safe House in Gauteng in the period between 2006 and 2012 were perpetrated by the child’s father, stepfather or uncle; LM Richter & ARL Dawes ‘Child abuse in South Africa: Rights and wrongs’ (2008)17 *Child Abuse Review* 83.

³⁵ Childline South Africa *supra* note 32, 34.

³⁶ ‘Solidarity: One child raped every three minutes in SA’ *Mail & Guardian* 3 June 2012. Available at <http://mg.co.za/article/2009-06-03-solidarity-one-child-raped-every-three-minutes-in-sa> (accessed 22 December 2013).

³⁷ South African Police Service Crime Report (2010/2011)11.

³⁸ Centre for AIDS Development, Research and Evaluation *Child sexual abuse and HIV/AIDS in South Africa: A review* (2004)17-20.

³⁹ N Paulsen & L Wilson ‘Caregivers’ experiences of the South African judicial system after the reporting of child sexual abuse’ (2013)14 *Child Abuse Research: A South African Journal* 56.

⁴⁰ *S v Swartz & another* 1999(2) SACR 380 CPD.

⁴¹ Section 28(1) (d) of the Constitution of South Africa, 1996.

⁴² Section 205 of the Constitution of South Africa, 1996.

Richter reports that only 10% of 19 281 child rape cases reported in the nine months from January to September 2001 ended in convictions.⁴³ More recently Conradie and Tanfa reported an even lower conviction rate of 7%, which implies acquittals to the tune of 93%,⁴⁴ which the authors partly attribute to poor adjudication.⁴⁵ The authors report that 71.5% of reported cases were withdrawn or resulted in acquittals for lack of evidence, poor investigation or procedural errors.⁴⁶ In fact in this instance convictions were secured in only 3 out of 96 cases,⁴⁷ thus exemplifying what the said writers refer to as a 'criminal-justice bottleneck' evidenced by huge discrepancy between reported cases and conviction rate.⁴⁸ The writers therefore conclude that the criminal-justice system has proved ineffectual in dealing with ACSA cases to the extent that, instead of offering succour according to its mandate, it is not only unhelpful but hostile towards its charges.⁴⁹ The writers argue that the prosecutorial function must be considered seriously deficient in this regard.⁵⁰ Amidst this dilemma, the South African Law Reform Commission (SALRC) has consistently underscored the need for innovative mechanisms to deal with sexual offences.⁵¹ Compared to Uganda, of course, South Africa has made important strides in this regard, but the low conviction rate detracts from and jeopardises these advances. Falsely-reported cases contribute to the low conviction rate, but it remains a factor that should not be overrated because it cannot make a substantial difference to the above-mentioned factors militating against the conviction rate.

43 LM Richter 'Baby Rape in South Africa' (2003)12 *Child Abuse Review* 395.

44 H Conradie & DT Tanfa 'Adjudication of child victims of rape and indecent assault in Gauteng' (2005)6 *Child Abuse Research in South Africa* 4-5.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 South African Law Reform Commission (SALRC) Discussion Paper 102 *Sexual offences: Process and procedure* (2002)531. The SALRC is a commission appointed to investigate law reform generally in South Africa and to make recommendations to government with a view to securing the development, improvement, modernisation or reform of the law. The SALRC investigates matters appearing on a programme approved by the Minister of Justice and Constitutional Development.

4 Potential of behavioural science evidence (BSE), protective measures and restorative justice

As noted above, increasing pressure has been exerted by the Law Reform Commissions in Uganda and South Africa to implement appropriate mechanisms to reduce the gap between reported cases of and convictions for ACSA.⁵² The need for such initiatives is underscored by the *United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime*, adopted by the Economic and Social Council in 2005, for the specific purpose of persuading governments to develop mechanisms to protect and meet the special needs of vulnerable young (i.e. underage) victims.⁵³ Special factors that need to be considered in the prosecution of ACSA cases are frequent lack of medical evidence, severe trauma suffered by the victim and severe disruption of relationship between victim and suspect (often initially one of close confidentiality). In light of these facts and calls from law-reform institutions, advocates for children's rights and academic scholars, amongst others, this study takes special cognisance of behavioural science evidence (BSE), protective mechanisms and restorative justice in addressing the said dynamics with a view to reducing and/or eliminating the justice gap in ACSA prosecutions.

Firstly, BSE could play a number of roles that directly address the realities of ACSA.⁵⁴ In the (all-too-frequent) absence of medical evidence, BSE provides substantive proof of abuse. Further, amidst the behavioural peculiarities of ACSA victims, such as recantation (backtracking), delay in reporting, continued interaction with the suspect, BSE can provide the court with an appropriate context within which to evaluate the

⁵² E.g. see South African Law Reform Commission Discussion Paper 102 titled *Sexual offences: Process and procedure* (2002)2. The SALRC underscored the need for changes in the criminal-justice system. The need for innovative and progressive mechanisms, with a view to encouraging victims of sexual violence to approach the system for assistance and to improve the experiences of those victims who choose to enter into the criminal-justice system was underscored; Uganda Law Reform Commission *A study report on rape, defilement and other sexual offences* (2000). The Uganda Law Reform Commission recommends a complete overhaul in the manner in which sexual offences are prosecuted. The need for reform of rules of procedure and evidence is accorded considerable attention by the Uganda Law Reform Commission.

⁵³ United Nations Economic and Social Council (ECOSOC) *United Nations Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, 22 July 2005, E/RES/2005/20. Available at <http://www.refworld.org/docid/468922c92.html> (accessed 7 January 2015).

⁵⁴ JEB Myers *et al.* 'Expert testimony in child sexual abuse litigation' (1989)68 *Nebraska Law Review* 52.

child's testimony so that it can arrive at an informed decision. McEwan underscores the critical role of BSE as follows:

the law of evidence, in particular, cannot afford to treat findings of behavioural scientists as merely an interesting slide show... the issues to which empirical research can make a legitimate contribution [should] be clearly identified. Empirical research can play an important role in debates about the reliability of evidence, and in understanding both the decision making process and the nature of difficulties faced by those witnesses upon whose testimony the criminal-justice system depends.⁵⁵

Secondly, if sufficient weight is attached to protective measures, the challenges inherent in prosecuting CSA cases (e.g. trauma-induced aberrancies displayed by the witness, such as incoherence of testimony) could be overcome with relative ease.⁵⁶ 'Where [protective measures] are utilised, court proceedings not only become less stressful for vulnerable witnesses, but also fairer for accused persons because of a better flow of more accurate communication.'⁵⁷ Thirdly, since the accused in ACSA cases may be a primary caregiver with whom the complainant remains in interactive contact, a restorative-justice approach could conceivably address these dynamics because such an approach entails participation by the victim, a process of relationship repair (if that is the goal), victim validation, offender accountability, and creation of a communicative and flexible environment to address crime.⁵⁸

Indeed, BSE, protective measures and restorative justice are not necessarily new to the two justice systems under scrutiny, with particular reference to South Africa. However, although they have the potential to respond to the unique dynamics of ACSA, and consequently to bridge the justice gap in ACSA prosecutions, as will be demonstrated in subsequent chapters, they remain a source of interpretive difficulty and uncertain application. At present, their mode of application in South Africa or non-application in the case of Uganda does not effectively further the cause of bridging the

⁵⁵ J McEwan 'Reasoning, relevance and law reform' in P Roberts & M Redmayne (eds) *Innovations in evidence and proof* (2007) 216.

⁵⁶ D Caruso & T Cross 'The case in Australia for further reform to the cross-examination and court management of child witnesses' (2012) 16 *The International Journal of Evidence & Proof* 367.

⁵⁷ CR Mathias & FN Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011) 19 *International Journal of Children's Rights* 267.

⁵⁸ J Braithwaite & K Daly 'Masculinities, violence and communitarian control' in T Newburn & EA Stanko (eds) *Just boys doing business? Men, masculinities, and crime* (1994) 189-213.

justice gap in ACSA prosecutions. Uncertainty about the exact place and role of these three mechanisms defines the discrepancy that is the object of attention in this study.

It is also to be noted that ACSA is a multi-systematic problem which requires multiple strategies including preventive strategies. Success in bridging the justice gap in ACSA prosecutions will depend on the systems' ability to maintain a coordinated, comprehensive effort. Thus, focus on BSE, protective measures and restorative justice should not be understood as undermining a preventive approach to CSA. Preventive strategies are important in light of the fact that their focus is primary prevention of child sexual offending before it occurs. A range of programs can be adopted to further a preventive approach. For instance, sexual abuse preventive programs can target vulnerable families, vulnerable children and vulnerable settings so that a healthy environment is created for children to live free from abuse. Thus, the ideal goal should be to prevent CSA abuse from occurring in the first place. However, even with preventive measures in place, child sexual offending may not be ruled out. Thus when child sexual offending occurs, the discussion is removed from the realm of prevention to one of holding the suspect to account through the criminal-justice system. It is at this stage that BSE, protective measures and restorative justice are underscored in ensuring that the gap between sexual offending and conviction rates is bridged. Finkelhor⁵⁹ has warned that ACSA is a complex problem that requires a comprehensive approach that moves beyond strategies within the criminal-justice system. Thus, emphasis on BSE, protective measures and restorative justice should be seen as complementary to, and not a replacement for preventive strategies, with the application of these mechanisms being seen within the wider spectrum of the many strategies that can be relied on to ensure that the justice gap in ACSA prosecution is bridged.

5 Thesis statement

As noted, the incidence of ACSA is rising while the conviction rate stays low. Mechanisms such as BSE, protective measures and restorative justice have the potential to relieve the plight of ACSA victims and effectively close the justice gap in ACSA prosecutions. The problem addressed here is that although these mechanisms certainly do not lack application in both Uganda and South Africa, their specific application in

⁵⁹ D Finkelhor 'The prevention of childhood sexual abuse' (2009)19 *The Future of Children* 169-194.

ACSA cases is problematic. The object of the present study is therefore to implement these mechanisms in the distinctive context of ACSA prosecutions with due attention to the related challenges and the specific contextualities respectively prevailing in Uganda and South Africa. In the latter the criminal-justice system has clearly accommodated these mechanisms over the years while in Uganda their application is hardly discernible. In South Africa, though, the low conviction rate in ACSA cases remains cause for alarm, Uganda can nevertheless derive considerable benefit from emulating South Africa's application of the said mechanisms.

6 Research questions

In light of the above, the exact place, role and weight of BSE, protective measures and restorative justice in ACSA prosecutions are explored in this study with a view to offering guidance for the benefit of the justice systems of South Africa and Uganda, to which end the following questions are addressed:

1. How distinctive is ACSA and how could BSE, restorative justice and protective measures respond to these dynamics?
2. What role should BSE be playing in addressing this distinctiveness and the evidentiary challenges of ACSA prosecution?
3. How could the rules of evidence be interpreted and applied to ensure that BSE is accorded adequate weight and broadly accommodated?
4. What role should protective measures be playing in ACSA prosecutions and what are the limitations of these measures in adversarial justice systems?
5. What role should restorative justice play in striking a balance between criminally holding suspects to account and safeguarding the best interests of ACSA victims?

7 Limitations and scope of the study

Although, as already alluded to, a preventive approach plays a critical role in preventing child sexual offending from occurring in the first place, this thesis focuses on the potential of BSE, protective measures and restorative justice in bridging the justice gap in ACSA prosecutions. Thus, although the criminal-justice systems of Uganda and South

Africa need to take cognisance of preventive mechanisms in ultimately bridging the justice gap in ACSA prosecutions, this thesis focuses on redress within the criminal-justice system (after child sexual offending has occurred).

8 Conceptualisation

8.1 Child sexual abuse

The term 'child sexual abuse' (CSA) has been widely defined. Throughout the literature, terms used to denote CSA include seduction, sexual harassment, sexual exploitation, sexual victimisation, sexual molestation, sexual assault, sexual violence, incest, and child rape. Some researchers have exclusively restricted their definition to acts of sexual contact and penetration⁶⁰ while others have included a range of victimisation, such as witnessing sexual acts between others, being fondled or being spoken to in a manner calculated to be sexually suggestive or provocative.⁶¹

Kempe⁶² defines CSA as the involvement of dependent, developmentally-immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent, or that violate the social taboos of family roles. Kempe's definition is credited for bringing CSA to the legal audience. The words 'dependence and developmental immaturity' reflect the powerlessness and vulnerability of many ACSA victims as a result of their dependence on the aggressors whose victims they become, and the immature state of mind that contributes critically to their dependence and vulnerability, with the result that they cannot be relied upon to adopt a course of action that is commensurate with societal standards of moral credibility.

Violata and Genuis⁶³ describe CSA as any unwanted sexual contact, ranging from genital touching and fondling to penetration during the period in which the victim is

⁶⁰ W Feldman *et al.* 'Is childhood sexual abuse really increasing in prevalence? An analysis of the evidence' (1991)88 *Pediatrics* 29-33.

⁶¹ M Metcalfe *et al.* 'Childhood sexual experiences reported by male psychiatric patients' (1990)20 *Psychological Medicine* 925-929.

⁶² C Kempe 'Sexual abuse, another hidden problem' (1978)62 *Pediatrics* 382.

⁶³ C Violata & M Genuis 'Problems of research in male child sexual abuse: A review' (1993)2 *Journal of Child Abuse* 37; P Carstens & R du Plessis 'Medico-legal aspects pertaining to children' in CJ Davel (ed) *Introduction to child law in South Africa* (2000)362. Like Violata & Genuis, Carstens & Du Plessis view sexual abuse as acts of a sexual nature, including exposure, genital manipulation, fellatio, sodomy and coitus, inappropriately perpetrated by adults or other children, upon children.

considered a child by legal definition, and the perpetrator, by comparison, is in a position of relative power. The definition proposed by Violata and Genuis hinges on 'power', thus fixing attention on the power/powerless nexus between perpetrator and victim (i.e. victim's relative powerlessness versus relative power of aggressor) in ACSA cases.

Finkelhor⁶⁴ qualifies CSA by noting that it excludes contact with a child's genitals for caretaking purposes, to which end his definition seeks to alert the criminal-justice system to the possibility of false accusations, particularly where caretaking is confused with CSA. Finkelhor also distinguishes contact and non-contact categories of CSA abuse. Contact generally refers to touching of the sexual zones of the child's body, or the child touching sexual zones of the offender's body. But contact itself is divided into cases of penetration, including penile, digital, and object penetration of the vagina, mouth, or anus; and non-penetration, which includes fondling of sexual zones of the child's body, sexual kissing, or alternatively, the child touching sexual parts of the offender's body. Contact may also include performing any of the acts the offender may require the child to do (as those already mentioned). On the other hand non-contact CSA usually entails exhibitionism, voyeurism, and involvement of the child in creating pornography.

The literature review presented by Wyatt and Peters⁶⁵ identifies three common themes in the definition of CSA. The first theme is determined by the age limit of the child at the time of the sexual experience. The second describes the type of sexual behaviour, particularly whether it was contact or non-contact. The third subsists in the criteria applied to qualify the experience as abusive. Defining elements in this regard include violence, threats, coercion, and manipulation of the trust relationship between the victim and the suspect.

McGregor⁶⁶ uses the term 'incest' to denote sexual abuse by anyone whom the child has been encouraged to consider a family member. She contends that the distinctiveness of ACSA, particularly the pressure exerted on the child to remain silent about the abuse, is not dependent on the child being a relative, but on the existence of a

⁶⁴ Finkelhor *supra* note 1, 32; M Gill 'Protecting the abused child: It is time to re-evaluate judicial preference for preserving parental custody rights over the rights of the child to be free from physical abuse and sexual exploitation' (1997)18 *Journal of Juvenile Law* 68.

⁶⁵ GE Wyatt & SD Peters 'Issues in the definition of child sexual abuse in prevalence research' (1986)10 *Child Abuse & Neglect* 233-235.

⁶⁶ K McGregor *Warriors of truth: Adult survivors healing from childhood sexual abuse* (1994)11.

relationship of trust, a bond of trusting familiarity between the victim and the suspect who could be a neighbour or a family friend. Kelly⁶⁷ comments, however, that abuse is more traumatising when the suspect is a parent or a close family member. McGregor's definition is ground-breaking in that he extends it to include all forms of sexual abuse perpetrated by persons in positions of trust.

Putman⁶⁸ mentions an array of sexual activities subsumed under CSA. These include intercourse, attempted intercourse, oral-genital contact, fondling of genitals directly or through clothing, exhibitionism or exposing children to the spectacle of adult sexual activity or pornography and exploitation of the child for the purposes of prostitution or pornography. In South Africa, the Criminal Law (sexual offences and related matters) Amendment Act of 2007 enshrines a robust and innovative catalogue of sexual offences against children.⁶⁹ These include consensual sexual acts with certain children, also known as statutory rape, acts of consensual sexual violation performed with certain children, also known as statutory sexual assault, sexual exploitation of children, sexual grooming of children, exposure or display of or causing exposure or display of child pornography or pornography to children, using children for or benefiting from child pornography, compelling or causing children to witness sexual offences, sexual acts or self-masturbation, and exposure or display of or causing of exposure or display of genital organs, anus or female breasts to children.⁷⁰ In Uganda's Penal Code Act⁷¹ child sexual offences include defilement of a person under the age of eighteen, permitting defilement of a person under the age of eighteen and conspiracy to defile.⁷² As can be seen from the catalogue of sexual offences addressed in Ugandan and South African law on sexual offences, unlike South Africa where amendments were

⁶⁷ L Kelly 'What's in the name? Defining child sexual abuse' (1988)28 *Feminist Review* 72.

⁶⁸ Putman *supra* note 6, 269.

⁶⁹ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was enacted to comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute. This amendment was effected through repeal of some common-law offences and rules, and creation of new offences.

⁷⁰ See chapter three of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 on sexual offences against children.

⁷¹ The Penal Code Act Chapter 120 of the Laws of Uganda is the legislation that establishes the code of criminal law in Uganda. The amendment introduced in 2007 left several common-law sexual offences and rules unchanged, apart from the differentiation between simple defilement and aggravated defilement, the latter carrying the death penalty.

⁷² See chapter 14 of the Penal Code Act (Chapter 120 of the Laws of Uganda), which covers offences against morality. The Act retains the common-law definitions of sexual abuse, which limits the range of acts constituting sexual offences against children.

introduced recently, common-law definitions of sexual abuse still prevail in Uganda; consequently defilement is the only sexual offence pertaining to children in that country.

It is important to highlight that presently, there seems to be no standard definition of ACSA. A standard definition, underscoring the relationship of trust between the offender and the child victim is merited in view of the fact that such definition is the first step in gaining recognition of the mechanisms herein underscored-namely, BSE, protective measures and restorative justice.

8.2 Behavioural science evidence

Behavioural science evidence (BSE) takes the form of expert evidence on account of the expertise of the professionals in the field such as mental health experts and social workers.⁷³ It is therefore important to understand what is meant by expert evidence before proceeding to define BSE. The concept of expert evidence derives from common law which determined that witnesses could only testify to facts within their personal knowledge.⁷⁴ Opinions, inferences or beliefs were inadmissible in adducing proof of material facts. In practice, witnesses could only testify in respect of facts perceived through one or more of their sensory organs.⁷⁵ Over time, two exceptions to the rule against opinion evidence were developed.⁷⁶ The exception relevant to the present discussion provides that the opinion evidence of an expert is admissible if the court,

⁷³ Myers *et al. supra* note 54, 1-145. In explaining the various forms of expert evidence in CSA prosecution, these authors identify the broad categories of medical and BSE; A Allan 'The psychologist as witness' (unpublished). In implicitly categorising BSE as an exception to the opinion rule, Allan describes testimony given by psychologists as follows: 'Psychologists who are experts will therefore be allowed to make inferences and give opinions about matters within their field of expertise in psychology, provided that it is helpful and based on admissible facts.'; LB Oberlander, 'Psycho-legal issues in child sexual abuse evaluations: A survey of forensic mental health professionals' (1995)19 *Child Abuse & Neglect* 475. Oberlander considers mental-health professionals' testimony as admissible expert opinion in the prosecution of child sexual offences; MK Cirelli 'Expert testimony in child sexual abuse cases: Helpful or prejudicial? People v Beckley' (1991)8 *Thomas M Cooley Law Review* 425; JEB Myers 'Expert testimony in child sexual abuse litigation: Consensus and confusion' (2010)14 *UC Davis Journal of Juvenile Law & Policy* 1-57; L Berliner 'The use of expert testimony in child sexual abuse cases' in SJ Ceci & H Hembrooke (eds) *Expert witnesses in child abuse cases* (1998)11.

⁷⁴ J Doak & C McGourlay *Criminal evidence in context* (2009)311. Doak & McGourlay explain that the rationale behind the opinion rule was to prevent the lay jury from being swayed by the reasoning process of someone who was likely to be highly educated and well renowned within specialism; GC Pratt 'A judicial perspective on opinion evidence under the federal rules' (1982)39 *Wash & Lee Law Review* 314; RL Carlson 'Policing the bases of modern expert evidence' (1986)39 *Vanderbilt Law Review* 577; SR Gross 'Expert evidence' (1991) *Wisconsin Law Review* 1213-1232.

⁷⁵ *Ibid.*

⁷⁶ Doak & McGourlay *supra* note 74, 315.

owing to a lack of special knowledge or skill, is not sufficiently informed to draw properly reasoned inferences from the facts established by the evidence.⁷⁷ Zeffert and Paizes⁷⁸ note that '[t]he opinion of expert witnesses is admissible whenever, by reason of their special knowledge and skill, they are better qualified to draw inferences than the judicial officer.' The opinion is only admitted because it helps the court, failing which it should be excluded as irrelevant testimony. Wigmore notes that 'the only true criterion for admitting expert evidence should be: On this subject, can a jury receive from this person appreciable help?'⁷⁹

Meintjes-Van Der Walt defines expert evidence as denoting

certain kinds of specialised, systematised knowledge not usually possessed by non-specialised magistrates and judges or by legally trained or lay assessors. In this context the term includes the physical sciences such as chemistry, physics and biology; the social sciences such as psychology, sociology, criminology and economics; and technical sciences such as engineering, statistical analysis and computer science.⁸⁰

A general framework for the admissibility of expert testimony in criminal cases is formulated by Hoffmann and Zeffert as follows:

- The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it.
- The expert's qualifications have to be measured against the evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give relevant evidence.
- It is not always necessary that the witness's skill or knowledge be acquired in the course of his or her profession. It is dependent on the topic.
- An expert witness may be asked to state his or her opinion either as an inference from facts within his or her personal knowledge, or upon the basis of facts proved by others.
- The weight of the expert's opinion really depends on the underlying reasons for it and whether it renders material assistance to the court.⁸¹

⁷⁷ *Ibid.*

⁷⁸ DT Zeffert & AP Paizes *The South African law of evidence* (2009)321.

⁷⁹ JH Wigmore (1978) *Wigmore on evidence 1917-2169 (VII)* (1978)29.

⁸⁰ L Meintjes-Van Der Walt 'Expert evidence: Recommendations for future research' (2006)19 *South African Journal of Criminal Justice* 276.

⁸¹ LH Hoffmann & DT Zeffert *The South African law of evidence* (1988)97-104.

The difference between BSE and medical evidence should be clarified. The latter derives from medical diagnosis which starts with a medical history.⁸² The Royal College of Paediatrics and Child Health (RCPCH)⁸³ notes that a complete medical history consists of data identifying the patient, the source of referral to the doctor, the name of the person providing the medical history, the chief complaint, a history of the present illness, past medical history, family history, psychosocial history, and a review of body systems. Physical examination is often a prerequisite in cases of CSA. Abnormal physical findings could include bruises, hymenal openings, sexually-transmitted diseases, anal injuries and traces of sperm or semen.⁸⁴ Where the examination registers abnormal findings, the expert gives an opinion to the effect that the medical findings are consistent with CSA.⁸⁵

There seems to be no standard definition of BSE. Bagshaw defines it as ‘the branch of science concerned with the advancement of knowledge by observation of the behaviour of subjects in response to stimuli.’⁸⁶ But as it pertains to CSA prosecutions, Steele describes it as testimony given by psychiatrists, psychologists and social workers who have experience in dealing with sexually abused children.⁸⁷ The testimony of these experts explains the possible reasons for the behaviour of alleged CSA victims.⁸⁸ Myers *et al.*⁸⁹ describe BSE according to how it affects CSA prosecution:

1. Description of behaviour commonly observed in sexually abused children;

⁸² Royal College of Paediatrics and Child Health (RCPCH) *The physical signs of child sexual abuse* (2008)121.

⁸³ *Ibid.* 1-165. See also SS Kreston ‘An inconvenient truth: On the absence of definitive corroborative medical evidence in child sexual abuse cases’ (2007)8 *Child Abuse Research in South Africa* 81-96; JA Adams *et al.* ‘Examination findings in legally confirmed child sexual abuse: It’s normal to be normal’ (1994) *Pediatrics* 310-317.

⁸⁴ *Ibid.*

⁸⁵ JEB Myers ‘Expert testimony regarding child sexual abuse’ (1993)17 *Child Abuse & Neglect* 175. See also generally JEB Myers *supra* note 73, 1-57.

⁸⁶ R Bagshaw ‘Behavioural science data in evidence teaching and scholarship’ in P Roberts & M Redmayne (eds) *Innovations in evidence and proof* (2007)219.

⁸⁷ DL Steele ‘Expert testimony: Seeking an admissibility standard for behavioural science in child sexual abuse prosecutions’ (1999)48 *Duke Law Journal* 942. See also M Redmayne *Expert evidence and criminal justice* (2001)5 & 9. Redmayne observes that the role of expert evidence can broadly be thought of as the promotion of accurate decision making, adding that BSE offers a way of conceptualising a victim’s actions and behaviour in order to help the court to understand the victim’s behaviour and be appraised of how to corroborate the victim’s claims.

⁸⁸ Steele *supra* note 87.

⁸⁹ Myers *et al. supra* note 54, 52.

2. Rehabilitation of a child's credibility following impeachment in which the accused asserts that behaviour such as recantation and delay in reporting are inconsistent with allegations of sexual abuse; and
3. Rehabilitation of a child's credibility following impeachment in which the accused argues that developmental differences between adults and children render children less credible than adults as witnesses.

Askowitz and Graham⁹⁰ describe BSE as expert evidence given by mental health professionals such as psychologists to aid prosecution of CSA cases. Askowitz and Graham note that BSE is generally placed under four categories which they describe as follows:

First, the expert may explain behaviour of the child that are seemingly inconsistent with abuse, such as delayed, inconsistent, or unconvincing reporting of the incidents of abuse, or recantation of the allegations. This type of testimony is intended to rebut the implication that these behaviours indicate that the child's allegations are false. Second, the expert may explain that certain behavioural characteristics, such as nightmares, sleep or concentration difficulties, or withdrawal from social relationships and activities, commonly are observed in sexually abused children. The expert then opines that the child complainant's behaviour is consistent with being abused. The third and fourth categories are closely related. With the third type, the expert directly opines, based on an evaluation of the child's credibility and behaviour, that the child has been abused. With the fourth type, the expert employs the same bases actually to assert that the child's allegations of abuse are truthful.

McCord⁹¹ describes BSE as follows:

When a prosecutor offers an expert diagnosis that the complainant has been sexually abused to prove that the crime occurred, the theory of proof is as follows: a sexually abused child exhibits certain characteristics not common to children who have not been sexually abused, these characteristics can be detected by a trained expert, and thus an expert diagnosis of sexual abuse is evidence that the crime occurred. The most full-blown type of diagnosis is where the expert identifies a child sexual abuse 'syndrome', then compares the child's symptoms with the symptoms of that syndrome, and comes to a diagnosis that the child has been sexually abused. The second type of testimony is similar, but omits the 'syndrome' designation. The expert simply

⁹⁰ LR Askowitz & MH Graham 'The reliability of expert psychological testimony in child sexual abuse prosecutions' (1993-1994)15 *Cardozo Law Review* 2035.

⁹¹ D McCord 'Expert psychological testimony about child complainants in sexual abuse prosecutions: A foray into the admissibility of novel psychological evidence' (1986)77 *Journal of Criminal Law & Criminology* 9.

bases the diagnosis on the comparison of the complainant's symptoms to those manifested by other child sexual abuse victims. The expert can explicitly list common symptoms and then make the comparison. Or the expert's diagnosis can take place without the expert listing the common symptoms, but instead explaining his or her own experience in dealing with sexually abused children.

8.3 Protective measures

Generally, protective measures as applied at trial or pre-trial are intended to make the process of communication less traumatic. The *United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime* have set the international standard against which protective measures ought to be applied.⁹² The guidelines implore justice systems to develop measures that make it easier for children to testify, and to improve understanding and communication at the pre-trial and trial stages.⁹³ The guidelines equally proffer an inclusive list of measures to be explored, such as child victim specialists to address children's special needs, support persons, intermediary mechanisms, one-way mirrors, and legal guardians where appropriate.⁹⁴

Prinsloo⁹⁵ notes that these measures are implemented to protect the vulnerability of children against the negative effects of the criminal-justice system and the trauma associated with giving testimony, exemplified by secondary victimisation. He adds that besides protection these measures are intended to facilitate children's unique abilities.⁹⁶

Mathias and Zaal⁹⁷ describe protective measures as follows:

It has been recognised internationally that where child witnesses have to face perpetrators of abuse or other crimes in court, they may become too terrified to provide accurate testimony. They may also suffer trauma which harms them emotionally long after the court proceedings are over. Consequently, in many systems, attempts have been made to balance fair trial considerations with protective measures designed to reduce the stress experienced by child witnesses.

⁹² UN Guidelines on Justice Matters *supra* note 53.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ J Prinsloo 'The rights of child victims and witnesses of crime: An international analysis' (2012)13 *Child Abuse Research: A South African Journal* 74.

⁹⁶ *Ibid.*

⁹⁷ Mathias & Zaal *supra* note 57, 251.

Davies *et al.*⁹⁸ note that protective measures should be designed to strike a balance between serving the best interest of child witnesses and preserving the trial rights of the accused. They rightly emphasise that it is critical to preserve the quality of justice by ensuring that the fair-trial rights of the accused are guaranteed and, at the same time, that the evidence received from the child victim is accurate and complete.

8.4 Restorative justice

There is no universally-established definition of restorative justice as yet, but not for want of trying to give substance to the concept. According to the *United Nations Basic Principles on the Use of Restorative-Justice Programmes in Criminal Matters*, adopted by the Economic and Social Council in 2000, restorative justice denotes any process in which the victim, the offender and community members affected by a crime, actively participate in the resolution of matters arising from the crime, often with the help of a fair and impartial third party.⁹⁹ Previously application of the principle of restorative justice was pursued by adopting a system that did not conform to the pattern of traditional retributive systems. More recently, however, application of the principle has been increasingly sought within the framework of transformational retributive-justice mechanisms with a view to initiating a major advance in criminological thinking to improve the existing system, rather than to establish an alternative to retributive justice.¹⁰⁰

Sullivan and Tift¹⁰¹ define restorative justice as a system that seeks to bring the victim into the process of administering justice in an effort to address the premise that relationships have been harmed and that the damage of the crime can be undone in that the victim becomes part of an assertive, countervailing process while the offender is given the opportunity to assume accountability for the violation he or she perpetrated,

⁹⁸ E Davies *et al.* 'Facilitating children to give best evidence: Are there better ways to challenge children's testimony?' (2010)34 *Criminal Law Journal* 347.

⁹⁹ Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2.

¹⁰⁰ See K Daly & J Stubbs 'Feminist engagement with restorative justice' (2006)10 *Theoretical Criminology* 9-28; K Daly & R Immarigeon 'The past, present, and future of restorative justice: Some critical reflections' (1998)1 *Contemporary Justice Review* 21-45; J Braithwaite 'Restorative justice and social justice' (2000)63 *Saskatchewan Law Review* 185-194; K Wormer 'Restorative justice as social justice for victims of gendered violence: A standpoint feminist perspective' (2009)54 *Social Work* 109. Wormer views restorative justice as a movement within and sometimes extraneous to the criminal-justice system.

¹⁰¹ D Sullivan & L Tift (eds) *Handbook of restorative justice: A global perspective* (2006)2.

thus reducing recidivism. Marshall views it as a process that brings together all parties with a stake in a particular offence, with a view to dealing collectively with the aftermath of the offence and the implications of the crime for the course of future events.¹⁰² Snyman¹⁰³ does not delineate his conception of restorative justice in exact detail, but he does incorporate elements of the principle of restorative justice when he defines the reformatory theory of punishment. Effectively, therefore, in his conception of reformatory theory, Snyman emphasises the harm caused by the offence, rather than the offence itself. However, he rejects this system of justice unequivocally on grounds that it attacks the very essence of justice. Snyman's position on reformatory justice will be discussed in depth in chapter eight where the compatibility of restorative justice with the retributive system of criminal justice will be tested.

Daly¹⁰⁴ describes restorative justice from the point of view of securing and safeguarding justice for victims of sexual abuse, to which end she names five criteria that would have to be satisfied:

- Ensuring that the victim participates in the process of exacting legal accountability from the offender;
- ensuring that the voice of the victim is heard above and in spite of the turbulence of the investigative/legal process;
- validation of the victim to restore and/or safeguard his/her sense of personal dignity and integrity;
- vindication of victim's conduct in face of the humiliating and traumatising onslaught on his/her personal integrity and
- ensuring offender accountability.

In another paper Daly¹⁰⁵ yet again does not define restorative justice but provides different contexts within which the principle can be applied. She describes four legal contexts of restorative justice in handling criminal matters, notably, diversion from court, pre-sentence advice to judicial officers, as a complementary mechanism

¹⁰² T Marshall *Restorative justice: An overview* (1999)5.

¹⁰³ CR Snyman *Criminal law* (2014)17-18.

¹⁰⁴ K Daly 'Reconceptualising sexual victimisation and justice' in I Vanfraechem *et al.* (eds) *The international handbook of victimology* (2014)12-13.

¹⁰⁵ K Daly 'Restorative justice and sexual assault: An archival study of court and conference cases' (2005) *British Journal of Criminology* 338-340.

following a custodial sentence, and at post-sentence, as a component of pre-prison release or community sentence.¹⁰⁶

9 Methodology

The research at hand encompasses theoretical and investigative methods. The discussion entails analytical and comparative dimensions. The analytical dimension consists of critical analysis of jurisprudence, legislation, constitutional and international provisions of law and secondary sources. The secondary sources refer to academic research and academic views of material relevance to pursuing the study at hand. The Ugandan and South African systems are compared with a view to mapping out practices that will benefit both systems. Other systems (e.g. current in the USA, Germany and England) have been consulted as well to aid construal of recommendations with a view to securing a code of best practice. The reasons for consulting the American and European systems are that they are exemplary in terms of applying BSE, an inquisitorial approach to CSA prosecutions, and other similar mechanisms of restorative justice.

10 Significance of the study

The voluminous literature on BSE, protective measures and restorative justice sheds no light on applying these mechanisms towards closing the justice gap in ACSA prosecution because the topic is beyond the scope of said literature, which also does not cover the South African and Ugandan contexts. The uniqueness of this study therefore lies in its specific reference to the application of BSE, protective measures and restorative justice in prosecuting ACSA cases in Uganda and South Africa. More specifically, throughout the study, the instructiveness of the values and norms of the Constitutions of both Uganda and South Africa are golden threads that run through the study, thereby lending impetus and inspiration to reform. The study therefore brings persuasive momentum to bear on the systems current in South Africa and Uganda to implement these crucial mechanisms more pointedly and effectively in existing practice in this regard, with particular reference to prosecuting ACSA cases. Ultimately, the study makes recommendations on the exact place, role and weight of BSE, protective measures and restorative justice in ACSA prosecutions. The conclusions drawn and recommendations

¹⁰⁶ *Ibid.*

made afford crucial insight with a view to reforming the South African and Ugandan systems. Given the persistent difficulties associated with the understanding and application of these mechanisms, the present study should shed valuable light on the issue of applying the said mechanisms in the prosecution of ACSA cases and ultimately contribute materially towards lessening the justice gap in this regard.

11 Overview of chapters

This study is presented in eight chapters. The present chapter provides background and sets the scene for subsequent chapters. With specific reference to Uganda and South Africa, it exposes the problem of ACSA and the gap between its incidence and conviction rates. The insight afforded by the content of the chapter points to the justifiable conclusion that the discrepancy between reported incidence and conviction rates in ACSA cases is largely attributable to the limited application of the mechanisms of BSE, protection and restorative justice. The potential value of implementing these mechanisms is briefly outlined in the present chapter and systematically substantiated throughout the following chapters. To reiterate then, the distinctive dynamics attending ACSA cases warrants adequate contextual placement of the mechanisms of BSE, protection and restorative justice with a view to reducing the justice gap associated with ACSA cases and thus contribute towards raising the conviction rate in offences of this nature.

Chapter two

The distinctiveness of ACSA is discussed in this chapter with a view to preparing the ground for the important task of generally accommodating BSE, protective measures and restorative justice, with particular reference to ACSA offences. The discussion covers the typical ACSA dynamics, including the powerless position of the child victim, the relatively powerful position of the suspect, the ambivalent position of non-offending adults, the paucity of medical evidence, and delayed disclosure.

Chapter three

This chapter contains an analytical review of the role of BSE in ACSA prosecutions in South Africa and Uganda. Since BSE has been implemented for quite some time in South

Africa, consideration is given to the question whether, in light of the manner in which BSE is dealt with in other justice systems, more can be done in terms of the weight that the courts in South Africa accord to BSE in ACSA prosecutions. As regards the Ugandan system where BSE has hardly been admitted in any ACSA case, the future of BSE is assessed with due consideration of the positive example of existing South African practice as well as selected other justice systems. Further, the growing phenomenon of false CSA allegations is confronted with due reference to the possibility of using BSE to disprove such allegations.

Chapter four

Since BSE cannot be advanced in the abstract, the purpose of this chapter is to attend to the issue of applying appropriate standards in using BSE to further ACSA prosecutions. Diagnostic standards, syndromes and interview protocols for child witnesses and victims are considered in this regard, with particular reference to their exact role and place in the use of BSE to further ACSA prosecutions.

Chapter five

Since the relevance of BSE can be stifled by dogmatic application of the rules of evidence, these rules are selectively scrutinised to assess whether and to what extent their application might detract from the benefit that might otherwise be derived from application of BSE in the process of prosecuting ACSA cases. Some rules of evidence are reappraised for current relevance, and guidance is offered on how to interpret and apply them to ensure that BSE is broadly accommodated.

Chapter six

This chapter is specifically focused on the role of protective measures in ACSA prosecutions. Since this role is rather limited in light of the distinctiveness of ACSA cases, the question whether it would be constitutionally viable for an adversarial system to draw from inquisitorial justice systems in an effort to afford broader protection to ACSA victims is considered. This issue is addressed with specific reference to the possibility of strictly regulating the procedure of cross-examination in emulation of inquisitorial justice systems.

Chapter seven

This chapter discusses the exact place and role of restorative justice in cases of serious offending such as ACSA. The chapter underscores the critical need to apply a restorative-justice approach in such cases and decide after due consideration whether a retributive approach and a restorative-justice approach can be effectively harnessed to operate side by side to deal with serious offences such as ACSA to best advantage.

Chapter eight

This chapter summarises and makes recommendations relating to the findings and conclusions arrived at in all the chapters.

CHAPTER TWO: THE CONSTITUTIONAL FOUNDATION OF BRIDGING THE JUSTICE GAP IN ACQUAINTANCE CHILD SEXUAL ABUSE (ACSA) PROSECUTIONS AND THE DYNAMICS OF ACSA

1 Introduction

The previous chapter, with specific reference to Uganda and South Africa described the problem of high CSA incidence versus low ACSA conviction rate, which was referred to as the justice gap. The chapter underscored the need to accord greater weight to behavioural science evidence (BSE), protective measures and restorative justice if the justice gap in ACSA prosecutions is to be effectively bridged. The distinctive features characterising ACSA cases were noted as indicative of the need to implement the said three mechanisms as remedial aids in the prosecution of such cases. The argumentation to justify application of the said mechanisms is taken further in this chapter by positioning ACSA within the wider constitutional frameworks of Uganda and South Africa and subsequently delineating on the dynamics of ACSA.

2 Positioning the critical need to narrow the justice gap within the broader constitutional framework of Uganda and South Africa

Whereas traditionally ACSA was regarded as a private matter to be treated confidentially,¹ it is now emerging as an explicit societal and criminal issue.² Placing ACSA within the wider spectrum of criminal law brings to the fore a host of constitutional issues precisely because criminal laws derive their force from the supreme laws of states. Ultimately, the instructiveness of constitutional values and norms in ACSA prosecutions becomes inevitable. Burchell notes in reference to the Constitution of South Africa promulgated in 1996 that '[t]he values cast in constitutional stone provide the template for the system of

¹ R Wazir & N Oudenhoven 'context' in R Wazir & N Oudenhoven (eds) *Child sexual abuse: What can governments do?* (1998)1; D Finkelhor 'Current information on the scope and nature of child sexual abuse' (1994)2 *The Future of Children* 31.

² Finkelhor *supra* note 1, 31.

criminal justice both in its existing and any future form. There is [therefore] no question about the applicability of the Bill of Rights in the 1996 constitution to the criminal law.’³

ACSA prosecution has been a vexing problem for both Uganda and South Africa for quite some time, yet despite efforts by both countries, convictions remain lamentably low compared to the high reported incidence. It is submitted that in the prosecution of ACSA, the constitutional values and norms of both Uganda and South Africa should inform the mechanisms that are adopted to effectively prosecute ACSA. The constitutions of both Uganda and South Africa indicate that their Constitutions are the supreme laws of the country.⁴ The hallmark of systems based on principles of constitutional supremacy is that all laws and actions of all organs are subject to the Constitution.⁵ With respect to ACSA prosecutions, the import of this is that all actions and decisions pertaining to ACSA have to be measured against the values and norms enshrined in constitutions. In essence, these values and norms should become a yardstick against which responsive mechanisms to ACSA should be measured. Any values and norms that are directly relevant to ACSA prosecutions are instructive to the criminal-justice systems of both Uganda and South Africa.

Uganda’s current Constitution, proclaimed in 1995, was preceded by three others, respectively in 1962, 1966 and 1967.⁶ The process leading to the latest version started in 1988 and came to fruition in 1995⁷ and is particularly notable for its breakthrough on children’s rights and its generally democratic tenor.⁸ This Constitution has gone through a series of amendments,⁹ but has yet to have any particularly noticeable impact on the

³ J Burchell ‘Criminal justice at the crossroads’ (2002)119 *SALJ* 590.

⁴ See section 2 of the Constitution of the Republic of South Africa, 1996 (Constitution of South Africa) & article 2 of the Constitution of the Republic of Uganda, 1995 (Constitution of Uganda).

⁵ *Ibid.* Both constitutions indicate that since the constitution is the supreme law, all conduct has to be consistent with it.

⁶ Uganda gained independence in 1962 under a constitution drafted in London under the auspices of Great Britain. In 1966 Milton Obote, the Prime Minister of Uganda, abrogated the 1962 Constitution and declared himself President under the interim Constitution of 1966. The parliament whose term of office had just expired was turned into a Constituent Assembly to draft a new Constitution for Uganda. The 1967 Constitution was born out of this process.

⁷ JF Wapakhabulo ‘Uganda’s experience in constitution making’ (2001)1. Available at <http://www.commonlii.org/ke/other/KECKRC/2001/33.html> (accessed 20 January 2014).

⁸ Article 34 of the Constitution of Uganda is fully devoted to the rights of children.

⁹ See the preface of the Constitution of Uganda indicating a series of amendments including

administration of criminal law, with particular reference to children's rights. It, however, ostentatiously bids farewell to a turbulent past and embraces fundamental rights i.e. democratic values such as equality, freedom and justice,¹⁰ which have also been written into the present Constitution, particularly for the protection of individuals.¹¹ Emphasis is laid on the fact that the 'fundamental rights and freedoms of the individual are inherent and not granted by the State.'¹² Uganda's Constitution generally takes cognisance of the rights of children and encompasses a series of other rights that are relevant in ACSA prosecutions.¹³

The Constitution of South Africa was promulgated in 1996 and became effective in 1997.¹⁴ Like the Ugandan Constitution, it overrules other laws and commits to upholding democratic values, including social justice, fundamental human rights and equality.¹⁵ This commitment informs the values underlying South Africa's constitutional order, namely human dignity, equality, advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law and universal adult suffrage.¹⁶ The principles informing the 1996 Constitution and all other legislation (subordinate by definition under the Constitution) are constitutionalism, the rule of law, democracy, accountability, separation of powers, checks and balances, cooperative government and devolution of power.¹⁷ The Bill of Rights is entrenched by the same token¹⁸ and is described as 'a cornerstone of democracy in South Africa'¹⁹ which enshrines the rights of all its inhabitants by affirming the values of 'human dignity, equality and

Constitution (Amendment) Act, 2000, Act 13 of 2000, Constitution (Amendment) Act, 2005, Act 11 of 2005, Constitution (Amendment) (No.2) Act, 2005, Act 21 of 2005.

¹⁰ Preamble to the Constitution of Uganda.

¹¹ Chapter four of Uganda's Constitution encompasses a reasonably broad catalogue of human rights. It also deals with issues of application of fundamentally-guaranteed rights, non-derogation of rights and enforcement of guaranteed rights.

¹² Article 20 of the Constitution of Uganda.

¹³ See article 34 of the Constitution of Uganda, besides other rights encompassed under chapter four of the Constitution.

¹⁴ See current Constitution of the Republic of South Africa, 1996.

¹⁵ See section 2 of the Constitution of South Africa and preamble of the Constitution of South Africa.

¹⁶ See section 1 of the Constitution of South Africa on the values undergirding the Constitution.

¹⁷ I Currie & J de Waal *Bill of Rights handbook* (2005)7.

¹⁸ See chapter two of the Constitution of South Africa, detailing the Bill of Rights.

¹⁹ Section 7 of the Constitution of South Africa.

freedom'²⁰ in fulfilment of the obligation that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights.'²¹ Within the exhaustive catalogue of fundamental human rights is the right of children to be protected from all forms of abuse.²² By implication, this explicitness underscores the obligation of the state to ensure that the justice gap in ACSA prosecutions is narrowed.

Many of the values and norms in the constitutions of Uganda and South Africa directly impact and instruct ACSA prosecutions. The constraints of the subject at issue do not permit elaboration on all the constitutionally-guaranteed rights, values and norms; hence the discussion deals selectively with constitutional provisions that are most particularly relevant to ACSA prosecutions.

2.1 Application of the Bill of Rights

Application of the Bill of Rights can either be vertical or horizontal.²³ On the one hand, a bill of rights applies vertically when regulating the relationship between private persons and the state,²⁴ by imposing an obligation on all branches of government and organs of the state to protect human rights; while on the other hand horizontal allocation applies to regulate relationships between individuals,²⁵ on the understanding that private persons too are capable of violating fundamental rights, hence the need to set up checks and balances as precautions against such violation, that is, by obligating private persons to uphold constitutional rights in their dealings with other private persons. As in South Africa,²⁶ the Ugandan Constitution obligates organs of state (vertical application) and private persons (horizontal application) within its jurisdiction to respect, uphold and promote the rights guaranteed under the Constitution.²⁷

²⁰ *Ibid.*

²¹ Section 7(2) of the Constitution of South Africa.

²² Section 28(1) (d) of the Constitution of South Africa.

²³ I Currie & J de Waal *supra* note 17, 32-33; JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2013)64.

²⁴ Currie & de Waal *supra* note 17, 32-33.

²⁵ *Ibid.*

²⁶ Sections 8(1) and 8(2) of the Constitution of South Africa.

²⁷ Article 20 of the Constitution of Uganda.

In so far as the obligation to protect children from sexual abuse is concerned, it is apparent that the obligation does not merely rest on the state. It equally rests on private parties such as non-offending parties and parental figures, amongst others. Recognising the horizontal application of the Bill of Rights is particularly pivotal in ACSA issues since most child sexual offences occur in the privacy of homes, often out of the reach of the state.²⁸ With the express recognition of the horizontal application of the Bill of Rights, it is incumbent upon private persons to ensure that children are protected from ACSA, for instance, by making timely disclosure of ACSA to law enforcement authorities. It therefore becomes increasingly clear that constitutional regimes subscribing to the horizontal application of rights do not tolerate the common tendency by non-offending parties not to disclose ACSA. Equally, vertical application of guaranteed rights imposes a pivotal obligation on all organs of the state to ensure that suspects in ACSA cases are held to account by amongst other things putting in place mechanisms and legal structures more responsive to victims of ACSA. Thus horizontal application (individuals among themselves) as well as vertical application (state protection of individuals) is obligated to cooperate fully to combat ACSA by affording appropriate protection of individuals against abuse.

Since the administration of justice is bound to be confronted with adjudication of cases involving constitutionally guaranteed rights, South Africa's Constitution understandably expounds on the role of courts in the application of the Bill of Rights, particularly where the development of common law and the interpretation of legislation are concerned. The development of common law and customary law (and interpretation of legislation) in conformity with the Bill of Rights refers to the indirect application of the Bill of Rights, in which case no specific constitutional right is at stake, but the law outside the Constitution (common law) is developed and legislation interpreted to be consonant with constitutional values. In this way the Constitution indirectly impacts and informs common law as well as statutory law. Sections 8(3)²⁹ and 39(2)³⁰ of South Africa's Constitution deal

²⁸ See K Muller & K Hollely *Introducing the child witness* (2009)132. Muller and Hollely observe that most child sexual abuse (CSA) occurs by persons known where access and privacy are guaranteed.

²⁹ 8. Application. (l) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

comprehensively (directly and indirectly) with application of the Bill of Rights. Currie and De Waal³¹ note the following about the difference between the two forms of application:

The Bill of Rights establishes an ‘objective value system’, a set of values that must be respected whenever common law or legislation is interpreted, developed or applied. This form is termed ‘indirect application’, which does not override ordinary law or generate its own remedies but respects the rules and remedies of ordinary law, except that it demands furtherance of its values mediated through the operation of ordinary law. Yet in disputes involving direct application of the Bill of Rights it overrides ordinary law and any conduct that is inconsistent with it and, to the extent that ordinary legal remedies are inadequate or do not give proper effect to the fundamental rights, the Bill of Rights generates its own remedies.

The implication of section 8(3) of the Constitution is that when applying a provision of the Bill of Rights, such as the right to protect children from sexual abuse, it is incumbent upon courts to develop common law on issues pertaining to ACSA to the extent that statutory law fails to attend to the matter. Some of the issues in this regard could pertain to rules of evidence when dealing with ACSA cases, the adequacy of measures provided to protect ACSA victims, and the exact role and place of restorative justice in ACSA prosecutions. This provision is particularly significant since statutory law deals scantily with some of these issues (including ACSA). Similarly, the implication of section 39(2) of South Africa’s Constitution is that when courts are confronted with ACSA cases and common-law development to deal with ACSA is indicated, it is incumbent on the courts to

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;

and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

30 39. Interpretation of Bill of Rights

(2) When interpreting any legislation, and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

31 Currie & de Waal *supra* note 17, 32.

do so while ensuring that the ‘spirit, purport and objects of the Bill of Rights’ receive due cognisance. Thus, in light of the foregoing it follows that common-law development is required to protect potential and actual victims of ACSA, and by the same token legislation that directly impacts on ACSA prosecution must be interpreted to the best advantage with a view to protecting children against sexual abuse; moreover common-law development to deal with ACSA cases must be considered obligatory rather than discretionary. The Constitutional Court of South Africa explained this obligation in *Carmichele v Minister of Safety and Security*,³² noting that courts are under a general obligation to develop the common law where it is ‘deficient in promoting section 39(2) objectives.’ Thus when a rule of common law is inconsistent with a constitutional provision, or, when a rule of common law, though not inconsistent with a specific constitutional provision, nevertheless falls short of the spirit, purport and objects of the Bill of Rights,³³ it is incumbent on courts to develop common law for the purposes of dealing with ACSA cases, not merely in an abstract sense, but for the express purpose of practical application in consonance with the Constitution as the supreme overarching law that takes precedence over all others, while common law merely ‘supplements the provisions of the written Constitution’³⁴

It could analogously be posited that in cases where courts are confronted by ACSA cases and the common law on known responsive mechanisms does not further the ‘spirit, purport and objects of the Bill of Rights’, particularly on protection of children from sexual abuse, courts are under obligation to develop the relevant common law. Thus, in so far as the indirect application of the Bill of Rights under section 39(2) is concerned, the pertinent obligation to be fulfilled is one of ensuring that deficient common law is developed with a view to promoting the ‘spirit, purport and objects of the Bill of Rights.’ As it pertains to the direct application of the Bill of Rights under section 8(3), the courts are obligated to develop common law in order to protect the rights impacted by ACSA (e.g. children’s right to be protected against of sexual abuse, the right to parental care, the right to health, the right to equality, the right to dignity, etc.).

³² *Carmichele v Minister of Safety and Security* 2002(1) SACR 79 (CC) para 39 & 40.

³³ *S v Thebus* 2003(6) SA 505 (CC), 2003 (2) SACR 319 (CC) para 28.

³⁴ *Pharmaceutical Manufacturers Association of SA and Another, In re Ex parte President of Republic of South Africa 7 Others* 2000(2)SA 674 (CC) para 49.

As can be seen from the discussion so far, elaborate specification of the role played by South African courts in applying the Bill of Rights is a major strength of South Africa's constitutional framework as it offers interpretive guidance to the courts; quite unlike Uganda's constitutional framework where such specification is conspicuous by its absence.³⁵ This is particularly notable given the pivotal role of the application of rights in ACSA prosecutions and the vital need to develop aspects of common law that can make up the statutory shortfall in such matters so that the courts can have firm legal ground from which to proceed.³⁶

2.2 Interpretation of constitutionally guaranteed rights

Constitutional interpretation is 'the process of determining the meaning of a constitutional provision.'³⁷ How constitutional provisions are interpreted can either advance or inhibit rights protection. The purposive approach takes precedence in matters of constitutional interpretation. In *S v Zuma* the Constitutional Court preferred the purposive approach and in this regard made reference to the Canadian case of *R v Big M Drug Mart Ltd*, which articulates further on the scope of the purposive rule. Kentridge AJ, who delivered the

³⁵ Article 20 of the Constitution of Uganda goes no further than entrenching elements of vertical and horizontal application of guaranteed rights.

³⁶ In Uganda constitutional matters are the exclusive domain of the Constitutional Court, with the result that such matters, wherever and however they arise, are referred to said court for determination, thus prompting lower courts to refer even the most nugatory of issues with constitutional overtones notwithstanding that all major decisions and cases pertaining to CSA are adjudicated by lower courts. In South Africa, by contrast, the principle applies that constitutional issues are dealt with by all possible means, including the development of common law. Contrariwise, in the cases of *Attorney General v Susan Kigula & 417 Others* Constitutional Appeal No. 03 Of 2006; and *Centre for Health Human Rights & Development & 3 Others v Attorney General* Constitutional Petition No. 16 Of 2011, both the Constitutional Court and the Supreme Court of Uganda balked at the prospect of developing the law on grounds that the matters at issue did not fall within their terms of reference but should be relegated to other branches of government (i.e. specifically the legislature and the executive). Although the matters before the courts did not exactly entail common-law rules, the dicta demonstrate how conservative Uganda is in the judicial sense. This weakness notwithstanding, the Constitution of Uganda in its current form, broadly interpreted, can still impose an obligation on all courts to develop common law. Conceivably, article 20 of the Constitution which enjoins all organs of state to promote and uphold fundamental rights implicitly binds all courts. All courts adjudicating cases of CSA are certainly embraced by the expression 'all organs.'

³⁷ Currie & de Waal *supra* note 17, 145; Mubangizi *supra* note 23, 69-71.

judgment of the court in *S v Zuma*,³⁸ referred with approval to the following passage in the Canadian case of *R v Big M Drug Mart Ltd*:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...The interpretation should be...a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.³⁹

Kentridge AJ added that when interpreting the relevant provision in the Bill of Rights, the interpretation should give effect to the values which underlie an open and democratic society based on human dignity, equality and freedom.⁴⁰ In the subsequent case of *S v Makwanyane*, the decisions of *S v Zuma* and *R v Big M Drug Mart Ltd* were authoritatively cited when the court reiterated that the purposive approach is preferable in the interpretation of the fundamental rights enshrined in the Constitution.⁴¹ The purposive approach is likely to be conducive to the protection of rights, including the right of children to be protected against abuse; moreover it may aid the application of international and foreign law in the sense that where national laws cannot address fundamental issues adequately, or where the court is seeking the best interpretation of a domestic law, international and foreign law are more than likely to fill the gap, especially in ACSA prosecutions. Some of the mechanisms that may be critical in addressing the plight of ACSA victims may not be clearly and broadly entrenched in the domestic laws of either South Africa or Uganda. South Africa (as noted in chapter one) has fortunately entrenched a number of responsive mechanisms,⁴² but comparatively speaking, in light of developments and experiences in other jurisdictions, there is considerable room for improvement in the South African system. Indeed, again as noted earlier, South Africa has taken advantage of

³⁸ *S v Zuma* 1995 (2) SA 642 (CC) paras 15-17.

³⁹ *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321,395-6

⁴⁰ *S v Zuma supra* note 38, paras 15-17.

⁴¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 9.

⁴² See section 39 (1) (b) & (c) of the Constitution of South Africa on international and foreign law. The use of protective mechanisms such as intermediaries, admission and sufficient emphasis on BSE in CSA cases, and due allowance for the caregiving role of the suspect when sentencing, are some of the mechanisms in which the influence of international law and foreign law is underscored. Further exploration of these mechanisms can be found in chapters three, six and seven.

BSE, protective measures and restorative justice, yet nevertheless the system can benefit materially from consulting international and foreign law on these mechanisms⁴³ which, albeit barely noticeable in the Ugandan context, are extensively treated in foreign law with broad reference to ACSA prosecutions.⁴⁴ There seems to be sufficient evidence to conclude on the whole that application of international and foreign law pays dividends in that the plight of ACSA victims is addressed more effectively in such dispensations, simply because they are more flexible and tend to operate to higher international standards.

There are different approaches to the instructiveness of international law and foreign law in constitutional interpretation. Some constitutions have an express provision on the role of international law and foreign law. Others do not have general interpretation clauses but they implicitly acknowledge the role of international law in constitutional interpretation. South Africa's Constitution expressly pronounces on the role and place of international and foreign law in constitutional interpretation as evidenced by the provisions of section 39, which reads as follows:

39. Interpretation of Bill of Rights.-(1) When interpreting the Bill of Rights, a court, tribunal or form-

⁴³ *S v Makwanyane supra* note 41, para 37. The Constitutional Court rightly pointed out that international and foreign law are crucial given the dearth of instructive laws to draw from. Some international instruments in this regard include, among other international laws, the United Nations Convention on the Rights of the Child and The African Charter on the Rights and Welfare of the Child. Also included are: United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) on alternatives to imprisonment and restorative justice; United Nations Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20 of 22 July 2005; Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2, etc. See also *S v Makwanyane supra* note 41, para 35. The Constitutional Court of South Africa dealt extensively with sources that may constitute reliable international law for purposes of constitutional interpretation. These may be binding or non-binding laws. Some of these are international agreements, international instruments, decisions of tribunals, and reports of specialised agencies.

⁴⁴ For example, although South Africa's approach to intermediaries as one of the ways to bridging the justice gap is commendable, the approaches of England and Wales on the use of intermediaries offers a rich source of lessons for South Africa's system and even more lessons for Uganda, which has not trodden the path of intermediaries yet. Moreover, protection of ACSA victims should go beyond protective measures by equally addressing the techniques of cross-examination. Inspiration in this regard can be drawn from the approach exemplified by certain inquisitorial systems. A wealth of examples from the USA demonstrate greater emphasis on BSE as an aid to ACSA prosecution with a view to closing the vexed justice gap between reporting and convictions. Similarly, although restorative justice hardly features in serious offences such as ACSA in both South Africa and Uganda, examples of its application in such cases abound in countries like New Zealand and Australia.

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(e) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

In the context of constitutional interpretation, international law includes binding law as well as non-binding law.⁴⁵ These laws may take the form of international agreements and customary international law.⁴⁶ When applied in constitutional interpretation, these laws provide a framework within which constitutionally guaranteed rights can be evaluated and understood.⁴⁷ Foreign comparative law can be based on legal frameworks and precedents of various countries. When applied in the process of interpreting constitutionally guaranteed rights, it entails analysis of the similarities and differences between laws of two or more legal systems, thus making it a valuable resource from which to extract guidance with a view to addressing vexed issues concerning interpretation of guaranteed rights.⁴⁸ Note, however, that despite the guidance that can emanate from foreign comparative law in matters of constitutional interpretation, it 'will not necessarily offer a safe guide to the interpretation' of constitutional rights.⁴⁹ This limitation may be attributable to contextual differences and preference for frameworks that afford broader protection.

In light of section 39(1) it is imperative that interpretation of the Bill of Rights be informed by consultation of international law.⁵⁰ Whereas the application of foreign law is discretionary (i.e. see above-it 'may' be applied) in terms of section 39(1)(e), the

⁴⁵ *S v Makwanyane supra* note 41, para 35.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *S v Makwanyane supra* note 41, para 34.

⁴⁹ *S v Makwanyane supra* note 41, para 37.

⁵⁰ *S v Makwanyane supra* note 41, para 34. The Constitutional Court of South Africa pointed out that international and foreign authorities are of value because they demonstrate how courts of other jurisdictions deal with similar issues before domestic courts. They need to be considered because of their relevance in interpreting rights guaranteed under the Constitution.

determination is nevertheless instructive and commendable in that it opens the way to ensuring that interpretation of the Bill of Rights conduces to the protection of children against ACSA. Moreover, even without the discretionary qualification indicated as ‘may’, a long-standing tendency to consult foreign law, which has been extant in South African courts since before the constitutional transition of 1994, is bound to influence the courts’ interpretation of the Constitution favourably towards taking cognisance of foreign law on ACSA issues.⁵¹ Moreover the fact that the subsection allows freedom of choice eliminates the possibility, in principle, that incompatible foreign law (e.g. foreign law that takes no cognisance of basic rights) will be consulted by default. .

The role of international law is further amplified by section 233 of South Africa’s Constitution which requires all courts to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Note, however, that emphasis on consistence with international law is not tantamount to creating a climate of ‘just going with the international flow.’ Thus, even with the inadequacy of statutory provisions on mechanisms that are more responsive to ACSA, courts are still under obligation to consult international and foreign law with a view to affording ACSA victims broader protection. Section 39(3) is also of particular relevance in the broader discussion of rights with specific reference to ACSA prosecution. The fact that ‘[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation’ means that where common law articulates a right that is not expressly covered in the Constitution, common law may offer the required remedy. Fair-trial and privacy rights, amongst others, are notable examples that are directly affected in ACSA prosecutions. Whereas these rights are recognised in principle in the Constitution of South Africa, common law can afford insight into their practical application.

Uganda’s Constitution, on the other hand, does not have a general interpretation clause, with the result that the exact relevance of international law remains undecided in that country. The Constitution does have a praiseworthy provision contained in article 45,

⁵¹ See generally *S v Makwanyane* *supra* note 41 on the application of foreign comparative law.

however, that could open the way to application of international and foreign law for purposes of interpreting guaranteed rights. The relevant text reads as follows:

Human rights and freedoms additional to other rights.

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.

As noted, the broader implication of the above provision is that it can enable consultation of international and foreign law for the said purpose where ACSA cases are concerned. The result of its open-ended purport, however, is that it offers limited help to the court as regards the nature and extent of ‘other’ rights. Moreover, since the chapter on fundamental human rights seems to be the exclusive object of attention, in Uganda the benefit derived from the generous provision referred to will probably be narrowly restricted to the chapter on fundamental rights.⁵² Furthermore, although international law may be able to influence judgments through article 45, it may not be possible to achieve the same effect with the aid of foreign law and jurisprudence.⁵³ Arguably, express provisions on the exact place and role of international law and foreign law in the interpretation of rights is critical in ensuring that ACSA victims are accorded wider protection.

2.3 Limitation of rights and protection of children against ACSA

‘Constitutional rights and freedoms are not absolute.’⁵⁴ Enjoyment of constitutional rights often requires that the rights of others be taken into account.⁵⁵ Social concerns such as public order, safety, health and democratic values may justify curtailing constitutionally guaranteed rights and freedoms.⁵⁶ Limitations therefore refer to ‘infringements or encroachments on guaranteed rights under narrowly contoured permissible

⁵² Note that article 45 of the Constitution of Uganda expressly refers to chapter four and not the entire Constitution; moreover its purport does not go beyond guaranteed rights.

⁵³ Clearly article 45 refers to rights not entrenched in chapter four; consequently in light of Uganda’s relatively conservative judiciary it may be difficult to stretch this provision to encompass issues relating to foreign countries’ jurisprudence.

⁵⁴ Currie & De Waal *supra* note 17, 163; Mubangizi *supra* note 23, 66; D Meyerson *Rights limited: Freedom of expression, religion and the South African Constitution* (1997)xxiii-xxviii.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

circumstances.⁵⁷ The constitutional criteria on limitation of rights are of particular importance in ACSA prosecutions. Given that ACSA involves acquaintances, a series of constitutionally guaranteed rights tend to require urgent attention. For instance, where a child victim is sexually abused by a primary caregiver, two fundamental rights are impacted, namely the right to protection from sexual abuse and the right to parental care. This last right is impacted partly because prosecution of ACSA cases often ends in custodial sentences, which takes a toll on parental care where the suspect is a caregiver and for the same reason necessitates a balancing act to find an acceptable compromise between the right to privacy and justifiable intervention to exercise the right to freedom from sexual abuse. Thus, a constitutional framework with a strong and founded limitation regime plays a pivotal role in placing into proper context the children's rights which are directly impacted when ACSA occurs.

There are different approaches to the limitation of rights in constitutions. Some include individualised limitation clauses attending specific rights while others are generalised to cut across all provisions. South Africa has adopted the general limitation that justifies the imposition of restrictions on rights contained within the Bill of Rights. The relevant text reads as follows:

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

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.⁵⁸

⁵⁷ AK Abebe 'Human rights under the Ethiopian Constitution: A descriptive overview' (2011)5 *Mizan Law Review* 58.

⁵⁸ See also Section 7(3) of the Constitution of South Africa.

The general idea within the premise of South Africa's constitutional regime is that rights are not absolute. The constitutional framework therefore envisages situations where rights enshrined in the Constitution can be limited, but sets a high standard for justifiability,⁵⁹ to which end South African courts apply a two-stage inquiry. First, the court is required to interpret the scope and content of the right in question in order to determine whether the right has been infringed – if not the inquiry stops there, but if so a 'limitations analysis' has to be undertaken by considering the constitutional justifiability of the limitation in light of the factors listed under section 36 quoted above. Two general requirements have to be met in order to satisfy the provisions of section 36: The limitation must constitute a law of general application and must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.' Although the Constitutional Court has not explicitly set out what would qualify as a law of general application, it does state that original and delegated legislation, common law and exercises of executive rule-making are all classifiable as 'law of general application', provided they are 'accessible and precise.'⁶⁰ Currie and De Waal note that the inquiry is intended to prevent excessive limitation and ensure that the limitation serves a constitutionally acceptable purpose.⁶¹ Pieterse notes that this requirement is in accordance with the constitutional imperative of justification, ensuring that actors are held to account for actions that infringe constitutionally protected rights, and satisfying the principle of proportionality whereby limitation measures have to be helpful, necessary and contextually appropriate.⁶² The implication of the safeguarding limitation provisions as noted are that fundamental rights can be limited to protect children against ACSA. The nature and extent of rights infringement (e.g. the right to parental care, the right to be protected from abuse, the right to privacy and the right to fair trial) if any, in ACSA cases

⁵⁹ See *S v Makwanyane supra* note 41, para 104. The dictum elaborates further on the constitutional element of limitation of rights observing that though rights are not absolute, the infringement of the right had to be justifiable in terms of the limitation clause. Equally, limitations ought not to negate the essential content of the rights.

⁶⁰ Currie & De Waal *supra* note 17, 171.

⁶¹ Currie & De Waal *supra* note 17, 164.

⁶² M Pieterse 'Towards a useful role for section 36 of the constitution in social rights cases?' *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2003) 120 SALJ 41.

are considered. If no infringement is evident the inquiry stops there, but if infringement is found the above-mentioned 'limitations analysis' is required.

The Ugandan Constitution has a general limitation clause over and above the limitations built into provisions protecting individual rights in most instances.⁶³ The wording of the specific provision reads as follows:

43. General limitation on fundamental and other human rights and freedoms.

(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit:

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

This clause is commendable,⁶⁴ but despite mention of justifiability it seems to lack express criteria against which to measure the nature and extent of limitation, with particular reference to the overriding requirement of being consistent with the hallmarks of a free and democratic society. The many instances of using the pretext of 'public interest' to justify arbitrary limitations is an indication of the need for their curtailment as a safeguard against excess. The argument may be adduced that unspecified limitation bar the injunction that it must be acceptable in a free and democratic society and may be an advantage in

⁶³ See article 22 on the right to life, article 23 on the right to personal liberty, article 26 on the right to property, article 31 on family rights, etc.

⁶⁴ *Charles Onyango Obbo & Anor v Attorney General*, Constitutional Appeal No.2 of 2002. In this case, the Supreme Court of Uganda summarised article 43(1) and 43(2) as follows: "The provision in clause (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others" of their own rights and freedoms, as well as to protect the public interest. Therefore, in virtue of the provision contained in clause (1) there are two exceptions to constitutional protection of the enjoyment of rights and freedoms: (a) where the exercise of a right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudices" the public interest.'

Uganda in the sense that it could be interpreted as encompassing protection of children's right to be free from ACSA, yet this position can be dismissed as mere speculation because limitation analysis may be an uphill task, and may actually be counterproductive (i.e. encourage arbitrary limitation and militate against convictions in ACSA cases), in the absence of solid limitation criteria.⁶⁵

2.4 Derogation of rights

Most states make constitutional provision for situations that may require the suspension of protected rights by way of derogation. Unlike limitations that are permanent with a view to perpetually balancing the rights at issue, derogations are by definition temporary and a matter of suspension.⁶⁶ Essentially, derogations constitute 'a departure from the fundamental commitment of governments to observe and respect human rights norms.'⁶⁷ Derogation of fundamentally-guaranteed rights is permissible in specified circumstances. However, such departure from a permanent guarantee must adhere to prescribed procedures and safeguards.⁶⁸ It almost goes without saying, therefore, that derogations are only allowed in emergency situations.

Most constitutions provide a list of rights that are non-derogable in emergency situations. There is no standard catalogue of non-derogable rights across constitutions, but cross cutting, however, is a norm that as regards the listed non-derogable rights, governments cannot depart from their fundamental commitment to observe and respect them. The import of this is that in both normal and emergency situations, governments cannot deviate from their commitment to observe and respect listed non-derogable rights. The constitutional principle concerning derogation of rights is an unalterable imperative in

⁶⁵ However, in the case of *Charles Onyango Obbo & Anor v Attorney General supra* note 64, the Supreme Court of Uganda pointed out that since the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces 'a limitation upon the limitation', the probable danger of misuse or abuse of the provision under the guise of defence of public interest is checked. Despite the court's pronouncement, many would still agree that absence of criterion raises some form of risk.

⁶⁶ E.g. see the constitutions of both Uganda and South Africa, the limitation clauses are in constant application whereas derogation of rights only arises in emergencies.

⁶⁷ TR Hickman 'Between human rights and the rule of law: Indefinite detention and the derogation model of constitutionalism' (2005) 68 *The Modern Law Review* 660.

⁶⁸ See constitutions of Uganda and South Africa. Both constitutions prescribe procedures to be followed before rights can be suspended; see articles 46-49 of the Constitution of Uganda and Section 37 of the Constitution of South Africa.

ACSA cases in that irrespective of normal or emergency situations, the state cannot circumvent its obligation to protect children against sexual abuse and must therefore ensure that mechanisms are in place to hold suspects to account and address the plight of ACSA victims.

In view of this obligation under South Africa's Constitution, therefore, children's right to be protected against abuse is listed as a non-derogable right,⁶⁹ which circumstance is conducive to reducing the deficit between the heavy load of reported ACSA cases compared to the rather slender rate of conviction in such cases. The government cannot rely on emergency situations to depart from its obligation to ensure that criminal charges are brought against ACSA suspects and that they are convicted accordingly.⁷⁰ As indicated consistently in the course of this study, measures that have featured prominently in this regard are BSE, protective measures and restorative justice. It is therefore incumbent on state organs, including the judiciary, the legislature and the executive to ensure that these mechanisms are duly incorporated into their prosecutorial practice.

The fact that children's rights are not included in the list of non-derogable rights under Uganda's Constitutional regime can be cited as an unfortunate flaw. The list concerned includes freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to fair trial, and the right to an order of habeas corpus.⁷¹ However, the argument can be proffered that ACSA is covered by the non-derogable right of freedom from torture and cruel, inhuman or degrading treatment, in which case children do seem to be protected against sexual abuse after all.

2.5 Exactness of selected constitutionally guaranteed rights in ACSA cases

The constitutions of both Uganda and South Africa provide for a wide range of fundamental rights, and many of these rights are undoubtedly relevant to ACSA prosecution. Moreover, in light of the established principle of interrelatedness of rights, it cannot in conscience be

⁶⁹ Section 37(5) of the Constitution of South Africa.

⁷⁰ Section 37(5) indicates that no legislation enacted to deal with a declared state of emergency may cause the state to derogate from its obligations or rights, including children's right to be protected against abuse. Article 44 of the Ugandan Constitution expresses the same position, save that children's rights are not included among non-derogable rights.

⁷¹ See article 44 of the Ugandan Constitution on the list of non-derogable rights.

averred that certain rights take inherent precedence over others where ACSA is concerned.⁷² Among the rights implicated in this instance are the right to dignity, the right to equality, to freedom from abuse, to health, to freedom from inhuman and cruel punishment or treatment, to privacy, to fair trial, etc. Many of these rights are countenanced - at least up to a point - in common law, more specifically in the law of delict and criminal law. However, four rights, viewed from a different perspective, are discussed on account of their special significance in ACSA prosecutions. These are the right to protection against (sexual) abuse, the principle referred to as 'best interest of the child', the right to privacy, and the right to fair trial.⁷³

2.5.1 The right to protection against sexual abuse

Constitutionally guaranteed rights impose a positive obligation on state organs, as well as private concerns in some instances, to provide appropriate protection to rights holders by resorting to the laws, structures and conduct designed to afford such protection.⁷⁴ Broadly applied to ACSA prosecution, this obligation could have implications for rules of evidence, procedures and current mechanisms relating to ACSA prosecutions. For example, if current rules, procedures and mechanisms make it difficult for children to testify, to cope after exposure to the hardship of publicly re-enacting a traumatic experience in a criminal trial conducted against the accused, and for ACSA to be proved, then definitive grounds exist to

⁷² This principle holds true in ACSA cases in which the infringement of children's rights to protection from sexual abuse by acquaintances inevitably impacts on several other rights such as parental care and welfare, particularly in the event of a decision to prosecute. For a further elaboration on the principle of interrelatedness of rights, see the Vienna Declaration and Programme of Action by the world conference on human rights held on 25 June 1993, UN DOC.A/A/CONF.157/23.

⁷³ Note with respect to South Africa that even before the express entrenchment of these rights and guiding principles in the Constitution, they were already represented in South Africa's common law. The same may be said of Uganda's system.

⁷⁴ See article 20 of the Ugandan Constitution and section 7(2) of the Constitution of South Africa. These constitutional provisions create a binding obligation on states to respect, protect and fulfill rights as guaranteed under the Constitution; *Carmichele v Minister of safety and security supra* note 32, para 44, in which the court held that the constitutional guarantee of rights imposes a duty on the state to refrain from infringing on these rights and that in certain circumstances, this guarantee also involves a positive duty to provide appropriate protection to everyone through laws and structures designed to afford such protection; N Muller *et al. Women and Children as witnesses in cases of gender based violence* (2009)9. These authors persuasively argue that the right of children to be protected from abuse, if broadly interpreted, may have implications for the rules of procedure and evidence. If certain rules and procedures make it difficult for children to testify, then ultimately these procedures and rules are not in consonance with the obligation of states to protect children from abuse.

declare the relevant rules, procedures and mechanisms ineffectual and unresponsive to the plight of ACSA victims. The obligation to protect would be more effective if the rights concerned were expressly entrenched in the Constitution. Note in this regard that section 28 of the Constitution of South Africa is fully devoted to children's rights, particularly in the case of section 28(1)(d), which contains the guarantee that children will 'be protected from maltreatment, neglect, abuse or degradation.' Abuse in this case includes all forms, as well as ACSA. The constitutional guarantee provided in section 28 (1)(d) that children will be protected against abuse is valuable beyond measure as it lends critical substance to this vital state guarantee, from which flows the obligation to narrow the aforesaid justice gap (disproportion between reported cases and convictions) by ensuring that mechanisms are in place to offer succour to ACSA victims.

The Ugandan Constitution protects children's rights in terms of article 34 which guarantees the right to education, health, parental care and freedom from social and economic exploitation, but it lacks the specific strength of the Constitution of South Africa in this regard in that it does not contain a specific guarantee that obligates the state to protect children against (sexual) abuse; consequently the state's obligation cannot be pinned down to a literally specific provision in this regard but has to be invoked obliquely through non-specific provisions such as children's right to be protected against social exploitation, and guaranteed protection for vulnerable children. The advantage of a broad interpretation, however, is that article 45 imposes an obligation on duty bearers and that non-specific guarantees give access to the protection afforded by international children's rights instruments as a defence against CSA. In this regard, since Uganda is party to the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC),⁷⁵ duty-bearers can be called upon to fulfil their constitutional obligations to protect children against abuse. In fact, it is evident that the right of children to be protected from abuse as written into these instruments is widely defined, consequently affording children in Uganda wider protection. The ACRWC provides as follows:

⁷⁵ According to the status of ratification, Uganda ratified the UNCRC on 27 June 1997 and the ACRWC on 21 October 1994. Uganda is therefore bound under international law to apply the values and norms enshrined in these instruments in the prosecution of cases of ACSA where such need arises.

Article 16: Protection against child abuse and torture

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.
2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

A similar provision is entrenched in article 19 of the UNCRC. It is apparent in the text above that article 45 of Uganda's Constitution is an opportunity to vouchsafe wide-ranging protection to ACSA victims by taking cognisance of international laws. It is equally evident that ACRWC and the UNCRC afford wider protection for child victims. Due recognition is evident from the text that caregivers and acquaintances often visit sexual abuse upon the children in their charge. Thus, it is implicit in this formulation that children's lives are a public and not merely a private concern. Even more instructive is the clear delineation of the exact role of the duty bearers as apparent in the specific action listed in article 16(2) which obligates parties to the ACRWC to adopt measures to ensure that children obtain redress. It is not enough for the penal laws of subscribing states to criminalise child sexual offences. A positive obligation in light of article 16(2) of the ACRWC is imposed upon states to put in place effective procedures to support ACSA victims. Prevention, identification and investigation mechanisms are also highlighted.

2.5.2 The best interest of the child

The principle of the best interest of the child is at the heart of all issues and actions pertaining to children. Properly circumscribed, this principle, shows great potential to inform decisions in ACSA cases. Sloth-Nielsen corroborates this observation as follows:

The inclusion of a general standard [the best interest of a child] for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are

taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives.⁷⁶

Bonthuys advises that:

[T]he inclusion of the welfare principle in the Constitution should have concrete effects, chiefly to direct courts to conduct a proper examination of the other constitutional rights of children and other family members.⁷⁷

Chirwa adds:

This principle is by no means a new one. It has been recognised in domestic laws of many countries... this principle exceeds traditional concepts of protection...⁷⁸

Although the concept of the best interest of the child seems to be considered a novelty in some commentaries, it has been actively applied in Ugandan as well as South African common law for a number of years,⁷⁹ as evidenced by a considerable body of South African case law that accumulated before promulgation of the Constitution of South Africa.⁸⁰

Constitutional frameworks reflect divergent positions on this principle. Some expressly entrench it while others do not. Given its potential impact in decisions and actions that affect children, its status in a constitution can greatly influence how matters affecting children including ACSA are handled. In South Africa the principle of the child's best interest is enshrined in the Constitution. Its exact role is delineated in section 28(2) which provides that the child's best interest is the deciding factor - in fact is paramount

⁷⁶ J Sloth-Nielsen 'Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa' (1996) *Acta Juridica* 25.

⁷⁷ E Bonthuys 'The best interests of children in the South African Constitution' (2006)20 *International Journal of Law, Policy and the Family* 23.

⁷⁸ DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child (2002)10 *The International Journal of Children's Rights* 160.

⁷⁹ Bonthuys *supra* note 77, 40. Bonthuys observes that 'in Roman-Dutch law, from which much of South African common law is derived, custody of children was regarded as a matter for the discretion of judges. This discretion was generally based on what judges perceived as being the best interest of children.'

⁸⁰ See e.g. *Simey v Simey* (1881)1 SC 176.

wherever children's concerns are at issue. This principle has been defined and applied in a number of cases that have a material bearing on ACSA cases.

In *Minister for Welfare and Population Development v Fitzpatrick and Others*⁸¹ the best interest of the child was conceptualised as a right, giving it more force than a mere guiding principle:

Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).

As some scholars have noted, the best interest of the child has been elevated to an overriding principle that commands the deference of all in deciding matters affecting children's interests.⁸² This articulation provides valuable backing for the assertion of children's rights with a view to effectively prosecuting ACSA cases. Bonthuys⁸³ cautions, however, that 'although courts call it a right, they do not treat it as they do other constitutional rights.' He confirms in this regard that the handling of children's best interests in the Constitutional Court has not been on par with its treatment of other constitutionally guaranteed rights, thus creating the impression of a significant deficit between rhetorical assurances and realities on the ground. It seems undeniable, therefore, that the principle of children's best interests is considered of a lesser order than a fundamental right on par with others articulated in the Bill of Rights.

The express entrenchment of this principle in South Africa's Constitution has significantly influenced court pronouncements on law enforcement in cases where children were affected, with particular reference to cases of CSA, including especially ACSA. In *Hilda van der Burg & Another v National Director of Public Prosecutions*, the court pointed out that

⁸¹ *Minister for Welfare and Population Development v Fitzpatrick and Others* (2000) ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) para 17.

⁸² Sloth-Nielsen *supra* note 76, 25.

⁸³ Bonthuys *supra* note 77, 27.

the principle of the best interest of the child requires that ‘law enforcement must always be child-sensitive and courts must at all times show due regard for children’s rights.’⁸⁴

A similar pronouncement was made in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*:

Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child sensitive...the rights of the child to have his or her best interests given primary consideration in all matters concerning the child...[mean] that child complainants and witnesses should receive special protection and assistance that they need in order to prevent hardship and trauma that may arise from their participation in the criminal-justice system....[Thus], section 28(2) is an injunction to courts to apply the principle that the best interests of the child are of paramount importance in all matters concerning the child. It is incumbent upon all those who are responsible for the administration of justice to apply the principles of our criminal law and criminal procedure so as to protect child complainants in sexual offence cases...⁸⁵

Notably, as matters stand in this regard, the principle of the child’s best interest seems to be instructing and informing court decisions where children of accused persons are at issue. This was duly demonstrated in *S v M* where the court pronounced as follows:

The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected [by decisions against accused persons] receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.⁸⁶

The overriding interest of the child, as indicated in the above citation, is particularly relevant in ACSA cases, which implicate a web of relations, including instances where

⁸⁴ *Van der Burg and Another v National Director of Public Prosecutions* 2012(2) SACR 331 (CC) para 62.

⁸⁵ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* (2009) ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) paras 74, 78 & 113.

⁸⁶ *S v M (Centre for Child Law as Amicus Curiae)* (2007) ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) para 42.

suspects are caregivers; consequently a delicate balance must be maintained between parental care, child welfare and protection against CSA with the aid of the three mechanisms advocated for.

Equally, the paramountcy of the best interest of the child has ensured that in all affairs pertaining to children, decisions and actions take due cognisance of social relations and individual context. This is particularly critical in ACSA cases where sexual abuse sometimes occurs in the intimate circle of a family context, hence the above-mentioned need for a delicate balance between holding suspects accountable and taking due care of children's interests. South Africa's Constitutional Court states the following in this regard:

section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can...A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.⁸⁷

The purpose of taking account of context and the principle of family preservation is to serve the best interest of the child and thereby reinforce the primacy of children's rights. In this regard, the principle has been progressively interpreted to ensure that the rights of child victims are not prejudiced for the putative sake of preserving familial relations. The Constitutional Court of South Africa enunciated this point categorically in *C & Others v Department of Health and Social Services, Gauteng & Others* by ruling as follows:

In the context of section 28(1)(b) read with section 28(1)(d) and section 28(2), the scope of the right to parental care cannot include parental care that is harmful or detrimental to the safety and well-being of a child. It cannot be claimed that section 28(1)(b) entitles a child to parental care that is harmful to its safety and well-being. To read this right in a manner that includes harmful care would

⁸⁷ *S v M supra* note 86, paras 20 & 24.

be inconsistent with section 28(1)(d) and would legitimise the abuse of children, something which is not countenanced by the Constitution.⁸⁸

While South Africa's Constitution expressly entrenches the principle of the child's best interest, such clarity, as noted above, does not exist in the Ugandan Constitution beyond the provision contained in article 34 (1) to the effect that: 'subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.' Narrowly interpreted in this instance, the best interest of the child is only a matter of concern as regards children's right to parental care, which therefore leaves aside the critical matter of protecting children specifically against sexual abuse. Alternatively, however, the purport of article 45 of the Ugandan Constitution could be stretched to accommodate the principle of the child's best interest to the extent that it includes matters pertaining to CSA. As noted, article 45 has the effect of recognising rights that are not expressly mentioned in Uganda's catalogue of rights. It therefore does seem logically defensible to assume that the open-endedness of this provision instructs Uganda's adherence to the standards set in instruments created internationally by duly authorised bodies for the protection of children's rights, such as the UNCRC⁸⁹ and ACRWC.⁹⁰ These instruments have elaborately defined the place and role of the principle of the child's best

⁸⁸ *C & Others v Department of Health and Social Services, Gauteng & Others* Case CCT 55/11 (2012) ZACC 1 para 115.

⁸⁹ Article 3 of the UNCRC provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The intention of the UNCRC's construal of the child's best interest is clearly to impose an obligation on private and public organs alike to take account of the child's best interest in all actions concerning children. The principle is accorded the status of 'primary consideration.' Though it is not 'paramount' as in South Africa, it is nevertheless gratifying that the construal accords high-priority status to the principle, given the absence of its constitutional entrenchment in Uganda.

⁹⁰ Article 4 of the ACRWC provides that 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.' The articulation of the principle is closely similar to that of the UNCRC, save that in the former case the best interest of the child is 'the primary' consideration, as opposed to 'a primary consideration' in the latter; Chirwa *supra* note 78, 160, in attending to this difference, has noted that the ACRWC's formulation offers better protection for children since under the Charter the best-interest principle is the overriding consideration; unlike the equal weight accorded to other considerations by the UNCRC; J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) 11 *S. Afr. J. on Hum. Rts.* 409-410. Thus, Uganda stands to benefit from both standards in virtue of its status as signatory in both instances.

interest. Unfortunately such clear definition does not exist in Uganda's constitutional dispensation, whereas its entrenchment in South Africa has certainly helped the Constitutional Court to define its parameters, thereby conducing to the effective application of law in ACSA prosecutions.

2.5.3 Privacy rights and integrity of family life

The right to privacy is an essential consideration in a discussion of ACSA prosecution, first of all because ACSA prosecution invades the privacy of all concerned, for example by disrupting family life, a crucial aspect of privacy that has to be curtailed in seeking justice for ACSA victims. Likewise, prosecution of intrafamilial cases of CSA entails state penetration of the cloak of intimacy and integrity in which family life is wrapped with a view to protecting vulnerable victims from sexual abuse,⁹¹ the premise being that the state must perforce invade familial privacy in exceptional circumstances to protect the interests of society and of family members who may be at risk,⁹² provided of course that such justification applies within reasonable limits, thus raising the issue of deciding the extent of such justifiability. Establishing the parameters of the right to privacy is in fact a prerequisite for effective ACSA prosecution because it determines the limits of investigative and prosecutorial activity.

The Constitution of Uganda guarantees the right to privacy according to article 27, which provides:

- (1) No person shall be subjected to—
 - (a) unlawful search of the person, home or other property of that person; or
 - (b) unlawful entry by others of the premises of that person.
- (2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

⁹¹ EM Schneider 'The violence of privacy' (1990-1991)23 *Connecticut Law Review* 985.

⁹² FE Olsen 'The myth of state intervention in the family' (1984-1985)18 *Michigan Journal of Law Reform* 835; RP Malloy 'Market philosophy in the legal tension between children's autonomy and parental authority' (1988)21 *Indiana Law Review* 890-892; Schneider *supra* note 91, 977; RL Geiser 'The rights of children' (1976-1977)28 *Hastings Law Journal* 1030; KP Kindred 'God bless the child: Poor children, *parens patriae*, and a state obligation to provide assistance' (1996)57 *Ohio Law Journal* 526 & 535; JG McMullen 'Privacy, family autonomy, and the maltreated child' (1992)75 *Marquette Law Review* 569.

A similar provision is apparent in the Constitution of South Africa. Section 14 provides as follows:

Everyone has the right to privacy, which includes the right not to have-

- a) their person or home searched;
- b) their property searched;
- c) their possessions seized; or
- d) the privacy of their communications infringed.

It is evident from the above constitutional provisions that the family home and other institutions where ACSA cases are likely to occur, such as foster homes and schools, enjoy some measure of privacy and protection from interference. This right bestows upon persons within these institutions the right to live their lives without interference from private and public authorities. Penetrating the home and private institutions may therefore cause a dilemma in light of the bold pronouncements by courts on the status of the right to privacy. In *Bernstein and Others v Bester NNO and Others*, the Constitutional Court of South Africa went on record as follows:

A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority.⁹³

A similar pronouncement was made in *Centre for Social Accountability v Secretary of Parliament and Others* where the court stated as follows:

It is generally recognised that every person has an untouchable inner sphere of personal life where he or she has the sole autonomy to decide how and where to live his/her life, and where his/her decisions do not adversely affect other people. No interference by law is tolerated with conduct within this sphere, either by the state or by other individuals or institutions. At the heart of this right is the freedom of identity of each individual, enclosed in an area of private intimacy. That privacy pertains to the freedom of individuality, is recognised.⁹⁴

⁹³ *Bernstein and Others v Bester NNO and Others* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) para 77.

⁹⁴ *Centre for Social Accountability v Secretary of Parliament and Others* (298/2010) (2011) ZACGHC 33; 2011 (5) SA 279 (ECG); (2011) 4 All SA 181 para 64; D Archard 'The moral and political status of children' (2006) *Public Policy Research* 8. Archard conceptualises the traditional model of

Likewise, in *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*, the court observed:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.⁹⁵

Given that ACSA often occurs within the privacy of the home or in home settings, the question then shifts to the exact extent to which the criminal-justice system can penetrate the constitutionally shielded private sphere to vindicate the rights of vulnerable ACSA victims. The police in both Uganda and South Africa have consistently pointed out that penetrating the cloak of privacy remains a major challenge to the investigation of ACSA cases,⁹⁶ partly because a balance has to be struck between the right to privacy and the obligation to protect children against sexual abuse. It is therefore critical for the criminal-justice system to appreciate that ‘there are times when it will be legitimate for the state to invade private space.’⁹⁷ Ample evidence subsists to assert that ‘[v]iolence against women [and children] often lurks in the shadows of the home and historically state officials have refused to intervene to protect women [and children] on the basis of the inviolability of the home.’⁹⁸ Such refusal cannot be tolerated under the current constitutional regimes of either

child rearing, explaining the place of family privacy. The author notes that adult human beings form couples who may then make the choice to have a child with a further wish to raise that child as their own. That choice to bear and to rear children is often seen as a fundamental right, expressed as the right to found a family, which the state ought to protect.

⁹⁵ *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR (CC) para 32; Schneider *supra* note 91, 973. Schneider observes that the notion of the family as a sphere of privacy, immune from state interference, is central to all individuals.

⁹⁶ South African Police Service (SAPS) Annual Crimes Report 2011/2012 ‘An Analysis of the national crimes statistics: Addendum to the annual report of 2011/2012’ (2012) 5, 6 & 20. SAPS acknowledged that most contact crimes (including sexual crimes) occur between people known to each other. The police acknowledge their inability to prevent crimes of this nature because prior information about such crimes is usually not available; moreover they mainly occur in private beyond the scope of direct policing, which evidently complicates the role of the police in such cases; Uganda Police annual Crime report of (2009)11.

⁹⁷ *NM & Others v Smith & Others* (CCT69/05) (2007) ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) para 134.

⁹⁸ *NM & Others v Smith & Others*, *supra* note 97, para 134; Schneider *supra* note 91, 976. Schneider

South Africa or Uganda since everybody who lives under these jurisdictions has the inviolable right to be free from both public and private violence.

While courts have augmented the right to privacy through jurisprudence they have cautioned, at the same time, that the enjoyment of this right does not extend to individuals' social relationships outside their immediate circle. When the individual's activities acquire a social dimension, therefore, the right to privacy has to be systematically interpreted with due consideration of other rights, and appropriate limitation where possible. This view is well documented in the court's decision in *Bernstein and Others v Bester NNO and Others*. The most pertinent passage in the judgment merits quotation in full:

The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.⁹⁹

The significance of this passage for the purposes of ACSA prosecution can hardly be overstated. Implicit in this passage is recognition of the 'acquaintance' nature of relations as peculiar to ACSA cases. Despite the privacy that suspects enjoy within the context of family and other similar settings, the arm of criminal law has discretionary powers to penetrate this cloak of privacy where the rights of child victims are at stake.

Evidently, therefore, the need to strike a balance between privacy rights and the essential mandate to combat crime presents a critical challenge. In the case of *Thint (Pty)*

observes that because the dichotomy of 'public' and 'private' was previously viewed as an important construct for understanding crime within close affinities, the law was often absent in the private sphere. However, non-intervention in ACSA cases can no longer be justified as there is no realm of personal and family life that subsists in a legal vacuum. Essentially, although privacy is good and in particular enables individuals to carry out their role of producing well-adjusted, autonomous individuals, it is not absolute, nor can it be so.

⁹⁹ *Bernstein and Others v Bester NNO and Others supra* note 93, para 67.

Ltd v National Director of Public Prosecutions & Others the court took due cognisance of the possibility of abuse of privacy rights:

Understanding the range of protections for the right to privacy at the different stages of a criminal investigation and trial is important. Courts must take care that in ensuring protection for the right to privacy, they do not hamper the ability of the state to prosecute serious and complex crime, which is also an important objective in our constitutional scheme...This tension reflects the need to strike a balance between the privacy and other personal interests of individuals on the one hand and the public interest in the fight against crime on the other, both of which are relevant constitutional principles...[Thus], limiting the right to privacy becomes an inroad for investigators tool to combat organised crime.¹⁰⁰

In the matter of the state's obligation to intervene through criminal prosecution in ACSA cases, the bounds of protection afforded by the right to privacy are exceeded when the state considers the intimate suspects' expectation that he/she can rely on said protection to be overextended. This happens when, as explained by Ackermann J in *Bernstein and Others v Bester NNO and others*, the intimate suspect moves into '...communal relations and activities...'¹⁰¹ The overriding importance of the rights of children to be protected from sexual abuse thus stands out as a justification for the right to privacy to be limited.¹⁰² This does not mean, however, that the private space is not worthy of protection – the justification to override does not go that far. The state must justify its conduct through the criminal-justice system, particularly where it intrudes upon the right to privacy to defend the rights of ACSA victims. This limitation is clearly necessary to prevent arbitrary conduct and abuse of power. 'To hold otherwise would be to sacrifice constitutional rights at the altar of the fight against crime.'¹⁰³

¹⁰⁰ *Thint (Pty) Ltd v National Director of Public Prosecutions & Others* (2008) ZACC 13 Case CCT 89/07 para 80 & 140 & 229.

¹⁰¹ *Bernstein and Others v Bester NNO and Others supra* note 93, para 67.

¹⁰² *Centre for Social Accountability v Secretary of Parliament and Others supra* note 94, para 99. The Constitutional Court re-echoes the limits of privacy rights where the rights of other individuals are at stake.

¹⁰³ *Thint (Pty) Ltd v National Director of Public Prosecutions & Others supra* note 100, para 368.

Therefore, the challenge is not simply to reject privacy in favour of state intervention but to develop a more nuanced approach to weighing protection of the right to privacy against children's right to protection against sexual abuse.

2.5.4 Fair-trial rights

Fair-trial rights seem as unavoidably implicated in any discussion of ACSA prosecution as privacy rights; and the plight of the ACSA victim must inevitably be balanced against the right of the accused to a fair trial, so much so, in fact, that it seems high time to recognise the equal right to consideration of victims and accused persons in ACSA cases. Notably, therefore, the right to a fair trial is embodied in an assemblage of rights contained within the Constitution of South Africa,¹⁰⁴ and a similar catalogue of rights is present in Uganda's Constitution.¹⁰⁵

The scope and limits of the accused's right to a fair trial are of particular importance in ACSA prosecution because of the contingent requirement to decide whether special measures to cope with the characteristic dynamics of ACSA cases constitute infringement of the accused's right to a fair trial. Several authors¹⁰⁶ correctly submit that a 'fair trial' is different from the 'right to a fair trial.' Whereas the 'right to a fair trial' accrues to accused persons, 'fair trial' is an essential element of justice that all parties are entitled to in that a trial must lead to 'fair and correct outcomes.' These authors add that complainants and accused in sexual abuse cases are equally entitled to a fair trial, for example because they often switch roles, with the result that the complainant then becomes the 'accused' as well, in which case protective measures are actually no longer infringements of the accused's right to a fair trial, as evidenced by the judgment in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*, which pronounced as follows in light of said role reversals:

¹⁰⁴ See Section 35(3) of the Constitution of South Africa.

¹⁰⁵ Article 28 of the Constitution of Uganda.

¹⁰⁶ See e.g. DJ Boggs 'The right to a fair trial' (1998) *U. Chi. Legal F 2*; M Torrey 'When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions' (1991-1992) *24 University of California Davis Law Review* 1057. Torrey observes that complainants in sexual abuse cases are entitled to a fair trial just like the accused because sexual offences often involve a role reversal between accused and complainant, thus switching the accusatory spotlight to the complainant.

Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures [notably, special measures]... special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all.¹⁰⁷

It seems fair to note that given the above finding the right to a fair trial should be defined on a case-by-case basis, with due cognisance of all the interests and considerations relevant to each case. This is especially true for ACSA cases, given the unique experiences of ACSA victims; therefore the rights of the accused should not be allowed to take precedence (and *vice versa* the rights of the complainant should not take precedence at the unfair expense of the accused).

In conclusion, a host of rights, values and norms as institutionalised by the constitutions of South Africa and Uganda are implicated in the cause of bridging the justice gap in ACSA prosecutions. The criminal-justice systems of Uganda and South Africa now have to rise to the challenge of ensuring that the values and norms enshrined in these constitutions inform the mechanisms that are designed to measure up to the distinctiveness of ACSA cases. In fact, the distinctive dynamics of ACSA cases is exactly where the discourse on the overriding topic of this study is joined in the next section.

3 Understanding the dynamics of Acquaintance Child Sexual Abuse (ACSA) with a view to informing responsive mechanisms

Often, reforms fail to make desired impact because they were not informed by practical realities. Having positioned the ACSA problem within the wider constitutional frameworks of Uganda and South Africa, it is imperative to discuss the dynamics of ACSA and to demonstrate how these unique dynamics implicitly and innately underscore the critical need for priority to be given to BSE, protective measures and restorative justice in ACSA prosecutions. These dynamics are discussed below.

¹⁰⁷ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*, *supra* note 85, para 116.

3.1 The authoritative position of the suspect

Suspects in ACSA cases are often, if not always, in positions of trust with children.¹⁰⁸ This unique position is coupled with authority over child victims.¹⁰⁹ The suspect's authority is often based on seniority in age and their caregiving role in relation to their victims.¹¹⁰ Having authority and power commands the respect of others in society. Federle notes that this 'power suggests that someone else is powerless.'¹¹¹ As regards ACSA, this power, if arbitrarily applied predisposes the powerless in society such as children to abuse. McBride observes that 'the abuser indulges his sexual proclivities from a position of economic and emotional power, thereby immunising himself from legal reproach.'¹¹² On account of the power that intimate suspects wield, particularly in familial settings, the sexual abuse is often repetitive. Rudd and Herzberger¹¹³ explain that in these circumstances, CSA can go on for a considerable period of time without being disclosed. Often, the abuse starts at a very early age and continues in secrecy for years with more than one child being exposed to sexual abuse by the same person.¹¹⁴

Aside from familial settings, examples abound of institutional settings where the powerful position of adults predisposes children to sexual abuse and blocks any legal remedy. Institutions such as schools and foster homes create similar dilemmas because children are subordinate to teachers.¹¹⁵ Nhundu and Shumba¹¹⁶ demonstrate that teachers'

¹⁰⁸ TA DeMitchell 'The duty to protect, Blackstone's doctrine of *in loco parentis*: A lens for viewing the sexual abuse of students' (2002) *B.Y.U Education & Law Journal* 17; TL Bradshaw & AE Marks 'Beyond reasonable doubt: Factors that influence the legal disposition in child sexual abuse cases' (1990)36 *Crime and Delinquency* 277.

¹⁰⁹ D Glaser & S Frosh *Child sexual abuse* (1988)23; ML Paine & DJ Hansen 'Factors influencing children to self-disclose sexual abuse' (2002)22 *Clinical Psychology Review* 277.

¹¹⁰ DJ McBride 'Sexually abused children: The best kept legal secret' (1985-1986)3 *Hum. Rts. Ann* 447.

¹¹¹ KH Federle 'Looking ahead: An empowerment perspective on the rights of children' (1995)68 *Temple L. Rev* 1595.

¹¹² McBride *supra* note 110, 447.

¹¹³ JM Rudd & SD Herzberger 'Brother-sister incest-father-daughter incest: A comparison of characteristics and consequences' (1999)23 *Child Abuse & Neglect* 920.

¹¹⁴ Rudd & Herzberger *supra* note 113, 920; RE Felker 'Incest: The need to develop a response to intra-family sexual abuse' (1983-1984) *Duquesne Law Review* 904.

¹¹⁵ DeMitchell *supra* note 108, 36. DeMitchell observes that school children who are sexually abused by the very people who are entrusted with caring for them while at school are quite like prisoners, made captive by the condition of their dependency, and are shackled by confusion, shame, isolation, and fear.

¹¹⁶ TJ Nhundu & A Shumba 'The nature and frequency of reported cases of teacher perpetrated child

power over children is echoed by power relations at home, and that children can therefore be at risk of abuse by teachers because chances are that not all teachers are trustworthy in this regard.¹¹⁷ Youth makes children vulnerable to abuse by those who have power over them.¹¹⁸ The same risks are present in religious settings where spiritual authority holds sway over laity (e.g. priesthood in Roman Catholic establishments such as monasteries and convents where the situation is aggravated by enforced celibacy). Fogler *et al.*¹¹⁹ notes that where spiritual authority is a risk factor, it draws those who seek access to children for abusive purposes, and the risk is made worse for those under their control by the protective religious mantle that exemplifies love and authority in the relevant spiritual context as the love and authority of the Creator.¹²⁰ In this context sexual advances made by persons with religious authority may be perceived by those targeted for their attentions as an expression of moral authority that may not be defied.¹²¹ This cloak of religious/spiritual authority acts as a veil of secrecy that prevents disclosure and therefore eliminates prospects of legal redress.¹²²

Negative forces of the suspect's authoritative position are amplified by the prevalence of myths that enlarge the stature of the suspect, for instance by portraying the individual as 'sick' and possessed of an uncontrollable sex drive.¹²³ Such popular myths tend to trivialise ACSA.¹²⁴

sexual abuse in rural primary schools in Zimbabwe' (2001)25 *Child Abuse & Neglect* 1518.

117 *Ibid.*

118 *Ibid.*

119 JM Fogler *et al.* 'A theoretical foundation for understanding clergy-perpetrated sexual abuse' (2008)17 *Journal of Child Sexual Abuse* 307-310.

120 *Ibid.*

121 *Ibid.*

122 Fogler *et al. supra* note 119, 314.

123 TA Gannon & MR Rose 'Female child sexual offenders: Towards integrating theory and practice' (2008)13 *Aggression and Violent Behaviour* 450. Gannon and Rose observe that the general tendency to unequivocally and arbitrarily assume that suspects are victims of outside forces beyond their control is problematic as it creates a loophole via which suspects justify their criminal behaviour. The consequences of child sexual offences are trivialised and hence the seriousness of the offence fails to be appreciated; K Meursing *et al.* 'Child sexual abuse in Mataberland, Zimbabwe' (1995)41 *Social Science and Medicine* 1697. These authors observe that abuse of children has sometimes been justified by the force of men's nature; L Townsend & A Dawes 'Individual and contextual factors associated with the sexual abuse of children: A review of recent literature' in LM Richter *et al.* (eds) *Sexual Abuse of Young Children in Southern Africa* (2004)67; R Jewkes *et al.* 'If they rape me, I can't blame them: Reflections on gender in the social context of child rape in South Africa and Namibia' (2005)61 *Social Science and Medicine* 1814. Jewkes *et al.* note that although not all men sexually

3.2 The powerless position of the child victim

Victims of ACSA are often powerless in relation to offenders of the child.¹²⁵ Broadly, childhood refers to ‘the manner in which a given society perceives its children at a particular historical juncture and how such children are expected to relate to the adult world.’¹²⁶ Many constructions of childhood perceive children as undeveloped and incompetent.¹²⁷ The incompetent child is deemed to be unable to make rational decisions and in need of a level of understanding, knowledge and emotional stability¹²⁸ that can only be supplied by an adult presence because the child is incomplete, unfinished and lacking in maturity.¹²⁹ The expectation is that a child will grow and develop into adulthood and therefore maturity.¹³⁰ Autonomy as an aspect of childhood is a virtually unknown or unacknowledged concept because of the prevalence of adult perceptions of childhood.¹³¹ Given that childhood is a stage associated with dependency, children are often viewed as ‘subsidiaries’ of their parents and other caregiving adults,¹³² and are therefore expected to be submissive to adult authority.¹³³ Their inherently subordinate position exemplifies a

abuse children when aroused, this assumption explains the tendency to exclusively view child sexual offences as a biological issue.

¹²⁴ MR Burt ‘Cultural myths and supports for rape’ (1980)38 *Journal of Personality and Social Psychology* 217; KA Lonsway & LF Fitzgerald ‘Rape myths’ (1994)18 *Psychology of Women Quarterly* 134; GG Abel *et al.* ‘The measurement of the cognitive distortions of child molesters’ (1989)2 *Annals of Sex Research* 147.

¹²⁵ Bradshaw & Marks *supra* note 108, 277.

¹²⁶ B Rwezaura ‘Competing images of childhood in the social and legal systems of contemporary Sub-Saharan Africa’ (1998)12 *International Journal of Law, Polity & The Family* 254; RJR Levesque *Sexual abuse of children: A human rights perspective* (1999)44. Levesque notes that the diverse definition and construction of childhood is a major challenge to the protection of children from sexual abuse.

¹²⁷ J Fionda ‘Legal Concepts of childhood: An introduction’ in J Fionda (ed) *Legal concepts of childhood* (2001)9-12.

¹²⁸ *Ibid.*, 11.

¹²⁹ *Ibid.*

¹³⁰ Fionda *supra* note 127, 12.

¹³¹ J Garbarino ‘The human ecology of child maltreatment: A conceptual model for research’ (1977)39 *Journal of Marriage & Family* 725.

¹³² JS Rappaport ‘The legal system’s response to child abuse: A shield for children or a sword against the constitutional rights of parents?’ (1991-1992)9 *Journal of Human Rights* 264; Malloy *supra* note 92, 890; Geiser *supra* note 92, 1032; Archard *supra* note 94, 6.

¹³³ Fionda *supra* note 127, 8; Malloy *supra* note 92, 890-892. Malloy observes that the law empowers parental figures and adults by giving them legal responsibility of the care of their children. This simultaneously disempowers children.

dependency that clearly spells vulnerability to a range of abuse.¹³⁴ McBride therefore notes that children are ‘*ab initio* a passive target for sexual abuse.’¹³⁵

The already powerless position of CSA victims is exacerbated by the acceptance of the myth that children lie about being abused, and that they seduce adults.¹³⁶ Such myths increase children’s vulnerability because it is difficult to break through the barrier of dis-/unbelief set up by such random verbiage with a semblance of plausibility, which creates a climate in which the child is intimidated by the prospect of dis-/unbelief and tends therefore to hold back rather than disclose. The prospect of witnessing in court is particularly daunting, in fact traumatising, for a young child (the heavy-handedness of court procedure is renowned).¹³⁷ Thus officialdom unwittingly plays into the hands of the accused, whose position overall (ironically) is therefore strengthened, ultimately by the defencelessness of the child.

3.3 The ambivalent position of non-offending adults

The term ‘non-offending adults’ is used in this section to refer to adults in close proximity to victims and suspects and who are not involved in sexual offending against children but may be aware of the abuse. Children’s defencelessness puts the spotlight on non-offenders to assist in bringing suspects to book, for example by disclosing the offence to law-enforcement authorities, testifying for the prosecution and offering moral support for the victim,¹³⁸ which can be very helpful, particularly in the prosecution of CSA cases.¹³⁹ This

¹³⁴ NR King 1984 ‘Exploitation and abuse of older family members: An overview of the problem’ in JJ Costa (ed) *Abuse of the elderly* (1984)58.

¹³⁵ McBride *supra* note 110, 457.

¹³⁶ T Harbert *et al.* ‘Measurement and modification of incestuous behaviour: A case study’ (1974)34 *Psychology Reports* 80. Harbert *et al.* view children’s subsequent responsiveness to sexual abuse as seductive techniques, contributing to sexual abuse by acquaintances like fathers; P Sloane & E Karpinski ‘Effects of incest on the participants’ (1942)12 *American Journal of Orthopsychiatry* 670; Sloane and Karpinski contend that in several cases, sexual relations take place over long periods and as such, it is evident that victims are seductively compliant despite their protestations of innocence; P Machotka *et al.* ‘Incest as a family affair’ (1967)6 *Family Process* 100. Machotka *et al.* aver that on account of poor relations between mothers and daughters, children seduce fathers in sexual relations in furtherance of revenge against mothers; S Lewis *An adult’s guide to childhood trauma and grief: Understanding traumatised children in South Africa* (1999)108. Despite the general assumption that children seduce adults, Lewis demonstrates that sexual appeal is hardly the motivation behind the sexual abuse of children. Rather, offenders tend to target powerless and vulnerable children.

¹³⁷ Burt *supra* note 124, 217.

¹³⁸ E Jonzon & F Lindblad ‘Disclosure, reactions, and social support: Findings from a sample of adult

ideal role is, however, compromised by the web of relations affected in the instance of ACSA (for example parents and spouses who are related to the non-offending parties such as friends and professional colleagues), with the result that non-offenders tend to be ambivalent as witnesses in ACSA cases.¹⁴⁰ Characteristic tendencies are evasive tactics and negative attitudes towards victims,¹⁴¹ which exemplifies their competing loyalties towards victim and suspect. In many ACSA cases, non-offending adults are confronted with the negative consequences of pursuing criminal prosecution or what Massat and Lundy have termed 'reporting costs',¹⁴² which refer to costs such as loss of companionship (e.g.

victims of child sexual abuse' (2004)9 *Child Maltreatment* 195. Jonzon and Lindblad observed that children are often abused by one of their parents, a step-parent or somebody in a caring position towards the child. As such, non-offending parental figures such as mothers play a critical role in ensuring that suspects are held to account. The mother's role is even more critical because they are often the first people children turn to when disclosing sexual abuse; L Lawson & M Chaffin 'False negatives in sexual abuse disclosure interviews: Incidence and influence of caretaker's belief in abuse in cases of accidental abuse discovery by diagnosis of STD' (1992)7 *Journal of Interpersonal Violence* 532. Lawson and Chaffin reported that most of the children, constituting a percentage of 63, whose parents were willing to believe that their children might have been sexually abused, did disclose whereas only a small proportion of the children, constituting a percentage of 17, whose parents refused to accept this possibility disclosed.

¹³⁹ See generally S Lamb & S Edgar-Smith 'Aspects of disclosure mediators of outcome of childhood sexual abuse' (1994)9 *Journal of Interpersonal Violence* 307-326. Lamb and Edgar-Smith generally observed that positive and supportive response in child sexual abuse cases is often characterised by showing concern, empathy, and believing the victim, whereas a negative and unhelpful response is characterised by blaming the victim, denial, minimisation of the event or abandonment. On the other hand, non-supportive response occurs when a confidant fails to take appropriate protective action, does not believe the child's account or blames the child for the abuse.

¹⁴⁰ DM Elliott & J Briere 'Forensic sexual abuse evaluations of older children: Disclosure and symptomatology' (1994)12 *Behavioural Sciences & the Law* 274. Elliott and Briere observed that mothers were less likely to be supportive when the suspect resided with them and consequently, children whose mothers were non-supportive were significantly more likely to recant their initial disclosure of abuse than children whose mothers were supportive; AN Elliott & CN Carnes 'Reactions of non-offending parents to the sexual abuse of their child: A review of literature' (2001)6 *Child Maltreatment* 314. Elliott and Carnes found that most mothers partially or fully believed their child's disclosures and were partially or fully supportive; I Hershkowitz *et al.* 'Exploring the disclosure of child sexual abuse with alleged victims and their parents' (2007)31 *Child Abuse & Neglect* 119. Hershkowitz *et al.* noted that generally, children who reported being abused by familiar perpetrators are more likely to face unsupportive parental reactions than children who reported being abused by unfamiliar perpetrators. MR Bolen & JL Lamb 'Ambivalence of non-offending guardians after child sexual abuse disclosure' (2004)19 *Journal of Interpersonal Violence* 196 & 201. Bolen and Lamb note that the majority of non-offending mothers experience ambivalent feelings, unsure whether to formerly disclose the sexual abuse to have the suspect prosecuted. Non-offending mothers who have the greatest costs associated with disclosure often do not make formal disclosure to enforcement authorities as they cannot afford to lose the support provided by the suspect.

¹⁴¹ JB Sincoff 'Ambivalence and defence: Effects of a repressive style on normal adolescents' and young adults' mixed feelings' (1992)101 *Journal of Abnormal Psychology* 251.

¹⁴² CR Massat & M Lundy 'Reporting costs to non-offending parents in cases of intrafamilial child

spouses), shame, loss of a caregiver where the suspect assumes that role, and so forth.¹⁴³ It is therefore a common occurrence for non-offending adults such as mothers to sacrifice the need to protect children from sexual abuse at the altar of social relationships.

Shakeshaft and Cohan¹⁴⁴ have described the ambivalence of non-offending parties where CSA is perpetrated in educational organisations. They point out that non-offending school administrators have feelings of ambivalence as their loyalties are divided, often unsure whether to protect fellow offending teachers or to protect the victim.¹⁴⁵ To protect the reputation of their professions and guard against shame, non-offending administrators often strive to ensure that allegations of their offending colleagues are displaced.¹⁴⁶ Reliance on other surrounding factors such as the child victim's perceived seductiveness often becomes inevitable in an effort to trivialise the suspect's actions. Within the context of religious communities, Fogler *et al.*'s¹⁴⁷ description is instructive. Ambivalence in this context can take the form of exclusion of the victim in religious settings.¹⁴⁸ Given that religious communities are such powerful definers and enforcers of moral behaviour, it is often more shameful for such communities to be viewed as harbouring abuse.¹⁴⁹ Thus, the need to protect reputation often takes precedence over confrontation of CSA in these communities.¹⁵⁰ Within the context of family, Bolen and Lamb¹⁵¹ demonstrate that non-offending guardians often respond with ambivalence, particularly where the consequences of disclosing CSA within the family are likely to cause a financial strain and shame to the family. Essentially, despite the centrality of non-offending adults in the effective prosecution of child sexual offences, their positioning in the ACSA web often diminishes their pivotal role.

sexual abuse' (1998)77 *Child Welfare* 371.

143 *Ibid.*, 378-386.

144 C Shakeshaft & A Cohan 'Sexual abuse of students by school personnel' (1995)76 *Phi Delta Kappan* 9.

145 *Ibid.*

146 *Ibid.*

147 Fogler *et al. supra* note 119, 315-316.

148 *Ibid.*

149 *Ibid.*

150 *Ibid.*

151 Bolen & Lamb *supra* note 140, 195-196.

The realities pertaining to the delicate position of the various parties involved in ACSA poses a number of challenges in ACSA prosecutions. These include the trauma of sexual abuse suffered by the victim at the hands of an acquaintance in a relationship of trust and the possible lack of cooperation with the criminal-justice system on account of the costs that come with criminal prosecution.

3.4 General dearth of medical evidence

Medical evidence plays a crucial role in the effective prosecution of child sexual offences. Raulinga notes that in child sexual offences the opinion of such experts is indispensable.¹⁵² Where the medical examination findings are abnormal they play a crucial role in corroborating CSA allegations. Legal and social systems rely heavily on the outcomes of the medical evaluation, and as such, medical evidence can set the criminal process in motion.¹⁵³ There is indeed a growing body of medical literature on the diagnosis of sexual abuse of children. In some cases medical professionals have been able to offer well-founded opinions on the correspondence of medical examination findings with CSA.

Despite the critical importance of medical evidence its role in ACSA prosecutions may be limited by anatomical findings that are inconsistent with abuse; in fact, it happens increasingly that findings that used to be considered abnormal before are being overturned on suspicion of other causes besides abuse.¹⁵⁴ Even with histories of penetration, for some CSA victims, there is hardly any corroborative medical evidence.¹⁵⁵ There are extreme cases where suspects confess to sexually offending against children, yet the findings of medical examination cannot corroborate the charge of child sexual offending.¹⁵⁶ These contentions are not mere rhetoric. There is ample research demonstrating that medical evidence of injury, sexually transmitted diseases and seminal fluids are often absent in CSA

¹⁵² TJ Raulinga 'Expert testimony in cases of child sexual abuse: Does it assist judicial officers to arrive at the truth?' (2002)3 *CARSA* 27.

¹⁵³ Paine & Hansen *supra* note 109, 271.

¹⁵⁴ J Bays & D Chadwick 'Medical diagnosis of the sexually abused child' (1993)17 *Child Abuse & Neglect* 94-95.

¹⁵⁵ *Ibid.*, 92.

¹⁵⁶ DL Kerns *et al.* 'Medical findings in child sexual abuse cases with perpetrator confessions' (1992)146 *Pediatrics* 494. Kern *et al.* reviewed 83 cases of CSA in which the perpetrator had confessed at the time of the medical examination. Normal genital examinations were found in 60% of all confession cases.

cases.¹⁵⁷ These discrepancies should not merely be academic concerns. Where medical evidence is implicitly made a prerequisite in proving child sexual offences, it is highly probable that charging and prosecuting decisions will not be made in the absence of medical evidence.

¹⁵⁷ Heger *et al.* 'Children referred for possible sexual abuse: Medical findings in 2384 children' (2002)26 *Child Abuse & Neglect* 645. Heger *et al.*'s study sought to compare rates of positive medical findings in a 5-year prospective study of 2384 children, referred for evaluation of possible sexual abuse. Children were referred after they disclosed sexual abuse, because of behavioural changes, exposure to an abusive environment, and because of possible medical conditions. A total of 96.3% of all children referred for evaluation had a normal medical examination; 95.6% of children reporting abuse were normal, 99.8% who were referred for behavioural changes or exposure to abuse were also normal and 92% of the children referred for evaluation of medical conditions, were found to be normal. However, in all these referrals, the medical history had indicated that the majority of the children experienced severe abuse, defined as penetration of vagina or anus; JA Adams *et al.* 'Examination findings in legally confirmed child sexual abuse: It's normal to be normal' (1994)3 *Pediatrics* 310. Adam *et al.*'s study involved children between the ages of 8 months to 17 years. Genital examination findings in girls were normal in 28% of the cases. 49% were nonspecific, 9% suspicious and abnormal in 14%. Of the children that reported penile-genital contact, only 1% of the cases registered abnormal genital examination findings. Ultimately, the study concluded that for sexually abused children, it is absolutely 'normal to be normal'; VJ Palusci *et al.* 'Medical assessment and legal outcome in child sexual abuse' (1999)4 *Arch Pediatr Adolesc Medi* 388. Palusci *et al.* examined 497 children, between the ages of 2 and 17 years. Other than the presence of behavioural symptoms, no child registered abnormal genital findings by way of sexually-transmitted diseases; AR De Jong & M Rose 'Frequency and significance of physical evidence in legally proven cases of child sexual abuse' (1989)84 *Pediatrics* 1024. De Jong and Rose's analysis of legally proven cases of child sexual abuse equally found that physical evidence in the form of seminal fluids detected by laboratory analysis were present in only 29% of the cases examined. Up to 71% of the cases had no physical evidence and therefore, there was no corroborative evidence; CW Christian *et al.* 'Forensic evidence findings in prepubertal victims of sexual Assault' (2000)106 *Pediatrics* 100. Christian *et al.* examined 273 children under the age of 10 years. Some form of forensic evidence was identified in 24.9% of children, all of whom were examined within 44 hours from the time of the assault. After 24 hours, all evidence, with the exception of 1 pubic hair, was recovered from clothing or linens. No swabs taken from the child's body were positive for blood after 13 hours or semen after 9 hours. The authors concluded that abnormal genital findings are extremely rare in CSA cases. Abnormal genital findings are often apparent where medical examination is conducted within 24 hours from the time of the sexual assault; AB Berenson *et al.* 'A case-control study of anatomic changes resulting from sexual abuse' (2000)182 *Am J Obstet Gynecol* 820. Berenson *et al.*'s study sought to identify hymenal characteristics associated with sexual abuse among female children between the ages of 3 and 8 years. The study found that vaginal discharge is more frequent in abused children. However, no difference was noted in the percentage of abused versus non-abused children. The authors concluded that genital examination of the abused child rarely differs from that of the non-abused child; ND Kellogg *et al.* 'Genital anatomy in pregnant adolescents: "Normal" does not mean nothing happened'" (2004)113 *Pediatrics* 67. Kellogg *et al.*'s study summarised medical history and genital examination findings in 36 adolescents who were pregnant at the time of or shortly before their sexual abuse examination. The 36 pregnant adolescent girls were presented for sexual abuse evaluations to determine the presence or absence of genital findings that indicate penetrating trauma. Historical information and photograph documentation were reviewed. Only 2 of the 36 subjects had definitive findings of penetration. The authors drew the attention of criminal-justice systems to the need to understand that generally, vaginal penetration does not result in observable evidence of healed injury. Ultimately, the research demonstrated that 'normal does not mean nothing happened'.

The challenge of inadequate medical evidence is particularly vexing in ACSA cases because of the dynamics peculiar to this type of offence, some of which pertain to the nature that the sexual abuse takes, the delay in conducting the medical examination and the relationship of trust between victim and suspect. It is common for ACSA victims not to make timely disclosure of CSA. However, delay in disclosure stands out as a major explanation for normal examination findings. Normal medical examination findings generally reveal no abnormality of the genitalia that could indicate whether CSA occurred;¹⁵⁸ consequently the child's allegations of abuse by an acquaintance cannot be confirmed for lack of medical evidence.¹⁵⁹ In fact study findings are indicative that genital injuries, especially those sustained by children, heal rapidly, sometimes leaving no lesions worth noting for prosecutorial purposes.¹⁶⁰ The general tendency to delay disclosure is clearly a significant reason why medical evidence of ACSA is not forthcoming or unlikely.

¹⁵⁸ Royal College of Paediatrics and Child Health (RCPCH) *The physical signs of child sexual abuse* (2008)121.

¹⁵⁹ Christian *et al. supra* note 157, 100 & 102. Christian *et al.* note that children examined within 72 hours of their assault are more likely to have identifiable physical evidence. Examinations after 72 hours are most likely to register normal findings because of the rapid healing process; ME Rimsza & EH Niggemann 'Medical evaluation of sexually abused children: A review of 311 cases' (1982)69 *Pediatrics* 11. Rimsza and Niggemann reported that 36% of children examined within 24 hours of penetrating sexual assault had evidence of genital trauma but only 13% had such evidence when seen after 24 hours; D Muram 'Child sexual abuse: Relationship between sexual acts and genital finding (1989)13 *Child Abuse & Neglect* 213. Muram found that irritation and inflammation of the genitalia, found in 21 of 31 child victims seen within one week of sexual assault, were not seen at all in victims after a delay of a week or more.

¹⁶⁰ J McCann *et al.* 'Genital injuries resulting from sexual abuse: A longitudinal study' (1992)89 *Pediatrics* 307. McCann *et al.*'s study involved children who incurred injuries as a result of sexual assaults. The subjects who were 4 months, 4 years and 9 years of age, were followed up for periods ranging from 14 months to 3 years. Signs of acute damage disappeared rapidly and wounds healed without complications. Over time, injuries smoothed. Even severe injuries healed with minimal scar tissue and left only the slightest evidence of the trauma; J McCann & J Voris 'Perianal injuries resulting from sexual abuse: A longitudinal study' (1993)91 *Pediatrics* 390. McCann and Voris examined children who sustained perianal injuries as a result of sexual assault. The subjects were followed for a period ranging from 1 week to 14 months. Initial examinations revealed a variety of genital abnormalities. In a period ranging from 1 week and 5 weeks, wounds in many subjects had healed. Serious injuries had disappeared by the 12 to 14 months after the sexual assaults; J McCann *et al.* 'Healing of Hymenal injuries in prepubertal and adolescent girls: A descriptive study' (2007)119 *Pediatrics* 1103. In this most recent study, McCann *et al.* sought to identify the healing process and outcome of hymenal injuries in prepubertal and adolescent girls. All the pubertal adolescents examined were sexual assault victims. It was found that hymenal injuries healed at various rates and except for the deeper lacerations, left no evidence of the previous trauma. Abrasions and mild submucosal haemorrhages disappeared within 3 to 4 days, whereas marked haemorrhages persisted for 11 to 15 days. The research indicated that hymenal injuries healed rapidly and except for the more extensive lacerations, the abuse left no evidence of a previous injury.

Sexual offences involving the use of force may leave abnormalities that are noticeable in the course of medical examination, but ACSA offenders tend to use insinuating methods known as grooming to exploit the child's powerlessness without resorting to violence.¹⁶¹ Gillespie¹⁶² explains that grooming is done by befriending a child to gain his/her confidence and trust so that the offender can indulge his/her intentions without encountering strong resistance that might raise the alarm, under which circumstances injuries worth noting will not even result from penetration of orifices, especially in the case of older children.¹⁶³ Thus contrary to popular assumption, abuse is rarely attended by physical violence that can cause injuries worth noting as proof of abuse.

Most intimate offenders want continued access to their chosen victims. Based on this premise, non-penetrative sexual acts tend to be more prevalent because any violence against a child victim is likely to cause trauma and disclosure of the offence.¹⁶⁴ Kissing and fondling are therefore common in ACSA cases¹⁶⁵ and by their nature unlikely to leave identifiable traces that can serve as evidence against the accused. Lack of medical evidence

It was found that delays in disclosure and examination provide sufficient time for healing to occur; Kellog *supra* note 157, 68. Kellog's empirical findings affirmed McCann *et al.*'s conclusions in demonstrating that a major reason for normal genital medical findings among the pregnant adolescents was the rapid healing process. It was found that acute injuries were apparent as per the medical history in most of the cases but the injuries healed completely; A Heppenstall-Heger *et al.* 'Healing patterns in anogenital injuries: A longitudinal study of injuries associated with sexual abuse, accidental injuries, or genital surgery in the preadolescent child' (2003)112 *Pediatrics* 829. Heppenstall-Heger *et al.* reported that anogenital trauma heals quickly, often without scars; CD Berkowitz 'Healing of genital injuries' (2011)20 *Journal of Child Sexual Abuse* 538. Berkowitz observed that superficial injuries generally heal without residual evidence. The healing process occurs at the rate of one millimetre per 24 hours and is usually complete in 48-72 hours, though the process does continue for up to six weeks; Heger *et al. supra* note 157, 654.

¹⁶¹ McBride *supra* note 110, 449. McBride observes that the offender seeks domination through enticement, encouragement or instruction, and may resort to threats, intimidation or physical coercion only when faced with a recalcitrant victim.

¹⁶² A Gillespie 'Child protection on the internet challenges for criminal law' (2002)14 *Child and Family Law Quarterly* 411; L Woods & L Porter 'Examining the relationship between sexual offenders and their victims: Interpersonal differences between stranger and non-stranger sexual offences' (2008)14 *Journal of Sexual Aggression* 69. Woods and Porter observe that stranger CSA abuse was significantly more likely to be associated with dominant and hostile offence styles such as approaching the victim with a blitz attack, or the offender beating or using a weapon to threaten or control the victim. In comparison, ACSA was found to be associated with less violent and more personal offence styles, reflecting pseudo-submission and compliance-gaining, such as approaching the victim with a trust approach, making the victim participate in the attack.

¹⁶³ Delay in disclosure creates ample opportunities for healing to take course.

¹⁶⁴ Heger *et al. supra* note 157, 654.

¹⁶⁵ *Ibid.*

can therefore be seen as a prominent feature that tends to stymie ACSA prosecutions because the victim is often, or usually the only witness who can verify that the wrongful act did take place. Thus in light of the circumstances sketched above it must be reiterated that lack of medical evidence is bound to be a significant stumbling block in following up on ACSA cases for prosecutorial purposes, which implies that the justice gap in ACSA prosecutions can only be bridged if justice systems develop and give due weight to mechanisms that actively and purposefully seek to fill the gap as indicated so that ACSA prosecutions can go forward to best advantage.

3.5 Delayed disclosure

Disclosure of ACSA is generally divisible into formal and informal types. In the first instance disclosure is done in a formal statement submitted to law-enforcement authorities,¹⁶⁶ while informal disclosure simply means that the agencies through which it is done are not formal.¹⁶⁷ Disclosure is pivotal in ACSA prosecutions because the legal system's involvement in child sexual offences is dependent on disclosure to law enforcement agencies. When children fail to disclose sexual abuse in time they run the risk of being subjected to longer or repeated abuse, and/or they improve the chances that other children may also be abused, and that the defence will be emboldened to attack the victim's credibility.¹⁶⁸

Despite the critical need for disclosure, very few victims do so,¹⁶⁹ with the result that a paltry number of cases end up being prosecuted. However, even with the many obstacles that children face in deciding whether to disclose, some do manage to take the step to reveal their plight. Nonetheless, the disclosure is often delayed.¹⁷⁰ Collings has

¹⁶⁶ K Keary & C Fitzpatrick, 'Children's disclosure of sexual abuse during formal investigation' (1994)18 *Child Abuse & Neglect* 543.

¹⁶⁷ *Ibid.*

¹⁶⁸ LT Gries *et al.* 'Factors associated with disclosure during child sexual abuse assessment' (1996)5 *Journal of Child Sexual Abuse* 2.

¹⁶⁹ SJ Collings 'How do sexually abused children disclose? Towards an evidence-based approach to practice' (2006)19 *Acta Criminologica* 37.

¹⁷⁰ J Long *et al.* '10 strategies for prosecuting child sexual abuse at the hands of a family member' (2011) *Strategies* 2; HH Filipas & SE Ullman 'Child sexual abuse, coping responses, self-blame, Post-traumatic Stress Disorder, and adult sexual revictimisation' (2006)21 *Journal of Interpersonal Violence* 652. In Ullman and Filipas' student sample, 28% of females and 13% of males reported a

pointed out that ‘immediate disclosure in CSA is the exception rather than the norm.’¹⁷¹ ACSA victims are even more reluctant because of the relationship of trust which they have to betray to disclose.¹⁷² Fears of retribution, abandonment, shame, guilt or punishment of the suspect in case of criminal prosecution and disruption of the existing social settings like the family militate against timely disclosure.¹⁷³ Some child victims express concern for the physical and emotional well-being of the intimate suspect.¹⁷⁴ Further, given the ambivalence of non-offending adults, there is no guarantee that recognition of CSA through informal disclosure by non-offending adults will translate into a formal disclosure to law enforcement authorities.¹⁷⁵

CSA experience before the age of 14 years. Although two-thirds of respondents had disclosed their abuse at some time, most CSA victims only disclosed a year or more after the abuse had taken place; EW Smith *et al.* ‘Delay in disclosure of childhood rape: Results from a national survey’ (2000)²⁴ *Child Abuse and Neglect* 273. Smith *et al.* observed that delayed disclosure of childhood rape was very common, and long delays were typical; CM Arata ‘To tell or not to tell: Current functioning of child sexual abuse survivors who disclosed their victimisation’ (1998)³ *Child Maltreatment* 63. Arata observes that disclosure tends to be less common with more severe levels of assault and when the assailant is related to the victim; CS Tang ‘Childhood experience of sexual abuse among Hong Kong Chinese college students’ (2002)²⁶ *Child Abuse & Neglect* 23. Tang found that in a sample of Hong Kong Chinese college students who reported abuse, only 39% made timely disclosure of abuse during childhood; A Browne ‘The victim’s experience: Pathways to disclosure’ (1991)²⁸ *Psychotherapy: Theory, Research, Practice, Training* 153. Browne observed that disclosure is almost always an on-going process. It may begin with an initial quite dramatic first step, or it may manifest itself as a series of tentative revelations, hints, and explorations. It may therefore be delayed contrary to the expectation of criminal-justice systems; RTA Roesler ‘Reactions to disclosure of childhood sexual abuse: The effect on adult symptoms’ (1994)¹⁸² *Journal of Nervous and Mental Disease* 618-624; D Finkelhor *et al.* ‘Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors’ (1990)¹⁴ *Child Abuse & Neglect* 21.

¹⁷¹ Collings *supra* note 169, 37.

¹⁷² Smith *et al. supra* note 170, 273. Smith *et al.* observed that CSA by strangers is associated with more rapid disclosure compared child sexual abuse by acquaintances; I Hershkowitz *et al.* ‘Trends in children’s disclosure of abuse in Israel: A national study’ (2005)²⁹ *Child Abuse & Neglect* 1203. Hershkowitz *et al.* observe that children of all ages are less likely to disclose when an acquaintance such as a parent is the suspect; TB Goodman-Brown *et al.* ‘Why children tell: A model of children’s disclosure of sexual abuse’ (2003)²⁷ *Child Abuse and Neglect* 527; SE Ullman ‘Social reactions to child sexual abuse disclosures: A critical review’ (2003)¹² *Journal of Child Sexual Abuse* 97.

¹⁷³ RC Summit ‘The Child Sexual Abuse Accommodation Syndrome’ (1983)⁷ *Child Abuse and Neglect* 178.

¹⁷⁴ *Ibid.* Summit explains these ambivalent reactions in five stages, notably, secrecy, helplessness, entrapment and accommodation, delayed and unconvincing disclosure and retraction.

¹⁷⁵ D Finkelhor *et al.* ‘Police reporting and professional help seeking for child crime victims: A review’ (2001)⁶ *Child Maltreatment* 17-30. Finkelhor *et al.* demonstrate that disclosure of CSA entails two stages, notably, the recognition stage and the consideration stage. Even after recognition of CSA by non-offending adults, there is no guarantee of criminal prosecution since confidants and other non-offending parties weigh the costs and benefits of having the abuse disclosed beyond the parameters of close acquaintances.

Delayed disclosure by ACSA victims exposes them to inordinate risks. First, delayed disclosure betokens delayed medical examination and greatly reduced chances of turning up medical evidence as a result of rapid healing of injuries in youthful victims. Secondly, delay undermines the victim's credibility as it runs counter to the widely held assumption that children report sexual abuse immediately.

It is against the above backdrop that the argument for special measures that take cognisance of these realities gains credence. Having discussed the realities of ACSA, it is imperative to discuss why BSE, protective measures and restorative justice should be accorded greater weight in ACSA prosecutions.

4 Prerequisites for successful prosecution of ACSA cases in light of the distinctive dynamics of ACSA

4.1 Evidence to prove ACSA beyond reasonable doubt

The first logical prerequisite for the successful prosecution of ACSA cases is sufficient evidence to prove that the child was sexually abused. Palusci *et al.* note that abnormalities found during medical examinations often increase the chances of meeting the 'beyond reasonable doubt' threshold in the prosecution of child sexual offences.¹⁷⁶ However, as discussed above, ACSA cases are inclined to leave hardly any sign that can be interpreted as medical evidence, which seriously jeopardises chances of a guilty verdict.¹⁷⁷ Kreston observes that to many, the absence of medical corroboration implies a case that will founder on lack of proof beyond reasonable doubt.¹⁷⁸ This trend continues unabated despite assurances by clinicians that medical evidence is not definitive in proving abuse.

Relativising medical evidence raises the question whether alternative means can be devised to deal with the burden of proof. As noted, abuse cannot be ruled out for lack of medical evidence¹⁷⁹ because mental scarring (i.e. psychological damage) is a reality on par

¹⁷⁶ Palusci *et al. supra* note 157, 388.

¹⁷⁷ *Ibid.*

¹⁷⁸ SS Kreston 'An inconvenient truth: On the absence of definitive corroborative medical evidence in child sexual abuse cases' (2007)8 *Child Abuse Research in South Africa* 93.

¹⁷⁹ AB van As *et al.* 'Child rape-patterns of injury, management and outcome' (2001)91 *S Afr Med J* 1037.

with physical scarring.¹⁸⁰ Heger *et al.* observe that ‘medical, social, and legal professionals have relied too heavily on the medical examination in diagnosing child sexual abuse’ and suggest that the time has come for medical and legal professionals to change their approach.¹⁸¹ De Jong and Rose add that it is problematic for a criminal-justice system to view medical evidence as the only form of evidence with probative value in CSA prosecutions.¹⁸² Adam *et al.* recommend a move away from such an exclusionary stance.¹⁸³ On this score Raulinga warns that ‘[c]ourts should be careful not to draw the wrong inferences based on outdated assumptions or myths that have no scientific basis, such as ‘the absence of medical evidence to corroborate the abuse points to a false complaint having been made.’¹⁸⁴

The dynamics pertaining to ACSA create strong legal and policy arguments for reliance on evidence of experts in behavioural sciences, which means that BSE as evidential material in ACSA cases should be emphasised, and that further emphasis is called for in South Africa where it is already admitted. In Uganda the matter should be broached with some urgency as it has yet to be introduced in ACSA prosecutions.

Advocacy of BSE does not imply reduced significance of medical evidence. Indeed medical evidence is crucial when present, but if absent or inadequate BSE must step into the breach, albeit in a complementary role and not as a surrogate.¹⁸⁵ Further, BSE is not a

¹⁸⁰ See generally JN Briere & DM Elliot ‘Immediate and long term impacts of child sexual abuse’ (1994)4 *Future Child* 54-69; I Schutte ‘The prevention and early detection of sexual abuse’ (2000)1 *CARSA* 8; Ullman *supra* note 172, 89-121; Jonzon & Lindblad *supra* note 138,190-200; I Hershkowitz *et al. supra* note 140, 111-113; JR Conte & JR Schuerman ‘Factors associated with an increased impact of child sexual abuse’ (1987)11 *Child Abuse and Neglect* 201-211; C Davenport *et al.* ‘Opinions on the traumatising effects of child sexual abuse: Evidence for consensus’ (1994)18 *Child Abuse & Neglect* 725-738; RA Hibbard & GL Hartman ‘Behavioural problems in alleged sexual abuse victims’ (1992)16 *Child Abuse and Neglect* 759-76; L Chantler *et al.* ‘The psychological evaluation of child sexual abuse using the Louisville behaviour checklist and human figure drawing’ (1993)17 *Child Abuse & Neglect* 271-279; KA Kendall-Tackett *et al.* ‘Impact of sexual abuse on children: A review and synthesis of recent empirical studies’ (1993)113 *Psychological Bulletin* 164-180. These authors, and many others, demonstrate that many sexually abused children display behavioural, cognitive and emotional reactions to their abuse.

¹⁸¹ Heger *et al. supra* note 157, 645.

¹⁸² De Jong & Rose *supra* note 157, 511.

¹⁸³ Adam *et al. supra* note 157, 310.

¹⁸⁴ Raulinga, *supra* note 152, 31.

¹⁸⁵ JEB Myers *et al.* ‘Expert testimony in child sexual abuse litigation’ (1989)68 *Nebraska Law Review* 64. Myers *et al.* affirm the complementarity of BSE, noting that although BSE is pivotal in prosecution of child sexual offences, exclusive reliance on it may be limited because in some cases, it ‘serves only

guarantee, however well applied, that prosecution will produce a conviction, hence expectations held of BSE need to be reasonable since overblown expectations can lead to wrong convictions due to overzealous endeavours to close the justice gap. Fitzpatrick warns that an 'overzealous attempt to tackle child sexual abuse should not cause the criminal-justice system to turn a blind eye to the falsely accused.'¹⁸⁶ A healthy balance should therefore be struck between reliance on BSE to assist the prosecutorial process, while ensuring, on the other hand, that false allegations are duly shown up.

4.2 Measures to strike a balance between the need to produce quality child-victim testimony without aggravating the trauma of ACSA

If the conditions under which BSE is applied are not optimally conducive ACSA, cases may be prosecuted in vain. Accuracy of the child victim's testimony is crucial because the victim is most likely the only witness and the non-offending adults are unreliable as a result of divided loyalties, as indicated above. Yet accurate testimony is hardly possible in view of the challenges facing the victim in court.¹⁸⁷ Besides the trauma of court procedure in the first place, an added ordeal resides in the violated trust of the relationship between the victim and the familiar suspect.¹⁸⁸ In Uganda the ACSA victim must directly face the accused, usually a trusted familiar, and attest the truthfulness of the condemning testimony in spite of the familiar suspect's direct presence, clearly a highly stressful experience that is

to establish that the child may have experienced some type of traumatic event.' Consequently, it may be fruitless and in fact problematic to exclusively rely on BSE to prove ACSA.

¹⁸⁶ TL Fitzpatrick 'Innocent until proven guilty: Shallow words for the falsely accused in a criminal prosecution for child sexual abuse' (1991-1992)12 *Bridgeport Law Review* 208.

¹⁸⁷ D Lorenzen 'The admissibility of expert psychological testimony in cases involving the sexual misuse of a child' (1987-1988)42 *Miami Law Review* 1038; LR Askowitz & MH Graham 'The reliability of expert psychological testimony in child sexual abuse prosecutions' (1993-1994)15 *Cardozo Law Review* 2034; GS Goodman *et al.* 'Testifying in criminal court: Emotional effects on child sexual assault victims' (1992)57 *Monographs of the Society for Research in Child Development* 153; SP Mele 'Major evidentiary issues in prosecutions of family abuse cases' (1984)11 *Ohio Northern University Law Review* 245. Generally, children as witnesses are confronted by challenges that directly impact on their credibility. Children are often confused by dates, times and frequencies of previous statements.

¹⁸⁸ D Finkelhor & A Browne 'The traumatic impact of child sexual abuse: A conceptualisation' (1985)55 *American Journal of Orthopsychiatry* 530-535. Finkelhor and Browne note that CSA exposes child victims to trauma in the form of betrayal, powerlessness, and stigmatisation, particularly where the offender is in a position of trust with the child victim; C Eastwood & W Patton 'The experiences of child complainants of sexual abuse in the criminal-justice system' (2003) *Trends and Issues* 3.

bound to destabilise and militate against the accuracy of the testimony, borne out by a good number of probably inevitable instances of incoherence and inconsistency.¹⁸⁹ Such testimony erodes the child witness's credibility in the eyes of the court, which construes the rationale from it that the imperfections of the testimony are attributable to the child's immaturity which is manifest as cognitive-psychological deficits that prevent the child from giving consistent, spontaneous, and detailed reports of the sexual abuse visited upon them. And since the prosecution's case is often fatally dependent on the child's testimony the credibility issue can (and frequently does) undermine the case for the prosecution. As Flint¹⁹⁰ puts it, the trial process often becomes a 'credibility match' between the child victim and the accused with the child often losing the match.

Alternative measures to aid the prosecution's case, given the risk attending the victim's capacity to testify effectively, are clearly necessary according to research, which shows that protective measures are conducive to more accurate testimony because the child's concentration and mental alertness generally improve as the trauma of facing the accused and the intimidating court appearance diminish;¹⁹¹ after all the trauma experienced by the child is essentially caused by 'fear of seeing the accused'¹⁹² and the martyrdom of merciless probing of cross-examination.

4.3 Sentencing mechanisms cognisant of costs of criminal prosecution

Criminal prosecution of ACSA brings with it a number of corollaries that take a toll on the victim. One of these is the prospective loss of a primary caregiver where that is apposite. Delayed disclosure and non-offending parties' lack of cooperation in prosecutions are largely attributable to fear of the negative consequences of criminal prosecution. These are significant considerations in determining sentence, failing which the victim is exposed to

¹⁸⁹ Goodman-Brown *et al. supra* note 172, 525–540. Results by Goodman-Brown *et al.* indicated that fear of negative consequences, and perceived responsibility on the part of the child, affect their effectiveness in the prosecution process; KM Burke 'Evidentiary problems of proof in child abuse cases: Why family and juvenile courts fail' (1973-1974)13 *Journal of Family Law* 828-832.

¹⁹⁰ RL Flint 'Child sex abuse accommodation syndrome: Admissibility requirements' (1995)23 *American Journal of Criminal Law* 181.

¹⁹¹ Eastwood & Patton *supra* note 188, 4. See also CR Mathias & N Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011)19 *International Journal of Children's Rights* 251.

¹⁹² Eastwood *supra* note 188, 3.

added risk. For instance, if the suspect's caregiving role is ignored the victim's right, besides others, to care, housing and shelter is compromised, thus accentuating the need to include restorative justice in the sentencing equation. Daly has noted with approbation that restorative justice can be combined to advantage with retribution to protect the child victim's interests.¹⁹³

5 Conclusion

Having positioned ACSA within the broader constitutional frameworks of South Africa and Uganda, this chapter has explained the distinctiveness of ACSA. In light of these dynamics, the chapter has underscored three prerequisites for successful ACSA prosecution, notably, evidence sufficient to prove ACSA, child testimony that is credible, and sentencing mechanisms that are cognisant of the 'costs' of criminal prosecution. These prerequisites accentuate the role of BSE, protective measures and restorative justice. It should be noted that this chapter presents the basic minimum requirements for successful prosecution of ACSA. The mechanisms referred to here as aids to prosecution will not necessarily improve the ACSA conviction rate and may even fail to secure convictions for extraneous reasons beyond the scope of this study. However the uncertainty must be weighed against certain failure in the absence of such measures.

The next chapter treats the role of BSE in ACSA prosecutions in context with the justice systems of South Africa and Uganda. The gaps apparent in the current approaches of the two criminal-justice systems are identified. Recommendations are made on how these gaps should be addressed so that BSE plays its ideal role in ACSA prosecutions.

¹⁹³ K Daly 'Reconceptualising sexual victimization and justice' in I Vanfraechem, A Pemberton & F Ndahinda (eds) *Justice for victims: Perspectives on rights, transition and reconciliation* (2014)375-395; K Daly 'Restorative justice and sexual assault: An archival study of court and conference cases' (2005) *British Journal of Criminology* 338-340.

CHAPTER THREE: ASSESSING THE ROLE OF BEHAVIOURAL SCIENCE IN ACSA PROSECUTIONS IN SOUTH AFRICA AND ITS POTENTIAL IN UGANDA

1 Introduction

The previous chapter described the distinctiveness of ACSA with reference to three prerequisites for the successful prosecution of ACSA cases. These three prerequisites are evidence sufficient to prove ACSA beyond reasonable doubt, measures cognisant of the need for reliable and credible child victim testimony despite the traumatic nature of ACSA, and sentencing mechanisms that make allowances for the costs of criminal prosecution. The need to import BSE as an aid to prosecution is evident in light of the need for sufficient evidence to prove child sexual offending beyond reasonable doubt. The role of BSE in South Africa and Uganda, respectively, is discussed in this chapter, first with reference to benchmarked standards for its assessment as implemented in the form of substantive as well as background evidence, and then in relation to implementation deficiencies, together with recommendations towards remediation, to which end the discussion draws on the USA justice system where BSE has been a steady feature for a number of years. Finally, since it can be pressed into service in the defence cause, the application of BSE is discussed as a means of exposing false allegations of ACSA.

2 Relevance of behavioural science evidence in determining whether child sexual abuse has occurred (diagnostic evidence)

All too often, the definition of substantive or corroborative evidence in CSA cases is too narrow. Despite the prevalence of plainly observable evidence of the psychological and emotional effects of ACSA, the inordinate faith placed in medical evidence often causes criminal-justice systems to overlook evidential material manifest as children's idiosyncratic behaviour that can be read as indicative of their recent trauma. To date, the role of BSE in the successful prosecution of CSA cases is undisputed in many justice systems including South Africa's. Over the years, BSE has served two purposes - as evidence in determining whether CSA has occurred, and as background evidence in

providing a context within which to evaluate the victim's evidence. The substantive role of BSE is discussed first.

There is no standard pattern of emotional and psychological reaction to CSA as reactions vary with individuals. Moreover the reactions may be too general to be clearly linked to CSA. However, McCord¹ warns that 'general' may not necessarily rule out CSA² because it at least comes a step closer to determination. Similarly, Faust³ notes that with BSE the 'central aim is to cut into or reduce the level of uncertainty... anything that reduces the level of uncertainty is good.' Myers *et al.*⁴ add that when evidence based on observed behavioural and psychological reactions is combined with the child's accurate testimony on the occurrence of CSA, the probative value of this evidence increases. Thus, some observed emotional and psychological effects of CSA may be generalised yet contribute nevertheless to determining the occurrence of CSA, and some may be more probative than others (e.g. sexual behaviour and knowledge that seems out of character).⁵ Friedrich *et al.*⁶ observe that sexual symptoms are frequently indicative of sexual knowledge in younger children (e.g. sexual aggression, imitation of adult sex acts, and a display of sexual knowledge that seems too advanced for the child's age and stage of development).⁷ Myers contends that being ostensibly unusually informed about sexual matters could be due to coaching or exposure to pornography, but may

¹ D McCord 'Syndromes, profiles and other mental exotica: A new approach to the admissibility of non-traditional psychological evidence in criminal cases' (1987)66 *Oregon Law Review* 79 & 80. McCord notes that evidence that is not physical in nature has often been found by courts to be irrelevant because of its generality. McCord contends that this reasoning and approach is incorrect.

² *Ibid.*

³ D Faust 'Holistic thinking is not the whole story: Alternative or adjunct approaches for increasing the accuracy of legal evaluations' (2003)10 *Assessment* 432.

⁴ JEB Myers *et al.* 'Expert testimony in child sexual abuse litigation' (1989)68 *Nebraska Law Review* 61. See also L Hoyano & C Keenan *Child abuse: Law and Policy across boundaries* (2007)884-885, who sum up the approach by observing that, there is no standard behaviour or symptom in all sexually abused children nor is there a single constellation of psychological symptoms or behavioural indicators which can validate that child sexual abuse occurred. Nevertheless, the presence in a child of certain behaviour and symptoms can provide some evidence which may justify a clinical opinion that a child has been sexually abused. The probative value of evidence of specific behaviour can be measured by a ratio comparing the frequencies of such behaviour in abused and non-abused children respectively. Thus, despite the generality of such evidence, the evidence may provide another perspective to courts in understanding and evaluating the prosecution narrative of alleged abuse.

⁵ JEB Myers 'Expert testimony in child sexual abuse litigation: Consensus and confusion' (2010)14 *UC Davis Journal of Juvenile Law & Policy* 32.

⁶ WN Friedrich *et al.* 'Normative sexual behaviour in children' (1991)88 *Pediatrics* 462.

⁷ *Ibid.*

nevertheless be sufficiently indicative of sexual abuse.⁸ He cites⁹ a description of seminal fluid as an example that is less readily dismissible as incidental and should receive red-letter attention.

For BSE to be admitted in court, it has to be relevant. Relevance is 'regarded as the basic criterion of admissibility.'¹⁰ Generally, relevant evidence is admissible while irrelevant evidence is inadmissible. Zeffert and Paizes note that relevance is 'a matter of reason and common sense' applied in relation to the relevant facts, circumstances and principles.¹¹ Taken together, if a properly qualified expert evaluates a CSA victim and observes psychological disorders such as PTSD and/or depression, anxiety and other similar distressed conditions, the expert would be justified in testifying that the child's condition is consistent with sexual abuse. Such evidence is a useful substitute for medical evidence, lending a measure of real probability to the alleged abuse.

3 Relevance of BSE as background evidence in providing a context within which to evaluate the evidence of ACSA victims (rehabilitative evidence)

Aside from BSE performing the role discussed above, it can also provide a context within which to evaluate the evidence of ACSA victims. It may not be easy to distinguish the difference between a description of behaviour presented to prove the occurrence of CSA, and behaviour supporting the child's credibility by explaining that the child's unusual conduct is not inconsistent with the allegation. Child sexual abuse victims tend to exhibit behavioural reactions that seem perplexing to the average person. Lonsway¹² provides a broad catalogue of behaviour that are often deemed deviant, including failing to defend or otherwise physically resist during the assault, experiencing 'frozen fright' during the assault, delaying a report to the police, or reporting only under pressure from family or friends, failing to recall or deliberately omitting specific details about the assault, being unable to identify the suspect to police, denying or minimising the assault

⁸ Myers *supra* note 5, 33.

⁹ *Ibid.*

¹⁰ DT Zeffert & AP Paizes *The South African law of evidence* (2009)237.

¹¹ *Ibid.* See also A Keane *Modern law of evidence* (1989)15.

¹² KA Lonsway 'The use of expert witnesses in cases involving sexual assault' (2005) *Violence Against Women* 11.

to friends and family members, exhibiting no apparent emotional expression following the assault, no recollection of events before the attack, providing apparently inconsistent statements at different points in time, having a relationship with the suspect prior and subsequent to the assault, assuming blame for the assault, and recanting. These reactions are commonly deemed unusual or deviant because they seem inconsistent with the stereotypical reactions expected; moreover they create the impression that the complainant is being disingenuous; and since the complainant is usually the only witness, prosecution is seriously jeopardised if that testimony is deemed unreliable.¹³ Sinnott¹⁴ notes that unreliable testimony for the prosecution could clearly be exploited by the defence, which could build its case on the idiosyncrasies of the witness and effectively render the testimony unsatisfactory in proving CSA. This is where BSE can step into the breach by providing a background or proper context within which to evaluate the complainant's testimony. Unlike the previous instance, BSE merely provides background to establish grounds for credibility, rather than proof of abuse.

A major controversy surrounding admissibility of evidence that explains children's behavioural reactions pertains to when, that is, at which stage of the trial it ought to be adduced. Myers *et al.*¹⁵ note that this testimony should be adduced in rebuttal following an undue attack on the child's credibility by the defence. They¹⁶

¹³ See e.g. the case of *Evans Michael v The State*, case No 2011/A46 (*Evans Michael* case), Where the court found it unsafe to found a conviction, largely because of the unexplained unusual behaviour displayed by the child complainant, namely, delayed disclosure and continued interaction with the accused persons subsequent to the alleged child sexual offense.

¹⁴ CJ Sinnott 'When defendant becomes the victim: A child's recantation as newly discovered evidence' (1993)41 *Cleveland Law Review* 574-575. Sinnott notes that bizarre behaviour might be a basis for a motion to disqualify the child as a witness on the grounds of incompetence or inaccuracy. See also F Raitt 'Expert evidence as context: Historical patterns and contemporary attitudes in the prosecution of sexual offences' (2004)12 *Feminist Legal Studies* 233-244; S Armbrust 'Re-evaluating recanting witnesses: Why the red-headed stepchild of new evidence deserves another look' (2008)28 *Boston College Third World Law Journal* 95. Armbrust compares acquaintance child abuse victims to an accused who implicates himself as a result of surrounding circumstances such as coercive interrogation. A host of psychological factors can cause individuals to confess to crimes they did not commit. These interrogation methods are capable of eliciting confessions from the innocent. Armbrust advises that as the case is for confessions among accused persons, bizarre behaviour among acquaintance child abuse victims present criminal-justice systems with the need to assess and evaluate bizarre behaviour so as to establish the validity and appropriateness of bizarre behaviour in displacing child abuse allegations.

¹⁵ Myers *et al. supra* note 4, 92.

¹⁶ Myers *et al. supra* note 4, 92; BC Trowbridge 'The admissibility of expert testimony in

contend that where the testimony is admitted before cross-examination that attacks the child's credibility it unduly heightens the child's credibility profile. However Hunter¹⁷ contends that 'the problem with this position is that assumptions about the behaviour of rape victims not specifically raised by the defendant may still be operating in the minds of the judge and jury and may also need rebutting.' Ellison¹⁸ adds that 'strategically, the defence may steer [away from] direct attacks, trusting the trier of fact to draw its own adverse inferences.' Taslitz¹⁹ makes a similar point that '[c]ultural rape narratives are ...omnipresent. There should be no need to await rebuttal.' It is therefore submitted that this background evidence should be part of the evidence in chief in anticipation of an attack on the credibility of the witness. It seems wrong to limit such evidence to rebuttal after cross-examination, given that the object of the evidence is to provide credible context within which to evaluate the complainant's testimony. The prosecution ought to have wide latitude in determining when to adduce opinion evidence of behavioural science experts as a central part of its case. The decision on when to adduce the opinion of behavioural science expertise should be dependent on the dynamics pertaining to the ACSA trial in issue without being limited to rebuttal.

Overall, there is a general tendency to assess CSA cases solely with reference to medical evidence.²⁰ Often, BSE that would be forthcoming from behavioural science

Washington on post-traumatic stress disorder and related trauma syndromes: Avoiding the battle of the experts by restoring the use of objective psychological testimony in the courtroom' (2003)27 *Seattle University Law Review* 455.

¹⁷ R Hunter, 'Gender in evidence: masculine norms vs feminist reforms' (1996)19 *Harvard Women's Law Journal* 150.

¹⁸ L Ellison 'Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases' (2005)9 *International Journal of Evidence and Proof* 261.

¹⁹ A Taslitz *Rape and the culture of the courtroom* (1999)132.

²⁰ P Stevens 'Unravelling the entrapment enigma: Reflections on the role of the mental health expert in the assessment of battered woman syndrome and coercive control advanced in support of a defence of non- pathological criminal incapacity(1)' (2011)74 *THRHR* 434. See also P Stevens 'Unravelling the entrapment enigma: Reflections on the role of the mental health expert in the assessment of battered woman syndrome and coercive control advanced in support of a defence of non- pathological criminal incapacity(2)' (2011)74 *Journal of Roman-Dutch Law* 585-605; S Herman 'Forensic child sexual abuse evaluation: Accuracy, ethics and admissibility' in K Kuehnle & M Connell (eds) *The evaluation of child sexual abuse allegations: A comprehensive guide to assessment and testimony* (2009)147. Herman observes that forensic evaluation of CSA can be based on hard evidence such as perpetrator confessions, medical evidence or other physical evidence, or, soft psychosocial evidence. Herman draws the attention of criminal-justice systems to an all-round approach to evaluation in view of the tendency for criminal-justice system to ignore soft psychosocial evidence. Herman identifies psychosocial case characteristics that are relevant to judgments about validity of CSA allegations. These include contents of the child's verbal statements, narrative qualities of the child's report, the child's non-verbal behaviour,

experts is either ignored or not accorded full weight. This type of evidence is critical in explaining the psychosocial dynamics of an abusive relationship, dispelling the myths about abuse, and explaining the often ‘invisible traits and manifestations of abuse.’²¹ In light of the formidable research on the limits of medical evidence in ACSA cases, there is a critical need to look beyond medical evidence and to increasingly accommodate BSE in the prosecution of ACSA cases.

4 Behavioural science evidence in CSA prosecutions: The position of South Africa and the United States of America (USA)

Having elaborately underscored the relevance of BSE in ACSA prosecutions generally, it is now imperative to narrow the discussion to the two countries of focus - South Africa and Uganda. For this purpose, selected cases from South Africa and Uganda are discussed to decide whether BSE is admitted and to what extent it is accredited. In the case of South Africa, there is an established practice by the courts to admit such evidence. Uganda’s criminal-justice system can therefore draw useful lessons from this example since the practice does not exist in Uganda. However, there is an observable trend to deal with behavioural and emotional reactions in Uganda’s courts where CSA cases are concerned, which does not amount to a radical departure since courts have consistently drawn inferences relating to the said reactions in the adjudication of CSA cases. It seems fair to assume, therefore that Uganda is ready to take the next step coming to terms with BSE in the prosecution of ACSA cases. Although South Africa and Uganda are placed at the heart of the study, case law from USA is selectively consulted as well to add cogency to the argument for admission of BSE.

4.1 The position in South Africa with reference to selected recent case law

Although it is a rare exception in Africa, BSE has been consistently countenanced in the South African justice system for a number of years. The following are recent examples that might shed useful light on the matter at issue.

²¹ context in which the child’s report emerges, changes in the child’s behaviour, and history and behaviour of other parties involved in the case.
Stevens *supra* note 20, 448.

4.1.1 *Mdletye v State (Mdletye case)*²²

This case pertained to the offence of incest between the appellant and his daughter, the complainant (aged 16 years at the time of the trial in 1996). The complainant grew up under the care of her grandmother. Towards the beginning of 1993 the complainant moved in with the appellant and attended school there. The complainant's allegations against the appellant were that a few months after she began to live with him in 1993, the appellant asked her to rub his back. That he used to fondle her body including her genitalia. That the appellant later started having sexual intercourse with her regularly, three to four times a week. This state of affairs allegedly continued consistently from 1993 when she came to live with him, until 1996 when she reported the abuse to her aunt. In 1994, the complainant ascertained that she was pregnant. The appellant allegedly arranged for her to undergo an abortion which was conducted at home. The complainant alleged further that after the abortion, the appellant continued to have sexual relations with her. According to the complainant, the appellant's attitude towards her was one of possessiveness. The appellant sometimes severely assaulted her, particularly because of her relationships with other men. It was the complainant's testimony that the appellant threatened to commit suicide or to kill himself if the complainant disclosed the sexual activities of which he was the initiator. The appellant, however, denied all the sexual abuse allegations. The beating, he argued was moderate chastisement that he was entitled to perform like any reasonable parent. The credibility of the complainant was therefore called into question, as might be expected. With respect to her evidence, it was established that whereas she had earlier stated that the appellant was the only person with whom she had sexual relations between 1993 and 1996, it transpired that she had also engaged in sexual intercourse with other men on several occasions within this period.

There was no conclusive medical evidence whatsoever in view of the complainant's delay in disclosing the alleged sexual abuse. However, two experts adduced evidence pertaining to the complainant's behaviour that was consistent with trauma. One of the expert witnesses, a qualified and experienced social worker trained to observe and assess complainants in child abuse cases, pointed out a number of

²² *S v Mdletye* (246/98) (1999) ZASCA 77.

symptoms displayed by the complainant²³ whose school work suffered from lack of concentration,²⁴ and who suffered from recurrent nightmares.²⁵ This expert submitted that in her view the complainant had been manipulated by the appellant to the extent that it was not surprising that she had kept the sexual abuse to herself for three years.²⁶ The expert pointed out that the complainant's decision to later run away from home was a common occurrence among child abuse victims. The second expert witness, with a master's degree in clinical psychology and experience working with child abuse victims for years equally proffered opinion.²⁷ The second expert testified that her interview indicated that the complainant had displayed symptoms, all consistent with her version of what occurred between her and the appellant. These included tension headaches, poor sleeping, poor appetite, poor concentration at school and forgetfulness.

In the judgment the Supreme Court of Appeal ruled, amongst others, that the evidence of the two experts provided support for the complainant's version,²⁸ and that the complainant's symptoms could be justifiably regarded as genuine as they were confirmed independently by the complainant's aunt.²⁹ The court therefore assumed the position that the complainant was a traumatised young person,³⁰ but that her traumatised condition could not be laid at the appellant's door as a result of his abusive action.³¹ The court acknowledged that the expert's opinion was consistent with the complainant's allegations but that other possible reasons accounting for these symptoms could not be ruled out.³²

Ultimately, the conviction and sentence were set aside partly because of the material inconsistencies in the complainant's testimony. However, the case is worthy of notice as an example where the court admitted BSE.

23 *Ibid.*, para 12.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 *Mdletye case supra* note 22, para 13.

28 *Mdletye case supra* note 22, para 20.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

4.1.2 *Godi v The State (Godi case)*³³

The 2011 case of *Godi v The State* pertained to the offence of rape. The facts of the case were that the appellant lived with her grandmother. The appellant (accused) worked in a tuck shop close to where the complainant and her grandmother lived, and they (appellant and complainant) became acquainted by proximity. The complainant (who was 9 years of age at the time of trial in 2001) attested the alleged rape, recurrent on Fridays (during 2001) when the grandmother was away. The appellant (according to the complainant) had initially invited her into her room and told her to undress upon which he had sexual intercourse with her. The following occasion was when the appellant asked her to wash dishes. It is not clear when the abuse was first reported. The facts, however, indicate that a report was not made immediately after the first alleged rape. In 2008, the appellant was convicted by the Regional Court and accordingly sentenced to 15 years imprisonment. The appellant appealed against sentence and conviction in the High Court.

On appeal, pertaining to the testimony of the complainant, the defence submitted that her evidence was unreliable and self-contradictory, hence did not establish the offence that the appellant was charged with.³⁴ The defence submitted further that the trial magistrate had misdirected himself in relying upon the evidence of the expert called by the prosecution to adduce BSE.³⁵

In the proceedings at the regional court the prosecution called an expert to adduce BSE. The expert, an educational psychologist, evaluated the complainant on 4 May 2005 when she was 15 years of age.³⁶ Amongst other sources, the expert had recourse to a trauma report prepared by a social worker, dated 26 March 2001, as well as a letter by an educational psychologist dated 2 June 2005. These two documents did not form part of her written record and were equally not included in the record. The report of the social officer dated 26 March 2001 had reported that 'there were objective symptoms of traumatisation possibly as a result of sexual molestation, in the form of enuresis, sleep disturbances...'³⁷

³³ *Godi v S* (A683/09) (2011) ZAWCHC 247.

³⁴ *Ibid.*, para 17.

³⁵ *Ibid.*

³⁶ *Godi case supra* note 33, para 18.

³⁷ *Ibid.*

With regard to the expert's reference to these documents, the defence argued on appeal that such reference fell afoul of the principles pertaining to admissibility of expert evidence as set out by Satchwell J in *Holtzhausen v Roodt* (*Holtzhausen case*).³⁸ Amongst others, the principles in the *Holtzhausen* case underscore that the expert's opinion should be based on admissible evidence and should not usurp the role of the court. The defence accordingly submitted that the expert's evidence was inadmissible because the expert's opinion was based on inadmissible evidence and usurped the role of court.³⁹

In addressing this objection on appeal in the High Court Olivier AJ categorically ruled that the expert was obliged to have regard to both documents.⁴⁰ Although the expert had indeed consulted the two documents without their being admitted in evidence, the expert was extensively cross-examined on the results and conclusions drawn in these documents.⁴¹ Olivier AJ added further that

the fact that the expert drew inferences also as to veracity and truthfulness [of the complainant] does not by itself make the evidence inadmissible—a court is bound to itself examine the facts—which may include expert opinion of the witness—and to draw its own conclusions.⁴²

In affirming the role of BSE in providing a context within which to evaluate the evidence of the ACSA complainant, the court ruled that the expert gave important evidence with regard to the perception of events by the complainant, both at the time they took place and the time at which the complainant testified.⁴³ More specifically, the court pointed out that the evidence of the educational psychologist was important in informing the court's decision on the competence and truthfulness of the rape itself.⁴⁴ Without further elaboration, the approach of the court in this case demonstrates the critical role that BSE played in providing background information and the appropriate context within which to evaluate the complainant's testimony.

³⁸ *Holtzhausen v Roodt* 1997 (4) SA 766 (W).

³⁹ *Godi case supra* note 33, para 19.

⁴⁰ *Godi case supra* note 33, para 22.

⁴¹ *Ibid.*

⁴² *Godi case supra* note 33, para 24.

⁴³ *Godi case supra* note 33, para 25.

⁴⁴ *Ibid.*

4.1.3 *S v The State*⁴⁵

The case of *S v The State* pertained to the offence of rape. The facts of the case were that between 2001 and 2002, the appellant allegedly raped his daughter, the complainant who was 12 years of age at the time. During trial in the Regional Court, the complainant testified against her father, recounting three cases of rape. The first, she said, took place in Glenharvie when she was in Grade 4 and 12 years old. The second, she said, took place at their home in the Newcastle Flats in Lucas Street which one may surmise, if the record is read purposively, is in Rustenburg while she was in Grade 7 (which would, on the probabilities, have been during 2001). The third, according to her evidence, took place at their dwelling in Van Zyl Street, Rustenburg, when she was in Grade 8 (which was during 2002). All three rapes allegedly took place under similar circumstances (the complainant was in bed, her mother was elsewhere, the appellant undressed her, she resisted but was overpowered and the appellant had intercourse with her). The appellant was convicted in the Regional Court on a charge of rape. He was sentenced to 15 years imprisonment. The conviction and sentence by the Regional Court was confirmed by the High Court. The appellant appealed against conviction and sentence in the Supreme Court of Appeal. At trial in the Regional Court, the complainant's allegations were denied by the appellant and in the end, the magistrate was confronted with conflicting versions: that of the complainant and the denial of the appellant. Thus, on appeal in the Supreme Court of Appeal, the only issue in the case was whether the appellant had raped the complainant, and not whether she had been raped or sexually molested.

At trial in the Regional Court, the prosecution called an educational psychologist, who interviewed the complainant and formed certain impressions about her.⁴⁶ The gist of her evidence as summarised by the magistrate was that the complainant was unwilling to cooperate or communicate, that she blamed herself for causing a rift in the family, that she was emotionally unstable and lacked confidence and that she hated her father because he was always drunk. As a matter of fact, the information that the psychologist had obtained from the complainant was that she had been raped while she

⁴⁵ *S v The State* (423/11) (2011) ZASCA 214.

⁴⁶ *Ibid.*, para 12.

was in Grade 4. The expert's report did not contain any reference to other instances of rape.

There were also inconsistencies in the complainant's evidence. The complainant's statement to the police, dated 30 October 2001 only recorded one instance of rape. Since the complainant was immediately removed from parental care, it was difficult to understand how the third rape could have occurred during 2002. Although the magistrate at the Regional Court was aware of these inconsistencies, she relied on the evidence of the education psychologist in corroboration of the fact that the appellant was the culprit. The Supreme Court of Appeal, in hearing the appeal, ruled that the education psychologist's evidence could in no way help to determine whether the appellant had raped the complainant.⁴⁷ The expert evidence, though relevant, therefore did very little to determine whether the appellant had raped the complainant, and the conviction and sentence were therefore set aside.

In light of the outcomes of the case of *S v the State* an issue arises whether the court's approach to BSE in this instance was justifiable. First, it was commendable that the court admitted BSE, as it did in the *Godi* and the *Mdletye* case respectively, and did so on the same footing as the rest of the evidence. Nevertheless the court found in *S v the State* that on balance the expert opinion was irrelevant in the matter before it. Did the court deal unfairly with the relevant opinion? More likely the opposite. Instead the finding underscores the need to weigh BSE against the rest of the evidence on record. By the same token, admission of evidence does not imply that it of necessity deserves consideration and weight by virtue of admission alone. As noted by Zeffert and Paizes, relevance as a criterion of admissibility of evidence is 'a matter of reason and common sense' applied to a proven factual base in context with the operative principles in each case.⁴⁸ After due consideration, therefore, if the opinion is found to be at odds with the rest of the body of evidence it should be discarded.

However, what is puzzling about Harms J's ruling in the case of *S v the State* is the strength with which traditional legalist ideas about the admissibility of expert evidence continue to inform his thinking despite his earlier demonstration of readiness to accommodate BSE. The rules of expert evidence were apparently applied according to

⁴⁷ *S v The State* case *supra* note 45, para 17.

⁴⁸ *Ibid.* See also Keane *supra* note 11, 15.

outdated rules governing exclusion of expert evidence, which could derogate from the weight assigned to relevant BSE if applied dogmatically. Harms J made reference to the case of *S v Engelbrecht*⁴⁹ wherein Satchwell J stated as follows:

Courts frequently turn to persons with expertise and skill for assistance. The relevant principles applicable to the admissibility of opinion evidence by experts, including psychologists and social workers, have been set out in numerous authorities. Firstly, the matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge. Secondly, the witness must be a person with experience or skill to render him or her an expert in a particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the Court. Fourth, the expertise of any witness should not be elevated to such heights that the Court's own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others. Sixth, the opinion of such a witness must not usurp the function of the Court.

Thus, in the case of *S v the State*, the court concluded that the evidence of the behavioural science expert did not satisfy requirements four, five or six.⁵⁰ It suffices to reiterate that requirement six pertains to the evidence of the expert not usurping the function of the court. It is submitted that arguments based on expert evidence having the effect of usurping the function of the court are out of step. They only serve to impact negatively on the weight accorded to BSE. This submission will be discussed in chapter five where the rules of evidence will be discussed in greater detail.

Far from being an exhaustive rehearsal of instances of admitted BSE, the cases dealt with are merely intended to give an overview of relevant judgments passed in recent decades, and that illustrate the premises of conclusions considered indicative. The broad indication is that even prior to the above decisions there has been an established practice in South Africa for BSE to be admitted. Indeed the jurisprudential record of South Africa suggests that the admission of BSE is improving the prosecution of ACSA cases. Thus, the existing trend of the courts in South Africa should not be underestimated. However, there is room for improvement in as far as the weight accorded to BSE is concerned. And arguably, there is reason for South Africa to look

⁴⁹ *S v Engelbrecht* 2005 (2) SACR 41(W) para 26.

⁵⁰ *S v The State* case *supra* note 45, para 19.

beyond the borders of its legal system. The approach of courts in the USA could be useful in this regard.

4.2 The position in USA with reference to selected case law

The courts in USA, like South Africa's courts, have over the years admitted BSE in the prosecution of ACSA cases. USA courts were reportedly the first in the common law world to admit BSE in cases such as CSA.⁵¹ Two selected decisions from the courts in USA are discussed with a view to establishing whether South Africa should do more in terms of the weight accorded to the admitted BSE in ACSA prosecutions.

4.2.1 *People v Beckley (Beckley case)*⁵²

The facts of this case arose in Michigan, USA. The appellant was charged and convicted of the offence of criminal sexual conduct in the first degree with the complainant, his fifteen-year-old daughter.⁵³ According to the complainant's testimony at trial, on 29 May 1983, she was watching television at her father's trailer where she resided following her parents' divorce. Her father joined her when he arrived home. During this time he rubbed her back and kissed her several times.⁵⁴ The appellant then went to his room but later called for her. He asked her to lay down with him for a while and then grabbed her onto his bed.⁵⁵ While holding down her arms, the appellant unclothed his daughter and had sexual intercourse with her.⁵⁶ At the appellant's demand, she promised to keep the incident a secret.⁵⁷ After washing and dressing, the complainant phoned her mother and reported her father's 'passes' but never mentioned intercourse.⁵⁸ The complainant's testimony indicated that she initially declined her mother's offer to pick her up but called back immediately and accepted.⁵⁹ She never

⁵¹ Hoyano & Keenan *supra* note 4, 895.

⁵² *People v Beckley*, 161 Mich. App. 120, 409 N.W.2d 759 (1987). See also *Smith v State* 100 Nev. 570, 688 P.2d 326 (1984) and *State v Cleveland* 58 Wash. App. 634, 794 P.2d 546 (1990), in which an approach similar to that in the *Beckley* case was evident.

⁵³ *Beckley supra* note 52, 122.

⁵⁴ *Ibid.*, 123.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

mentioned intercourse to her mother.⁶⁰ The complainant's testimony further indicated that the following year, in 1984, she told various people about accused's advances but made no mention of the intercourse.⁶¹ She resumed visits with her father after the incident. She did not reveal the act of intercourse until approximately one year later (1984) when she wrote about the incident in a journal for a high school English assignment.⁶² After the first allegations reported to the mother, no action was taken because the complainant retracted the allegations she made to the mother a few days later.

The appellant denied any act of intercourse but admitted to kissing his daughter and inviting her to bed. He explained that it was a way to see if his daughter was sexually active. On cross-examination of the complainant, defence counsel attacked the truth of her allegations by implying that her post-attack behaviour was inconsistent with that of a victim of sexual abuse.⁶³ The defence cited her postponed reporting (a year after the incident), means of reporting, continued contact with the accused, and initial denial of intercourse as indications that no sexual intercourse actually occurred. The prosecution tried to restore the complainant's credibility with the testimony of a mental health expert, a certified social worker, who had previously examined the complainant. The expert possessed a double master's degree in psychology and education. The court limited the expert's testimony to the observed behaviour of the complainant which was consistent with that of an incest victim. The court allowed the expert's testimony during the prosecution's case in which she testified that psychiatric literature has settled on certain patterns of behaviour as consistent with abuse i.e. (1) delayed disclosure in the school journal, (2) medium of disclosure, i.e. to a nonfamily member through an impersonal written communication, (3) the daughter's continued desire to see the suspect, and (4) the daughter's initial tendency to deny to others the occurrence of the sexual intercourse.⁶⁴ The expert stated that these behaviour taken singly or together typify commonly observed behaviour among ACSA victims.⁶⁵ She identified the causes documented in literature for each of these apparently incongruous

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*, 124.

⁶⁵ *Ibid.*

behaviour in an abused child.⁶⁶ In cross-examination, defence counsel questioned the complainant's failure to remember conversations that she had had about the event. This, the expert explained, was typical of a victim trying to minimise the event and did not necessarily indicate fabrication.⁶⁷ Additionally, she stated that a bitter divorce, a spiteful mother, and resentful feelings between the appellant and the complainant did not rule out sexual abuse but would need to be examined.⁶⁸ The appellant was consequently convicted.

The appellant appealed the decision of the trial court, arguing amongst others that the expert's testimony should not have been admitted.⁶⁹ The appellant stated that this was a kind of scientific evidence which did not meet the standard required for expert testimony and that the expert vouched for the credibility of the complainant, consequently going so far as to suggest that the assault actually occurred.⁷⁰ In addressing the objection raised by the defence the court made reference to Rule 702 of Michigan Rules of Evidence (MRE) which provides as follows:

If the court determines that recognised scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.⁷¹

Consequently, the Supreme Court of Michigan affirmed the conviction and sentence by the trial court.⁷²

Since the delayed disclosure precluded medical evidence, the complainant's testimony formed the crux of the prosecution case. The inconsistencies in the testimony could be explained. The detailed expert opinion demonstrates the critical role of BSE in CSA prosecutions. Interestingly, in addressing the objection to the expert opinion, the court readily made reference to the codified rules of evidence as provided for in the

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 125.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*, 131.

MRE. The added advantage of a codified framework of evidence will be discussed in one of the subsequent sections.

4.2.2 *State v Myers (Myers case)*⁷³

In this case Myers, the appellant was charged and convicted of the offence of criminal sexual conduct in the second degree with a complainant under 13 years of age in contravention of section 609.343(a) of the Minnesota Statute.⁷⁴ Pursuant to the judgment of conviction, Myers was sentenced to a 35-month term of imprisonment.⁷⁵ The facts of the case were that between August 1980 and July 1981, Myers, the appellant and accused at trial had criminal sexual contact with the young daughter of the woman with whom he was living (the complainant).⁷⁶ The facts indicated that one morning in either November or December of 1980, when the complainant was seven years old and while Myers was preparing breakfast in the kitchen of their two-story home, he told the complainant to come downstairs from her bedroom to help him.⁷⁷ The complainant initially refused but complied when Myers threatened to spank her.⁷⁸ The facts indicated further that on that morning, the complainant's mother was in bed when Myers called the complainant. Because it was quite dark downstairs, the complainant's mother got out of bed to see what was happening.⁷⁹ When she arrived downstairs, Myers was sitting on the living room sofa and her daughter was standing directly across the room in the doorway between the living room and kitchen.⁸⁰ The mother took the complainant upstairs to her bedroom and asked her what had happened.⁸¹ The complainant first responded that she did not know but ultimately she said that Myers did things to her like he did to her mother.⁸² The mother then confronted Myers who said he did not know what the complainant meant.⁸³ It was not, however, until several months later, on 15 September 1981, when the complainant's maternal uncle contacted

⁷³ *State v Myers*, 359 N.W.2d 604 (Minn. 1984). See also *Townsend v State of Nevada* 734 P. 2d 705 (1987), in which an approach similar to that in the *Myers* case was evident.

⁷⁴ *Myers case supra* note 73, 607.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 608.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

the St Louis County Department of Social Services that the authorities were notified of the possibility of abuse.⁸⁴ On the following day (16 September 1981), a social worker talked to the complainant at her school. During the conversation between the complainant and the social worker, the complainant informed the social worker that the appellant would sometimes come into her bedroom at night and touch her on her 'chest' and between her legs.⁸⁵ Upon further questioning by the social worker, the complainant detailed the manner in which Myers molested her.⁸⁶ The social worker's session with the complainant led her to the conclusion that the appellant had commenced abusing her when she was six and that the child could not conceptualise the difference between sexual penetration and contact. On 6 October 1981 formal charges were filed against Myers. The complainant's mother and the social worker testified in affirmation of the allegations. The complainant, who was eight years old at the time of the trial, also testified and substantially repeated her earlier statements to the mother and the social worker.

To prove its case, the prosecution adduced the evidence of an expert in behavioural sciences. The expert had a doctorate in psychology as well as experience in dealing with familial sexual abuse cases. The expert testified that commencing on 11 December 1981, she saw the complainant on seven occasions in sessions each lasting at least one hour.⁸⁷ The expert stated that in each of these sessions, the complainant related the manner in which the accused abused her and that while she continually added information, the child's allegations remained consistent.⁸⁸ At trial, the complainant repeated the statements she had made to the expert. The expert related what the complainant had told her about the incident at breakfast and other occasions of sexual abuse, and she testified that the complainant's allegations had remained consistent throughout their several meetings. In addition, the expert testified to the uniqueness of child sexual offences perpetrated by known persons, stating that this kind of abuse tends to persist⁸⁹ rather than occur as a single incident.⁹⁰ The expert was permitted to describe characteristics or traits typically observed in sexually abused

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*, 609.

90 *Ibid.*

children. She explained that fear of blame or punishment, of a family breakup or branding as a liar keeps the child from making her plight known.⁹¹ The expert further testified that youthful victims of sexual abuse are especially prone to confusion.⁹² Because of the child's confusion, shame, guilt and fear, disclosure of the abuse is often delayed.⁹³ When the child does complain of sexual abuse, the mother's reaction frequently is disbelief, disinclination and delay in reporting the matter.⁹⁴ The expert also described the symptoms and emotional conditions she observed in the complainant which could have resulted from the sexual abuse.⁹⁵ These were more specific individual characteristics including fear of men, nightmares that have an assaultive content, sexual knowledge unusual in a child of the victim's age, and age inappropriate behaviour.⁹⁶ She then identified those characteristics commonly exhibited by sexually abused children which she had observed in the complainant.⁹⁷

The appellant testified at trial, denying the allegations of sexual abuse. The denial was rejected by the trial court and the appellant was convicted and sentenced to a 35-month term of imprisonment, hence the appeal to the Supreme Court of Minnesota. The Memorandum of Appeal raised several grounds, for instance that the court had erred in admitting expert psychological testimony describing the behaviour and symptoms typically exhibited by sexually abused children and expressing the opinion that the complainant's allegations were not fabricated.

On appeal in the Supreme Court of Minnesota, the court dealt with the objection as follows: As regards the propriety of admitting expert opinion, it ruled that admission was at the court's discretion, and proceeded in this instance on the ruling that the expert was sufficiently qualified to comment on emotional and psychological characteristics observed in young victims of sexual abuse⁹⁸ (the expert had significant experience of the sexual abuse in question).⁹⁹ The court found that the expert opinion as indicated had been helpful.¹⁰⁰ The court also found that the complainant's credibility

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*, 610.

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

had certainly benefited, though indirectly, from the expert opinion proffered,¹⁰¹ but that nevertheless such benefit did not in and of itself render the opinion inadmissible.¹⁰² The court emphasised that the test is not whether opinion testimony embraces an ultimate issue to be decided by the court, but whether or not the expert's testimony, if believed, will help the court to understand the evidence or to determine a fact in issue.¹⁰³ Expatiating further on the role of BSE, the court observed that the credibility of a young child who complains of sexual abuse is not materially dependent on the nature of the alleged abuse,¹⁰⁴ but that evaluating the credibility of the complainant can benefit materially from an expert's explanation of the emotional antecedents of the victim's conduct and the impact of the crime on other members of the family.¹⁰⁵

About the expert's description of symptoms and emotional states observed in the victim (diagnostic evidence), the appellant contended that this part of the testimony was inadmissible because it was unreliable. The appellant averred that the conditions described by the expert were highly subjective and not necessarily the result of sexual molestation. In addressing this contention, the Supreme Court stated that the fact that the expert's observations of the complainant's psychological and emotional symptoms are not physically demonstrable does not justify the conclusion that they are not probative of CSA and therefore of no help to the court;¹⁰⁶ moreover many physical and emotional ailments, including wholly subjective complaints, cannot be demonstrated with absolute certainty but are nevertheless considered real enough to be subject to expert testimony.¹⁰⁷ The court added that relativity of expert testimony with regard to the existence or cause of the condition goes not to the admissibility of the testimony but to its relative weight.¹⁰⁸ Put precisely, inadmissibility automatically rules out weight. So weight comes into play on condition that evidence is admissible. Further, concerning the expert's opinion on the truthfulness of the complainant, the Supreme Court made reference to Rule 608(a) of the Minnesota Rules of Evidence, consequently finding that

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*, 611.

105 *Ibid.*

106 *Ibid.*

107 *Ibid.*

108 *Ibid.*

it removes an obstacle to the opinion touching upon the ultimate issue.¹⁰⁹ Consequently the Supreme Court upheld the conviction and sentence pronounced by the trial court.

5 Admissibility and weight attached to behavioural science evidence in USA and South Africa: Similar in principle and doctrine yet slightly different in application

The doctrine and principle informing the approach to BSE in South Africa and the USA is essentially the same in that both admit BSE in CSA prosecutions, except that USA courts are more accommodative and attach more weight to BSE in this regard.

Generally, when dealing with expert evidence, the court is not only faced with the task of determining which portion of experts' evidence must be disregarded as irrelevant or unimportant, but has to find means of determining the significance or weight that should be attached to expert evidence in any given case. The concepts of admissibility and weight of evidence are closely related and sometimes overlap. If evidence is admissible in court, it can be presented and tested in court.¹¹⁰ "The court will then analyse the evidence to see how influential it may be. In other words, the court will decide how much weight to give to evidence."¹¹¹ A piece of evidence is admissible if it might assist the court in establishing a fact.¹¹² It does not necessarily follow that once evidence has been admitted in court it will be given full weight. Weed observes that evidence may be given full weight, partial weight, more or less weight than other evidence, or no weight at all.¹¹³ Once the evidence has been admitted, it is the court's role to evaluate it to assess its weight. In doing this, firstly, the court must consider up all the evidence as a whole.¹¹⁴ A particular piece of evidence, in this case BSE, must fit into the overall evidence adduced. Gough, in commenting on the principle of weight of evidence, observes that a court renders separate judgments on different pieces of evidence and consequently holistically combines them to make an overall judgment on the ultimate issue for determination before the court.¹¹⁵ Secondly, having evaluated the

¹⁰⁹ *Ibid.*

¹¹⁰ A Bellengere *et al.* *The law of evidence in South Africa: Basic principles* (2013)23.

¹¹¹ *Ibid.*

¹¹² Zeffert & Paizes *supra* note 10, 237.

¹¹³ DL Weed 'Weight of evidence: A review of concept and methods' (2005)25 *Risk Analysis* 1545.

¹¹⁴ Bellengere *et al.* *supra* note 110, 28

¹¹⁵ D Gough 'Weight of evidence: A framework for the appraisal of the quality and relevance of evidence' in J Furlong & A Oancea (eds) *Applied and practice-based research* (2007)213-228.

evidence in question together with the whole body of evidence adduced, the court must draw proper inferences.¹¹⁶ Thus, weight of evidence is a phrase used to describe the evaluative consideration given to a particular piece of evidence.

Without substantial rehearsal of the above-mentioned cases it seems readily evident that BSE is received more favourably in the USA than in South Africa. As noted, BSE has been admitted in both countries for some time but has been given a more accommodative hearing in the USA. For instance, besides limiting BSE to the role of providing context within which to evaluate the evidence of the ACSA victim, the often ignored diagnostic role of informing the decision of the court as to whether CSA occurred is accommodated in the USA in cases where the evidence is properly adduced by qualified experts (e.g. in the *Myers* case). This is an advance on the position in South Africa where some scholars have contended that BSE constituting substantive evidence that CSA occurred should not be accommodated¹¹⁷ on grounds that proffering an opinion on the ultimate issue amounts to usurpation of the court's function.¹¹⁸

Superior weight is therefore accorded to BSE in the USA, albeit on the same doctrinal basis as South Africa, in light of which it is submitted that it may be worth South Africa's while to relent somewhat on the weight of BSE, particularly where it has been considered on par with the body of evidence on record since, after all, the difference between the USA and South Africa is merely based on practice and not doctrine, which would therefore require fine-tuning of its existing approach, rather than a radical departure, for a positive adjustment as regards BSE to be effected.

Bellengere *et al.* argue that the process or interpretive methods that the court adopts in evaluating and assessing admitted evidence may well influence the final inferences drawn, and therefore the weight finally accorded to it.¹¹⁹ Thus, the weight accorded to a piece of evidence may depend on the interpretive approach of the court. The precise reasons for the accentual difference between the USA and South Africa are not readily ascertainable, but clear guidelines on the treatment of BSE would certainly

¹¹⁶ Bellengere *et al. supra* note 110, 28.

¹¹⁷ See e.g. R Songca 'Aspects of sexual abuse of children: A comparative study' (2003) *Unpublished LLD thesis: University of Pretoria* 460-461; A Allan & DA Louw 'The ultimate opinion rule and psychologists: A comparison of the expectations and experiences of South African lawyers' (1997) *Behavioural Sciences and the Law* 310 & 318; D Nelson 'Non-Pathological criminal incapacity in South Africa- A disjunction between legal and psychological discourse? A case study' (2012) *Unpublished Research project: University of Cape Town* 27.

¹¹⁸ *Ibid.*

¹¹⁹ Bellengere *et al. supra* note 110, 28.

redound to a more informed basis for interpretation, assessment and inferences, which in the final analysis is bound to impact positively on the weight assigned to expert opinion.

In the USA, prior to the Federal Rules of Evidence of 1975, an officially recognised mutual accommodation between science and law had not been established. Evidence scholars breathed a sigh of relief when their perdurable advocacy of reform culminated in the said Rules of Evidence. Until then the exact place and application of expert evidence had not been established for lack of the said accommodation. Interpretation of the admissibility and weight of expert evidence was therefore significantly helped by promulgation of the said Rules.¹²⁰ For instance, Rule 702¹²¹ amongst others addresses the issue of expert qualification and the test of 'helpfulness'. Rule 703¹²² addresses the issue of the basis of expert opinion, ultimately streamlining the exact place of hearsay in founding expert's opinion. Rule 704¹²³ abolishes the rule against expert testimony on the ultimate issue, thus finally laying to rest unsubstantiated preliminary objections to relevant expert opinion. Rule 706¹²⁴

¹²⁰ See the case of *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct.2786 (1993) for a further discussion on the application of the Federal Rules of Evidence.

¹²¹ Rule 702-Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a) the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

¹²² Rule 703-Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

¹²³ Rule 704-Opinion on an Ultimate Issue

(a) In general-Not automatically objectionable.

An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defence. Those matters are for the trier of fact alone.

¹²⁴ Rule 706-Court-Appointed Expert Witnesses

(a) Appointment process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

expressly brings on board the issue of court-appointed experts. The significance of Rule 706 is especially noteworthy, given that some prosecutors are reluctant to rely on BSE to substantiate on behavioural issues in contention.

Indeed the codified rules of evidence are merely an affirmation of the evolving common law. Against the argument that no substantial purpose is served by codifying a system of law that continues to evolve, the counterargument may be adduced that codification of the rules of evidence, expressly discarding certain traditional rules of exclusion such as the ultimate issue rule, has guided the courts with positive results for the accommodation of BSE and the weight attributed to it. For instance, the courts were demonstrably led by the rules of evidence in the cases of *Beckley* and *Myers* (see above). The content of the Federal Rules of Evidence similarly affirm the greater extent to which BSE is accommodated.

The fact that insight is drawn from the USA does not betoken a transshipment of that country's system to South Africa, first of all since the operation would be attended by implementation problems because the Rules of Evidence were partly developed in the context of jury trials whereas South Africa's trials do not have juries. Nevertheless, however, the point is made that South Africa needs to develop a codified framework on admissibility of expert evidence that addresses the contextual gaps in the current discourse of expert evidence, as well as the needs of a non-jury system. Statutory guidelines should be introduced to strengthen the advancement of BSE and expert evidence generally. The statutory rules should be drafted to assist judicial officers to evaluate expert evidence in controversial areas such as BSE.

(b) Expert's role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court.

The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs- and the compensation is then charged like other costs.

(d) Disclosing the appointment to the jury.

The court may authorise disclosure to the jury that the court-appointed the expert.

(e) Parties' choice of their own experts.

This rule does not limit a party in calling its own experts.

Thus far, emphasis has consistently been placed on the need for courts to accord greater weight to admitted BSE. However, this recommendation is of little utility if the opinion of the experts is fundamentally flawed. 'Without logical coherence no theory can command validity.'¹²⁵ If courts in South Africa are to accord greater weight to BSE in ACSA cases, then behavioural science experts will need to perform a more thorough task in advancing their opinion. Meintjes-Van der Walt has rightly observed that

[i]f the primary objective of expert evidence is to assist the court, then it follows logically that every attempt should be made, systemically and otherwise, to fulfil this purpose. This can only be achieved if the expert evidence is introduced to the criminal-justice process in such a way as to optimally achieve this primary goal. Expert evidence can only be of assistance where it is presented in such a way as to illustrate the expert's evidence and not obfuscate his information. It is only when the expert succeeds in educating the trier of fact in respect of his (the expert's) particular field of expertise to a sufficient degree, that the court will be in a position to apply the expertise to the fair adjudication of the issues in dispute.¹²⁶

Foster and Huber confirm that

[h]ow a proposition is framed says much about how solid or slippery it really is. This is true in science as it is in ordinary discourse.¹²⁷

Undoubtedly, the explanatory power of the expert can profoundly impact the weight accorded to their opinion. It is therefore critical for experts to enlighten the court in such a manner that the court receives the appreciable help sought by admitting the expert's opinion.

Since courts tend to be sceptical for cogent reasons in their treatment of broad generalisations,¹²⁸ it is incumbent on behavioural science experts to provide evidently sound reasons for their conclusions in ACSA cases, and to account competently and accurately for the investigations to which they attribute their conclusions. The persuasive power of their opinion should preferably be enhanced by making precise

¹²⁵ L Meintjes-Van der Walt 'The proof of the pudding: The presentation and proof of expert evidence in South Africa' (2003)47 *Journal of African Law* 96.

¹²⁶ *Ibid.*, 95.

¹²⁷ KR Foster & PW Huber *Judging Science: Scientific knowledge and the Federal Court* (1977)71.

¹²⁸ B Black *et al.* 'Science and the law in the wake of Daubert: A new search for scientific knowledge' (1994)72 *Texas Law Review* 755-756.

statements on the child concerned and how that child's unusual behaviour relates to the principal issue before the court. This should be backed up by appropriate explanatory power. The existing literature and empirical studies on the subject should be of insight to the expert to aid them in effectively furthering the role of educating the court. The implication of logical consistency and explanatory power of experts on the ultimate weight accorded to their opinion is readily apparent from the discussions of the *Beckley* and *Myers* cases. In these two cases, there is a clear indication of logical consistency and sound explanatory power. Reference was consistently made to existing literature on the subject in question, and the experts endeavoured to relate their findings to the ACSA victim in question. Their opinion was related in considerable detail that left little room for assumption and speculation on the part of the court. The treatment accorded the experts' sound explanations in court spoke clearly of the weight attached to the testimony.

The scientific community has accumulated a considerable fund of knowledge in many areas of behavioural science in recent decades to which the criminal-justice system might well become significantly beholden as mutual accommodation between behavioural science and the law grows apace and potentially allows more profound insight into ACSA and the ACSA victim's behaviour. Further to the matter of favourably considering the admission of BSE, expert opinion could be a useful surrogate for the general paucity of medical evidence in deciding whether CSA has occurred. If BSE is to effectively bridge the justice gap in ACSA prosecution, it should not merely be admitted but accorded full weight where it has been duly considered in context with the relevant body of evidence on record. The weight accorded to expert opinion in inferences drawn suggests that a coherent framework to guide judicial officers' interpretations would be a worthwhile aid to closing the justice gap. An envisaged role of such significance also suggests, however, that behavioural experts need to present their testimony with due care and competence so that the courts will be able to draw reliable inferences from it in their adjudication of ACSA cases.

6 The need for the prosecution in Uganda to start advancing behavioural science evidence

Reliance on expert opinion to adjudicate ACSA cases in the USA and South Africa is not emulated by Uganda. Presently, in some CSA cases, the prosecution in Uganda is implicitly relying on lay witnesses to advance evidence that vaguely touches upon the behaviour of CSA victims.¹²⁹ Though arguably at least a step in the right direction, the point to consider is whether more can be done to incorporate BSE in the handling of ACSA cases. Bellengere *et al.* observe that there are two instances in which opinion evidence becomes relevant and admissible:

- First, the opinion of a layperson is relevant and admissible on certain issues which fall within the competence and experience of laypersons generally.
- Secondly, expert opinion evidence in the form of an appropriately qualified expert, or an experienced and skilled layperson, is always admissible to assist the court in determining facts in issue that require specialist knowledge not available to the court.¹³⁰

Indeed, Uganda's current approach falls neatly within the ambit of the first of the above categories. However, the inferences drawn by lay witnesses in CSA cases in Uganda are merely an item of circumstantial evidence. Reference to these reactions in the few cases where inferences are drawn is often made in passing and only circumstantially, hence there is scant evidence that BSE is gaining sufficient ground as a factor worth considering in Ugandan court proceedings. Zeffert and Paizes observe that '[t]here is a strong tendency in practice, certainly in criminal proceedings, to regard lay opinion, when received, as constituting prima facie evidence only.'¹³¹ It therefore can never carry

¹²⁹ See e.g. *Uganda v Sekabito Kassim (Sekabito case)* Criminal case No 178 of 2003. In this case a neighbour to the victim, was indicted with defilement of the victim who was 14 years of age. At trial, there was no medical evidence to corroborate the child complainant's testimony. The evidence of the complainant and that of the victim's mother formed part of the evidence on record. The victim's mother's testimony centered on the victim's behaviour towards the accused subsequent to the alleged defilement. The mother of the complainant testified that the child victim refused to serve the accused food and entered the house in protest; in *Katende Mohamed v Uganda (Katende case)* Supreme Court Criminal Appeal 32 of 2001, a neighbour to the victim, was convicted of defilement of a 7 year old female child. The appellant appealed against conviction and sentence, arguing that there was insufficient evidence to sustain a conviction. The prosecution counsel noted in reply that the victim's distressed condition was corroborative evidence of sexual abuse.

¹³⁰ Bellengere *et al. supra* note 110, 257.

¹³¹ Zeffert & Paizes *supra* note 10, 340.

as much weight as the opinion advanced by experts in the field. It is therefore submitted that in addition to the general inferences drawn by lay witnesses, Uganda's prosecution should consider placing more reliance on expert opinion in ACSA cases because specialist knowledge that may not be available to the court is frequently required to explain the behaviour of CSA victims. Exclusively relying on lay witnesses in this regard is clearly ill-advised as it is indicative of an underestimation of the complexity of CSA victims' behaviour and the expertise required to evaluate their behaviour. The available research shows that evaluation of children's behavioural and emotional reactions requires the evaluator to have a thorough grasp of child development, memory and suggestibility, normal sexual development, the impact of sexual abuse, normal and abnormal psychology, medical evidence of CSA, proper and improper interview methods, prevalence rates of various symptoms in abused and non-abused children, and the strengths and weaknesses of clinical judgment.¹³²

It is to be noted further that many issues pertaining to the mind and mental disorders have only recently been propounded by medical psychiatry and psychology. This makes the task of evaluating children's behavioural and emotional reactions 'neither simple nor easy as it entails delving into the psyche of a witness or party.'¹³³ Mackay and Colman,¹³⁴ for instance, note that 'ordinary, reasonable people can easily misunderstand some forms of behaviour that fall within their common knowledge and experience.' Price¹³⁵ adds that although unassisted, judges can rely only on their common sense, intuition, and knowledge or experience of human behaviour, which may be extensive, this is nevertheless insufficient to enable them to draw appropriate inferences or reach fair conclusions. Prentky *et al.*¹³⁶ explain further that testimony of experts in the field serves a critical gatekeeping role in the prosecution process, thus when the law relies on bad science, such as individual constructions, this touchstone is severely compromised and instead arbitrariness creeps in.¹³⁷ Prentky *et al.* call it a 'volitional standard' that brings with it a high price for the criminal-justice system and is

¹³² Myers *et al. supra* note 4, 82-83.

¹³³ A Price 'Dealing with differences: Admitting expert evidence to stretch judicial thinking beyond personal experience, intuition and common sense' (2006)19 *SACJ* 142.

¹³⁴ RD Mackay & AM Colman 'Excluding expert evidence: A tale of ordinary folk and common experience' (1991) *Crim LR* 805.

¹³⁵ Price *supra* note 133, 142.

¹³⁶ RA Prentky *et al.* 'Sexually violent predators in the courtroom: Science on trial' (2006)12 *Psychology, Public Policy and Law* 361.

¹³⁷ *Ibid.*

in fact highly problematic.¹³⁸ It is therefore submitted that in addition to the opinion of lay witnesses and inferences drawn by justice professionals on the general behaviour of ACSA victims, the prosecution in Uganda should start relying on experts to advance BSE. A very important issue, however, is whether the current statutory framework in Uganda can accommodate admission of BSE at a sufficiently substantial level.

Such accommodation is on hand, broadly speaking. In Uganda the Evidence Act is the primary legislation governing the admissibility of expert evidence and evidence generally.¹³⁹ Section 47 generally encompasses opinion evidence. The section is of particular relevance to the discourse of BSE because evidence advanced by professionals in the field of behavioural science falls within the broader ambit of expert evidence. The section provides as follows:

When a court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions, the opinion, upon that point of persons (generally called experts) possessing special knowledge, skill, experience or training in such foreign law, science or art or question as to identity of handwriting or finger or other impressions are relevant facts.

There is no doubt that the opinion of experts on ‘science’ as described in section 47 includes BSE. In a wider context therefore, it can be assumed that section 47 covers admission of BSE in ACSA cases.

Presently, there is no precedent demonstrating the admission of BSE by experts in CSA cases in Uganda. A further issue is whether Uganda’s courts are prepared to accommodate BSE in ACSA cases. It is submitted that the observable trend in some court decisions in CSA cases seems to demonstrate that the courts in Uganda could admit BSE and accord it adequate weight if it is properly advanced by experts in the field. For instance, some courts in Uganda have occasionally drawn inferences from CSA victims’ behavioural and emotional reactions in deciding whether CSA occurred. There are also court rulings in place in which the courts have clearly underscored the need to rely on various forms of evidence to prove child sexual offending as opposed to exclusively looking to medical evidence. To some extent, one can argue that the current

¹³⁸ *Ibid.*, 363.

¹³⁹ Evidence Act Chapter 6 of the Laws of Uganda.

position, though not unanimous across all courts, demonstrates the preparedness of Uganda's system to fully admit BSE and accord it full weight in ACSA prosecutions.

Selected case law is discussed to demonstrate this preparedness. However, the cases that are briefly discussed do not deal with admissibility of expert evidence. The discussion merely identifies rulings in which the courts have drawn inferences from behaviour considered consistent with CSA. Some rulings directly underscore the court's openness to innovative forms of proving that CSA occurred. Moreover, because of the nature of case reporting in Uganda, the full details of the cases cannot be obtained.

In the 1995 case of *Basita Hussen v Uganda (Basita case)*,¹⁴⁰ the Supreme Court unanimously made interesting and memorable observations, pointing out as follows:

The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved by the victims own evidence and corroborated by medical or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration...Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.¹⁴¹

The phrase 'whatever evidence the prosecution may wish to adduce to prove its case...' is instructive as it demonstrates the readiness of Uganda's courts to accommodate evidence other than medical evidence. BSE advanced by experts in the field arguably falls within the ambit of the 'whatever evidence' envisaged.

There are a few cases in which the courts go a step further to draw inferences, either implicitly or explicitly, from CSA victims' behavioural and emotional reactions in deciding whether CSA occurred. In the 1965 case of *Aban Kibago v Uganda*¹⁴² the Court of Appeal upheld the trial judge's finding that in sexual offences the distressed condition of the complainant is capable of amounting to corroboration of the complainant's evidence depending upon the circumstances and the evidence.¹⁴³ Another 2001

¹⁴⁰ *Basita Hussein v Uganda* Criminal Appeal 35 of 1995.

¹⁴¹ Referred to by the High Court in *Uganda v Asimwe Edison* Criminal High Court Session No. 37 of 2003. Available at <http://www.ulii.org/ug/judgment/high-court/2004/3> (accessed 20 March 2013).

¹⁴² *Aban Kibago v Uganda* (1965)EA 507.

¹⁴³ Referred to by the High Court in *Uganda v Anyolitho (Anyolitho case)* Session case No 0074/2010. Available at <http://www.ulii.org/ug/judgment/high-court/2011/154> (accessed 21 March 2013).

Supreme Court decision of *Katende Mohamed v Uganda*¹⁴⁴ is instructive. The brief facts of this case are that the appellant, a neighbour to the victim was convicted of defilement of a 7-year-old female child. Conviction and sentence were appealed on grounds of insufficient evidence to sustain conviction. Although testimony on the CSA victim's behavioural or emotional condition was not led at trial the prosecution noted in reply that the victim's distressed condition was corroborative evidence of sexual abuse. The court preferred the prosecution's submission that the complainant's emotional reaction constituted corroborative evidence and accordingly dismissed the appeal. A similar stance was evident in another 2003 defilement case of *Uganda v Kiiza*.¹⁴⁵ Aweri-Opio J made reference to the CSA victim's behavioural and emotional reactions by observing as follows: 'I have no hesitation that the victim did experience sexual intercourse. I do agree with the testimony of [the prosecution witnesses] that the victim was highly distressed by the [sexual] experience she was subjected to.'¹⁴⁶

More recently, in 2010, the defilement case of *Uganda v Anyolitho*¹⁴⁷ affirmed the preparedness of Uganda's courts to indirectly make reference to CSA victims' behavioural and psychological reactions in arriving at their decisions. The facts of this case were that in 2008 the accused, a paternal uncle of the complainant performed a sexual act with the complainant, a 12 year old girl. The prosecution adduced expert evidence by a medical officer, whose examination revealed that although the complainant's hymen was ruptured, the rupture was not recent. The defence objected to the reliance on medical evidence, arguing that since the examination had been done two years after the alleged sexual act, the cause of the rupture could not be specifically linked to the accused's alleged sexual conduct. The defence further argued that the allegations were suspect on account of the complainant's delay in disclosing the sexual abuse to her mother. In the guilty verdict Mukasa J observed as follows:

I carefully observed the young girl as she gave her testimony and I find her evidence truthful. I am prepared to rely on it even without corroboration. I however find corroboration in the medical evidence and her distressed state as testified about by her and exhibited in the course of her

¹⁴⁴ *Katende* case *supra* note 129.

¹⁴⁵ *Uganda v Kiiza* case No HCT-05-CR-SC-015 of 2003.

¹⁴⁶ See full case note at <http://www.ulii.org/ug/judgment/high-court/2005/22> (accessed 21 March 2013).

¹⁴⁷ *Anyolitho* case *supra* note 143.

testimony. In the circumstances, I find that the prosecution has proved beyond reasonable doubt the ingredient of sexual intercourse.¹⁴⁸

On the whole these cases demonstrate that some courts in Uganda have occasionally made passing reference to CSA victims' behavioural and emotional reactions, thus indicating preparedness to draw inferences from behaviour considered to be consistent with CSA. In light of this brief jurisprudential exposition it seems possible that Uganda will admit BSE and accord it due weight in CSA and ACSA cases. Uganda should be inspired to that end by the ruling practice in USA and South Africa where BSE takes credence from the services of appropriately qualified experts. The jurisprudence of both USA and South Africa demonstrate the added advantage of advancing BSE with the help of experts. It is explicit in the selected cases treated above that the admission of expert testimony enabled a conviction that might not have been achieved if laypersons' testimony instead of duly qualified expert testimony was co-opted to bear out the rest of the overall body of evidence. By the same token, therefore, the growing prestige of BSE was evident in the South African case of *Evans Michael v The State*¹⁴⁹ in that the court took serious exception to the prosecution's attempt to secure a conviction by calling on lay testimony instead of appropriately qualified expert testimony. Uganda can certainly take a lesson from this example.

However, in the context of Uganda, the following barriers facing formal admission of BSE, as well as suggested ways to overcome them, should be duly noted.

¹⁴⁸ See full case note available at <http://www.ulii.org/ug/judgment/high-court/2011/154> (accessed 21 March 2013).

¹⁴⁹ *Evans Michael* case *supra* note 13, para 31. In this case, the prosecution tried to advance a case that the ACSA victim had been groomed by the accused hence the victims' seemingly unusual behaviour. Sutherland J ruled that 'what this attempt amounted to were several juvenile attempts to draw adverse inferences... if a case of grooming is to be advanced, it must be properly thought through and presented with expert support.'

7. Unravelling the underlying factors that could hinder the advancement of behavioural science evidence in ACSA prosecutions in Uganda

7.1 The local legal culture on the decision to charge and prosecute CSA cases in Uganda

Bell defines legal culture as ‘a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts.’¹⁵⁰ Nelken views it as ‘one way of describing relatively stable patterns of legally oriented social behaviour and attitudes.’¹⁵¹ In the words of Klare, it constitutes ‘professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? ...’¹⁵² Legal culture can manifest itself through ‘systematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality ...’¹⁵³

A particular legal culture can affect legal reform for better or worse. Even where imported legal norms are responsive to the challenges of ACSA prosecution, reception of these may still depend to a large extent on the attitude of justice professionals. There may be established orthodoxies within legal cultures about how to prosecute CSA cases to best advantage. Klare observes that the well-oiled routes of established custom may blind those forming part of the system to its faults and the potential virtues of adopting different pathways.¹⁵⁴ ‘Participants in a legal culture are often unaware or only partially attentive to its power to shape their ideas and reactions to legal problems.’¹⁵⁵ Some scholars argue, however, that the ‘un-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times’ is a

¹⁵⁰ J Bell ‘English law and French law-Not so different?’ (1995)48 *Current Legal Problems* 70.

¹⁵¹ D Nelken ‘Using the concept of legal culture’ (2004)29 *Australian Journal of Legal Philosophy* 1.

¹⁵² KE Klare ‘Legal culture and transformative constitutionalism’ (1998)14 *South African Journal on Human Rights* 161.

¹⁵³ TA Sullivan *et al.* ‘The persistence of local legal culture: Twenty years of evidence from the federal bankruptcy courts’ (1994)17 *Harvard Journal of Law & Public Policy* 804.

¹⁵⁴ Klare *supra* note 152, 167-168.

¹⁵⁵ *Ibid.*

known drawback to reform.’¹⁵⁶ Strangely, despite the urgency of giving credence to BSE in CSA cases, and the obvious examples of such practice being followed successfully in the USA and South Africa for decades, there is still no reported instance where the prosecution co-opted BSE into the pursuit of CSA cases. In Uganda the local legal culture seems to veer decidedly in the direction of dismissing BSE in CSA cases.

The local legal culture as exemplified in the police and the prosecution is a crucial element of the discussion in that these two agencies act as a gateway through which crime passes and victims of crime enter the justice system. The process is initiated by a complaint that the police receive and then investigate in virtue of a mandate to collect evidence. Spohn *et al.* note that the decision to charge is critical in that many cases of CSA lose momentum and do not proceed beyond it.¹⁵⁷ As Neubauer puts it, the police and prosecutors ‘control the doors to the court house’ because they perform the essential task of taking the decision to prefer charges,¹⁵⁸ and the decision is critically influenced by local legal culture, especially in the matter of sexual offending.

Charging and prosecuting in CSA cases is a fairly stable and settled process guided by established norms in Uganda, where guidelines spell out the minimum package of services to be received by CSA victims.¹⁵⁹ This includes HIV counselling and testing, presumptive testing and treatment of sexually-transmitted infections, preventive contraception for eligible survivors, trauma-counselling, and medical examination for forensic evidence and medical reports,¹⁶⁰ which has to be done by an approved health officer, preferably a police surgeon, in order to confirm the presence of injuries or genital fluids. The law requires that medical health practitioners (police surgeon, medical doctor, clinical officer and registered midwife) examine victims of sexual violence.¹⁶¹ The medical personnel who examine CSA victims are required to testify in court in support of the CSA victim’s testimony.¹⁶²

¹⁵⁶ *Ibid.*

¹⁵⁷ C Spohn *et al.* ‘Prosecutorial justifications for sexual assault case rejection: Guarding the gateway to justice’ (2001)48 *Social Problems* 206.

¹⁵⁸ D Neubauer *America’s courts and the criminal justice system* (1988)200.

¹⁵⁹ Uganda Reproductive Health Bureau *The responsiveness of Uganda’s public health system to the needs of child survivors of sexual abuse: A national study report* (2013)xiii. Available at www.childhope.org.uk/.../URHB-STUDY-FINAL-DRAFT-REPORT-2.d (accessed 10 January 2015).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

Typically, a case of child sexual offending commences with a formal report to the police.¹⁶³ This is followed by counselling and a medical examination of the alleged victim of sexual offending.¹⁶⁴ In Uganda disclosure of the findings of the medical examination is mandatory.¹⁶⁵ The findings are recorded on the Police Form III (PF3)¹⁶⁶ and the content of this form is the most critical factor in deciding whether to continue the investigation and whether to forward the case to the prosecutor for sanctioning.¹⁶⁷ The first step on being apprised of a CSA case, thus studies on police practice, is to enter the case in a register.¹⁶⁸ The alleged CSA victim, or the guardian(s) is given the PF3 to submit to the police surgeon for medical examination.¹⁶⁹ The doctor examines the alleged victim and takes special care to note bruises on genital organs, bloodstains and seminal fluid.¹⁷⁰ The examination is also conducted to determine the alleged CSA victim's age either by looking at the birth certificate or by relying on the child's dental configuration. If the indications specified above are found the police proceed with further investigations.¹⁷¹ If none of the signs mentioned are found the case is deemed not pursuable. Indeed the only discretion that the police have in relation to the continuing investigation of the alleged sexual offence is the arrest of the suspect.¹⁷² However, in practice police professionals in Uganda do exercise substantial discretion on whether to accept a charge of a sexual offence, whether to proceed with an investigation and whether to refer the case to the prosecuting authorities for a decision on whether to prosecute or not. The medical examination findings largely inform their discretion.

In sum, in Uganda's local legal culture medical evidence is definitive in deciding to prosecute in a CSA case, with the result that such a culture sets up an impenetrable barrier to integration of BSE in the prosecution of CSA cases; moreover, champions of

¹⁶³ Uganda Reproductive Health Bureau *supra* note 159, xiii-xv; D Nansasi 'Assessing the challenges faced in the control of girl child defilement: A study of two NGOs in Kampala district, Uganda' (2010) *Unpublished Masters Thesis: Makerere University* 32-34.

¹⁶⁴ *Ibid.*

¹⁶⁵ H Combrinck *Criminalisation of sexual violence in Sub-Saharan Africa-draft prepared for the World Health Organization* (2003); RE Gaensslen & HC Lee *Sexual assault evidence: National assessment and guidebook* (2002).

¹⁶⁶ Uganda Reproductive Health Bureau *supra* note 159, xiii-xv; Nansasi *supra* note 163, 32-34.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² See sections 2-27 of the Criminal procedure Code Act chapter 116 of the Laws of Uganda.

reform of the Ugandan system limit their aspirations to addressing gaps in medical evidence (e.g. how medical examinations are conducted). Suggestions in the available literature range across abolition or standardisation of fees for medical examination of CSA victims, increasing the number of police surgeons to carry out medical examinations, facilitation of medical officers to attend court sessions, specialised medical personnel to examine CSA victims, funding for laboratory equipment, and training of medical personnel.¹⁷³

The argument here is not that Uganda's justice system should not rely on medical evidence to prove child sexual offending. Indeed, the role of medical evidence should not be underestimated because where it is available it has played a very critical role in furthering the successful prosecution of CSA cases. The problem, however, is that the dogmatic faith placed in medical evidence as a basis of founding a prosecutable case means that a person in Uganda can sexually abuse children, and do so with impunity, in a manner that leaves no trace of medical evidence, yet for that reason and no other, still escape prosecution. Thus, suggestions that exclusively focus on reforms to medical evidence conveniently ignore the well documented fact that many of these cases are not supported by medical evidence. Such an exclusive preoccupation with medical evidence should therefore be tempered by taking equal cognisance of 'less tangible' evidence such as BSE to make sure that sexual offenders are brought to book.

The discussion on the local legal culture as it pertains to charging and prosecution decisions, in this section has served to demonstrate that the structure and functioning of justice systems is not determined by universal rationality. It does not necessarily follow that the practice in South Africa and USA, if applied in Uganda, will automatically yield the same results. For responsive and innovative mechanisms to have impact in a variety of criminal-justice systems, they have to be contextually placed. Thus for Uganda, in addition to consulting justice systems in South Africa and USA, admission of BSE in ACSA prosecutions would depend on Ugandan tolerance for letting go of established practices with regard to prosecuting CSA cases. Targeted steps need to be taken to change the attitudes of justice professionals so that they are able to be more accommodative of mechanisms such as BSE. Legal training offered by law schools and

¹⁷³ See e.g. Uganda Reproductive Health Bureau *supra* note 159, 14; Nansasi *supra* note 163, 69.

police training colleges could advance this objective. Presently, law practice in all fields, including the field of CSA prosecutions, is facing fundamental changes. Ribstein notes that the only thing that is certain is that law schools may face, for the first time, the need to provide the type of education the market demands... this may call for training in some ... theories and disciplines that have been developing...¹⁷⁴ Clearly, there is much unfinished business for legal academics and police training colleges in Uganda to deal with in preparing the ground for BSE admission in CSA prosecutions.

7.2 The institutional incapacity of Uganda's justice system to exploit BSE in CSA prosecutions

Besides the retardant effect of Uganda's legal culture, Uganda's limited systemic capacity is an inherent shortcoming. To be more precise, the question is whether Uganda's mental health professionals can offer 'appreciable help' that will stand up in court. In light of this question the status of forensic psychology and psychiatry in Uganda will now be discussed to shed light in this regard.

For the present purposes institutional capacity is the ability of criminal justice and its attendant or corollary (e.g. mental health) institutions to effectively perform their assigned tasks in accordance with established, reliable and valid standards. Potter submits that all innovative approaches or mechanisms may contribute to solving the challenges at issue.¹⁷⁵ However, the problem with any and all of them is that their implementation depends on the adequacy of the institutional capacity of the system.¹⁷⁶ Filling the gaps in forensic psychology and psychiatry in Uganda therefore depends on the capacity of that country to meet such challenges.¹⁷⁷ Forensic psychology 'is a branch of applied psychology which is concerned with the collection, examination and presentation of evidence for judicial purposes.'¹⁷⁸ Precisely put, a forensic expert who promotes incorporation of BSE must be able to formulate findings on behavioural, emotional and psychological reactions in legal language of the court to be of appreciable help.

¹⁷⁴ LE Ribstein 'Practicing theory: Legal education for the twenty-first century' (2011)96 *Iowa Law Review* 1649.

¹⁷⁵ PB Potter 'Legal reform in China: Institutions, culture, and selective adaptation' (2004)29 *Law & Social Inquiry* 471.

¹⁷⁶ *Ibid.*

¹⁷⁷ M Faulk *Basic forensic psychiatry* (1994)3.

¹⁷⁸ GH Gudjonsson & LRC Haward *Forensic psychology: A Guide to practice* (1998)1.

Over the years, studies have been conducted and arguments have been advanced to enable mutually intelligible and constructive interaction between the law and the forensic disciplines of psychology and psychiatry. Shuman and Greenberg, for instance, underscore the need for ethical norms and standards.¹⁷⁹ These norms, they argue, allow courts to distinguish experts who legitimately offer scientific testimony from those who misuse the opportunity for other motives and in doing so mislead the court. Thus ethical codes and guidelines seek to assure that when professional information is provided to courts, it is advanced by those with the requisite expertise, relying on validated methods and procedures, and using the informational bases that have been found necessary for accurate results. Edward¹⁸⁰ lists the following prerequisites in this regard:

- best practices (including the enforcement of robust performance standards);
- mandatory accreditation of forensic science laboratories;
- mandatory certification of forensic science practitioners;
- peer-reviewed interdisciplinary scientific research and technical development to support forensic science disciplines and forensic medicine;
- improved forensic science research and educational programmes;
- the funding of state and local forensic science agencies, independent research projects;
- educational programmes, with conditions that aim to advance the credibility and reliability of forensic science disciplines and achieve technological advances;
- education standards and the accreditation of forensic science programmes in higher education;
- programmes for lawyers and judges to better understand the forensic science disciplines and their limitations;
- the development and introduction of new technologies in forensic investigations; and programmes to improve the examination and assessment services.

Gunn and Taylor have also offered some guidelines, observing that experts adducing evidence in the field of psychology and psychiatry must be capable of assessing behavioural abnormalities, writing reports for courts and lawyers, giving evidence in

¹⁷⁹ D Shuman & S Greenberg 'The role of ethical norms in the admissibility of expert evidence' (1998)37 *Judges Journal* 5-9.

¹⁸⁰ HT Edwards *Strengthening forensic science in the United States: A path forward* (2009)3.

court, must be well-versed in mental health law, *et cetera*.¹⁸¹ On balance, therefore, for BSE to be effectively advanced in CSA prosecutions, Uganda must have the institutional capacity to offer material assistance to the court in the areas of psychiatry and psychology.

However, the gaps in the forensic science expertise on offer in Uganda in the disciplines of psychiatry and psychology are a major disadvantage,¹⁸² for example in the imperfect knowledge of diagnostic standards displayed by professionals in the said disciplines (e.g. the Diagnostic and Statistical Manual of Mental Disorders (DSM-V)).¹⁸³ Grace *et al.*¹⁸⁴ observe that Uganda lags behind other countries in its mental-health professionals' knowledge and grasp of the practical implications of said standards. They press home this observation by noting the scarcity of publications in the disciplines at issue, with the result that there is hardly any basis for contextually appropriate evaluations and assessments, especially given the questionable methodologies and unreliable data evident in the thin literature base. Munduni similarly notes that forensic examinations in Uganda are sometimes founded on persistent dysfunctions that produce misleading results that cannot assist the courts.¹⁸⁵ Critical deficiencies noted by Munduni in this regard are poor forensic facilities and incorrect methods of forensic assessment and evaluation.

Further, a mental health law and a strong regulatory framework are essential in reinforcing the application of psychology and psychiatry in the forensic context. In Uganda, the current enabling law for the operations of psychologists and psychiatrists,

¹⁸¹ J Gunn & PJ Taylor *Forensic psychiatry-clinical, legal and ethical issues* (1993)3.

¹⁸² R Munduni 'The role of forensic science in the administration of criminal justice in Uganda' (2008) *LLM Thesis: Makerere University*.

¹⁸³ Currently, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) stands out as one of the internationally recognised diagnostic systems that classify mental disorders. The DSM has implications for criminal-justice systems, particularly in the prosecution of child sexual offences because some of the mental disorders classified under the DSM have legal significance in the prosecution of child sexual offences. The DSM is authored by the American Psychiatric Association. It comprises of a classification of mental disorders with associated criteria designed to facilitate more reliable diagnosis of mental disorders. With successive editions over the years, it has become a standard reference for clinical practice in the mental field. The current DSM in use is the DSM-V, which came into operation in 2013. The DSM-V was preceded by several DSMs, with the most recent precedent being the DSM IV TR of 2000. See chapter four for a detailed discussion on the DSM-V.

¹⁸⁴ E Grace *et al. Forensic and clinical psychological research in Uganda: Challenges for trauma* (2014)1.

¹⁸⁵ Munduni *supra* note 182.

namely the Mental Treatment Act, was passed in 1938 and was last revised in 1964.¹⁸⁶ The law has been the subject of withering criticism over the years with arguments to the effect that it is out of step with the evolving roles of mental health professionals.¹⁸⁷ There has been a growing impetus for the law to be amended but recommendations of advocates for change remain unimplemented.¹⁸⁸ The Act is outdated and professionals have noted that it not only fails to address current trends but is out of step with international human rights frameworks such as the United Nations Convention on the Rights of Persons with Disabilities.¹⁸⁹ It has also been argued persuasively that ‘the current law is not in line with contemporary issues in mental health.’¹⁹⁰ In accordance with its title, ‘the law is primarily concerned with the treatment of persons with mental illness in psychiatric institutions’ and neglects other relevant critical issues such as forensic psychology and psychiatry.¹⁹¹

Deficiencies in the enabling law are worsened by the absence of a centralised body to regulate the functions of forensic experts generally and mental health professionals specifically,¹⁹² with the result that they operate in an uncontrolled environment that in effect, is likely to prejudice the process of administration of criminal justice.¹⁹³ Presently, the only arena in which the law/mental health nexus has played a central role is a case where the mental state of the accused has been at issue.¹⁹⁴ The weightier issue of forensics relating to psychology and psychiatry as an aid to prosecuting CSA cases has yet to go beyond a talking point. The findings of the study of Kigozi *et al.* re-emphasise the lack of mental health professionals who are specialised for children and adolescents in Uganda;¹⁹⁵ moreover non-specialised workers with little or no mental health training are perforce co-opted to stand in for the dearth of qualified

¹⁸⁶ See generally Mental Treatment Act, 1964, Chapter 270 of the Laws of Uganda.

¹⁸⁷ F Kigozi *et al.* ‘An overview of Uganda’s mental health care system: Results from an assessment using the World Health Organisation’s assessment instrument for mental health systems’ (2010)4 *International Journal of Mental Health Systems* 2; C Nyombi *et al.* ‘A critique of the Uganda Mental Health Treatment Act, 1964’ (2014)3 *Mental Health Law & Policy Journal* 505-526.

¹⁸⁸ *Ibid.*

¹⁸⁹ The Mental Health and Poverty Project *Mental Health law reform in Uganda* (2010)1-9.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Munduni *supra* note 182.

¹⁹³ *Ibid.*

¹⁹⁴ This in accordance with section 11 of the Penal Code Act Chapter 120 of the Laws of Uganda on the defence of insanity which is to the effect that an accused person is not criminally liable if they are insane.

¹⁹⁵ Kigozi *et al. supra* note 187, 8.

mental health personnel.¹⁹⁶ These revelations form a part of the general picture revealed by Munduni who found that expert evidence is required in many areas in Uganda but that the need remains unanswered.¹⁹⁷

If BSE is to come out of swaddling clothes in Uganda a great labour (e.g. promulgation of enabling mental-health law and regulatory framework) will have to be accomplished to heal the deficiencies in the provision of forensic services in the disciplines of psychology and psychiatry. Again, insight can be drawn from the current framework in South Africa where a law for the regulation of health professionals does exist. The Health Professions Act establishes the Health Professions Council of South Africa (HPCSA), a statutory body which regulates health professionals in South Africa.¹⁹⁸ The Professional Board for Psychology also operates under the jurisdiction of the HPCSA.¹⁹⁹ In order to promote ethical conduct within the medical profession, the HPCSA in consultation with professional boards has drawn up a code of conduct for psychologists in terms of the Health Professions Act.²⁰⁰ This broad regulatory framework has been pivotal in furthering forensic psychology and psychiatry. In light of this elaborate and enlightened provision in South Africa it is submitted that the proposed regulatory framework for the mental health professions in Uganda can establish much needed guidelines for the forensic applications of professional expertise in the mental health disciplines. Collaboration on CSA prosecutions between law and forensics in the area of psychology and psychiatry will be placed on a sound footing with the envisaged regulatory framework.

7.3 The limited catalogue of child sexual offences under Uganda's Penal Code Act which leaves limited room for BSE to be considered

The Penal Code Act Chapter 120 introduced by the British colonial government in 1950²⁰¹ was inherited by the independent Ugandan government in 1962. The child sexual offences recognised under this Act include defilement of a person under the age

¹⁹⁶ *Ibid.*

¹⁹⁷ Munduni *supra* note 182.

¹⁹⁸ See section 15 of the Health Professions Act 56, 1974; M Swanepoel 'Ethical decision-making in forensic psychology' (2010)75 *Koers* 875-876.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ See Penal Code Act Chapter 120 of the Laws of Uganda.

of eighteen, permitting defilement of such a person, and conspiracy to defile.²⁰² Thus it is plain that defilement (defined as sexual intercourse with a child under the age of eighteen) is the only child sexual offence recognised by statute and prosecuted under the said Penal Code Act.²⁰³ By this simplistic code there is no room for refinements in dealing with child sexual offending: the provisioning is at once too open and too narrow. For example, forms of sexual offending that do not involve penetration and contact are not in evidence. Since sexual intercourse is the essential ingredient of defilement, it follows that penetration (however slight) is required as proof, which hinges on medical evidence, failing which the matter is simply not prosecutable. Rupture of the hymen is taken as proof positive.²⁰⁴

A crude oversight in positing this condition is that incontrovertible penetration where boys are concerned may be hard to establish, which might well explain the virtual absence of cases of male CSA victims in the public record. Further, given the exclusive consideration of intercourse proved by medical evidence, other forms of sexual offending that may leave no trace in the form of injury, penetration or genital fluids simply fall beyond the scope of a recognisable sexual offence. Generally, non-penetrative child sexual offences rarely leave traces that can be regarded as medical evidence, but such cases could have been dealt with if admission of BSE had been countenanced. The statutory limitation precludes the possibility of such alternative remedies, albeit not altogether.

The amendment of the Penal Code Act in 2007 at least accommodated the possibility that boys can also be subjected to defilement, but offered little relief for the plight of many child victims of sexual offending that does not take the form of sexual intercourse or injury.²⁰⁵ All things considered, therefore, the introduction should be

²⁰² See chapter 14 of the Penal Code Act Chapter 120 of the Laws of Uganda. The chapter provides for offences against morality. Notably, the Act retains the common law definitions of sexual abuse. This limits the range of acts constituting sexual offences against children.

²⁰³ Section 129 of the Penal Code Act Chapter 120.

²⁰⁴ See e.g. the arguments and approach of the defence and prosecution in the cases of *Uganda v Girifasio* HCT-04-CR-SC 0046/2000; *Uganda v Anyolitho* Session case No 0074/2010; *Safari v Uganda* Supreme Court Criminal Appeal No 20/1995; *Uganda v Kiiza* case No HCT-05-CR-SC-015 of 2003; *Uganda v Magidu Othieno* criminal session case no. 0097 of 2010; *Uganda v Nabaya* criminal session case no. 0107 of 2010; *Uganda v Rwabulikwire* HCT-01-CR-SC-0066 of 2001; *Uganda v Rwaviira* HCT- 05- CR -SC- 0191 of 2003; *Bukenya v Uganda* Criminal Appeal No. 17 of 2010; *Uganda v Joseph Baluku* HCT-00-CR-SC-0015 of 2012; *Uganda v Gimogoyi* criminal session case no. 009 of 2010; *Mutumba v Uganda* criminal appeal no. 08 of 2008.

²⁰⁵ See Penal Code (Amendment) Act 2007, Uganda.

considered of innovative recipes such as BSE to bring Uganda closer to equity with its CSA caseload, or rather its potential caseload since a statistically significant proportion of notifiable cases probably remain 'below the radar' given the prospects of redress offered by the justice system as it stands. The fact that the Sexual Offences Bill has yet to be passed into law may present a valuable opportunity for Uganda to close with the suggestion to upgrade its position on sexual offences as suggested here. Possibly, broadening the catalogue of child sexual offences to include non-contact and non-penetrative sexual offending will draw the attention of Uganda's justice professionals to the need to explore the many creative mechanisms of effectively prosecuting child sexual offending. However, in the meantime, interim/provisional measures can be applied by charging suspects with common law offences such as *crimen injuria* (the act of unlawfully, intentionally and seriously impairing the dignity of another), which though not covered by Uganda's statutes, can at least be relied on as a basis for prosecution to hold suspects to account until more condign legislation is passed.

In Namibia and South Africa the array of child sexual offences has been extended and the role of BSE in their prosecution has been enhanced. For example, the South Africa the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 enshrines a robust and innovative catalogue of sexual offences against children.²⁰⁶ These include consensual sexual acts with certain children, also known as statutory rape, acts of consensual sexual violation with certain children, also known as statutory sexual assault, sexual exploitation of children, sexual grooming of children, exposure or display of or causing exposure or display of child pornography or pornography to children, using children for or benefiting from child pornography, compelling or causing children to witness sexual offences, sexual acts or self-masturbation, and exposure or display of or causing of exposure or display of genital organs, anus or female breasts to children.²⁰⁷ It is clear that this broad catalogue contemplates that child sexual offending may not always involve sexual contact and penetration and may therefore not leave discernible traces that could be adduced as medical evidence. Consequently a 'culture' is

²⁰⁶ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was enacted to comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute. This was through repeal of some common law offences and rules, and creation of new offences.

²⁰⁷ See chapter three of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 on sexual offences against children.

implicitly instilled in justice professionals to consider alternative forms of proving the offences recognised by the Act.

Since justice officials in Namibia were inclined to underrate BSE admission as an aid to prosecuting sexual offences, that country provided more leeway for the accommodation of BSE in its legislative framework. The existing provisions read as follows:

Evidence of psychological effects of rape

8. (1) Evidence of the psychological effects of rape shall be admissible in criminal proceedings at which an accused is charged with rape (whether under the common law or under this Act) in order -

(a) to show that the sexual act to which the charge relates is likely -

(i) to have been committed towards or in connection with the complainant concerned;

(ii) to have been committed under coercive circumstances;

(b) to prove, for the purpose of imposing an appropriate sentence, the extent of the mental harm suffered by that complainant.

(2) In estimating the weight to be attached to evidence admitted in terms of subsection

(1) the court shall have due regard to -

(a) the qualifications and experience of the person who has given such evidence; and

(b) all the other evidence given at the trial.²⁰⁸

The incorporation of a similar provision in Ugandan legislation seems advisable since BSE has never been given comparable recognition in that country and will help its justice professionals by offering guidelines on the exact place and role of BSE in CSA prosecutions.

In sum, Uganda's justice system can learn a great deal from South Africa and the USA that will help its imperative endeavours to incorporate BSE in its prosecution of ACSA and CSA cases, to which end justice professionals will have to be prepared for the required transition in that regard by exposing them to targeted training steps that will inculcate a more positive/receptive mindset towards eliminating flaws and deficiencies in the forensics of psychiatric and psychological disciplines in their justice system and towards the positive admission of BSE as an aid to prosecuting sexual offences.

²⁰⁸ Section 8 of the Combating of Rape Act, No. 8 of Namibia, 2000.

8 The role of behavioural science evidence in substantiating on false child sexual abuse allegations

When children's allegations of abuse were discounted out of hand, they were victimised not only by their abusers but by a society that neither believed nor protected them. Conversely, when allegations that have no basis in fact are believed, innocent adults can face a lifetime of imprisonment, shame, ostracism, and devastation.²⁰⁹

The above quotation serves to underscore the dilemma of striking a balance between holding suspects to account and ensuring that the innocent are not wrongly convicted. Thus far, the discussion has focused on the role of BSE in furthering the prosecution's case. However, BSE can equally be of relevance in furthering the defence case. The need for BSE in this regard gains credence from studies showing that though false CSA allegations are minimal, they do occur.

False allegations of CSA are different from 'unfounded' or 'unsubstantiated' CSA allegations. Many cases of alleged sexual abuse are labelled by investigators as 'unfounded' or 'unsubstantiated'. Yuille *et al.*²¹⁰ note that up to half of the reported cases are labelled in this fashion. Yuille *et al.* may be near the mark in their assessment as young children may lack verbal or other communication skills and may be unable to provide sufficient detail to determine whether abuse has occurred, thus inviting the label 'unfounded' or 'unsubstantiated'. Alternatively, deficient communication skills may prevent a child from making its suffering at the hands of an abuser known to the world, particularly if it is verbally, visually or aurally challenged. Alternatively, poor investigative techniques may prevent a child from disclosing what happened, with the result that genuine cases may be declared unsubstantiated or unfounded. False allegations do occur, however, as noted by Yuille *et al.*²¹¹ who classify such allegations as follows

²⁰⁹ L Shanks 'Cross-examination of a child witness' (2009-2010)³² *Legal Research Paper Series 32*.

²¹⁰ JC Yuille *et al.* 'The nature of allegations of child sexual abuse' in T Ney (ed) *True and false allegations of child sexual abuse: Assessment and case management* (1995)²². See also AH Green 'True and false allegations of sexual abuse in child custody disputes' (1986)²⁵ *J. Am. Acad. Child Psychiatry* 449-456.

²¹¹ Yuille *et al. supra* note 210, 23-24.

- Statements devoid of truth;
- Statements that are partly true (reflecting real events) but directed at the wrong (innocent) person; in other words the accused is not the offender. The part-truth is that the child does disclose the abuse but puts the blame on someone other than the offender;
- Statements that contain elements of truth and falsehood. In other words the complaint is real enough but the child embellishes the account with particulars that are fictitious.

Research shows that the risk/incidence of false allegations increases with child sexual offending.²¹² Apparent honesty and reliability may be deceiving. The intention may be there but it may be deflected. Brongersma explains that the high incidence of CSA may cause suspicion to settle on acts of harmless affection and gestures of goodwill, which in turn may spill over into CSA accusations.²¹³ Clarke-Stewart *et al.*²¹⁴ add that repeated questioning and suggestive interviews by law enforcement authorities can cause children to misconstrue non-abusive conduct as CSA. However, some cases are not misconstruals but demonstrably false as noted by Derdeyn.²¹⁵

²¹² For a demonstration of the reality of false allegations, see DC Schuman 'False accusations of physical and sexual abuse' (1986)14 *Bull. Am. Acad Psychiatry Law* 5-21; L Coleman & PE Clancy 'False allegations of child sexual abuse: Why is it happening? What can we do?' (1990)5 *Criminal Justice* 14-47; EP Benedek & DH Schetky 'Allegations of sexual abuse in child custody and visitation disputes' in EP Benedek & DH Schetky (eds) *Emerging issues in child psychiatry and the law* (1985) 145-156; GL Blush & KL Ross 'Investigation and case management issues and strategies' (1990)2 *Issues in Child Abuse Accusations* 152-160; C Gordon 'False allegations of abuse in child custody disputes' (1985)2 *Minnesota Family Law Journal* 225-228; N Kase-Boyd 'Fictitious allegations of sexual abuse in marital dissolutions' (1988)11 *Family Law News* 50-52; R Sheridan 'The false child molestation outbreak of the 1980s: An explanation of the cases arising in the divorce context' (1990)2 *Issues in Child Abuse Accusations* 146-151; A Yates & T Musty 'Preschool children's erroneous allegations of sexual molestation' (1988)145 *American Journal of Psychiatry* 989-992; KC Faller 'Possible explanations for child sexual abuse allegations in divorce' (1991)61 *American Journal of Orthopsychiatry* 86-91.

²¹³ E Brongersma 'The meaning of "indecent" with respect to moral offences involving children' (1980)20 *British Journal of Criminology* 30.

²¹⁴ A Clarke-Stewart *et al.* *Manipulating children's interpretations through interrogation* (1989); H Wakefield & R Underwager 'Manipulating the child abuse system' (1989)1 *Issues in Child Abuse Accusations* 58-67; S White & KM Quinn 'Investigatory independence in child sexual abuse evaluation: Conceptual considerations' (1988)16 *The Bulletin of the American Academy of Psychiatry and the Law* 269-278.

²¹⁵ AP Derdeyn 'Child psychiatry and the law: The family in divorce, issues of parental anger' (1983)22 *Journal of the American Academy of Child Psychiatry* 385-391; see also Green *supra* note 210; MD Everson & BW Boat 'False allegations of sexual abuse by children and adolescents' (1989)28 *Journal of American Academy of Child & Adolescent Psychiatry* 230-235; RE Ekman 'Kids' testimony in court: The sexual abuse crisis' in P Ekman *Why kids lie* (1989)152-180; RE Emery 'Interparental conflict and the children of discord and divorce' (1982)92 *Psychological*

Research²¹⁶ shows that parental battles during custody, divorce and separation proceedings may make CSA allegations a formidable and insidious weapon to sideline/score points off the opposite parent or guardian. Genuine CSA allegations cannot be ruled out during custody and divorce proceedings since the family may no longer be trying to keep itself together and hide this particular secret to preserve the family's solidarity. False allegations are therefore not unknown under these circumstances. However, Klein²¹⁷ cautions against a tendency under circumstances of family breakup to consider CSA allegations as false or suspicious per definition.

And of course such allegations cannot be ruled out in any case.²¹⁸ Thus the legal strictures against CSA, as critically important as they are, must not be allowed to endanger the innocent, hence the significance attached to admission of BSE as an aid to ensure the veracity of CSA allegations. Two cases will be examined now as instances of how false allegations eventuated.

9 False CSA allegations in selected criminal case law

9.1 *State of North Carolina v Sylvester Smith (Sylvester case)*²¹⁹

This 1984 case involved two girls, respectively four and six years of age, who were sexually molested by their nine-year-old cousin at their family home in Bellville, North Carolina. When the molestation was discovered the girls' grandmother pressured them to accuse Sylvester Smith, the boyfriend of one of their mothers, instead of their cousin, of committing the offence. The girls duly accused Smith who was therefore convicted of rape by the jury and sentenced to two consecutive life sentences. Twenty years later, in 2004, the victims came forward and recanted, confessing that Smith had never molested them and that they were pressured into lying by their grandmother Mrs Fannie Mae

Bulletin 310-330; D La Rooy *et al.* 'Repeated interviewing: A critical evaluation of the risks and potential benefits' in K Kuhnle & M Connell (eds) *The evaluation of child sexual abuse allegations: A comprehensive guide to assessment and testimony* (2009) 327-335.

²¹⁶ MC Fisk 'Abuse: The new weapon' (1989) *The National Law Journal* 20-25; Derdeyn *supra* note 215, 385-391; JE Hall 'Child abuse as a tool' (1989)1 *Register Report* 12-13; Green *supra* note 210.

²¹⁷ AJ Klein 'Forensic issues in sexual abuse allegations in custody/visitation litigation' (1994)18 *Law and Psychology Review* 347.

²¹⁸ See e.g. studies by Klein *supra* note 217, 347; DPH Jones & JM McGraw 'Reliable and fictitious accounts of sexual abuse to children' (1987)2 *Journal of Interpersonal Violence* 27; Everson & Boat *supra* note 215, 230-235.

²¹⁹ *State of North Carolina v Sylvester Smith* 337 S.E 2d 833 (1985)315 N.C.76.

Davis who was trying to protect their cousin (her grandson). In November 2004, Smith's conviction was overturned.²²⁰

Earlier, in 1984, the court held at trial that the state had proved the case against Smith beyond reasonable doubt. The prosecution advanced evidence through a number of witnesses. The state's evidence tended to show that one night during the weekend of 2 March 1984, the accused, Smith, entered the bedroom of the complainants, Gloria Ogundeji and Janell Smith, aged four and five respectively, and engaged in sexual intercourse with both girls. Gloria was the daughter of Ann Ogundeji with whom the accused was then living. Janell was Gloria's cousin, daughter of Ann's sister, Catherine. During the time in question, Janell was staying with Ann, Sylvester, Gloria, and the accused in a mobile home. At trial, Gloria testified that the accused came into the bedroom where she and Janell were sleeping, slipped off his pants, and touched her in her 'project' with his 'worm.' Janell testified that the accused threatened to beat her 'half to death', pushed her down on the bed, and stuck his 'thing in [her] project.' She also testified that he '[stuck] his hand in [her] butt.' At trial, the complainants were asked to show the jury where their 'project' was and both independently pointed to their vaginal areas. Gloria indicated the same area when asked to show where the 'worm' was, and also identified both the 'project' and the 'worm' on anatomically correct dolls used as exhibits at trial. Janell pointed to her anal area when asked to show where her 'butt' was.

Mrs Fannie Mae Davis, the girls' grandmother, testified that she went to the mobile home where Smith, Ann, Gloria, and Janell were living on 3 March 1984 and that Gloria had led her into the bedroom to tell her what Smith had done to her. She testified that Gloria told her that Smith had '[gone] in her.' She also testified that Gloria indicated to her that Smith had put his 'peeter' in her 'project' and in her 'butt' using his finger. She also testified that Gloria indicated that Smith had told her to go in the bathroom and wash the blood off.

Both Gloria and Janell were examined at the hospital by a medical expert on 5 March 1984. The medical expert testified that his examination of Gloria revealed 'a well-circumscribed area of bruising around the vaginal opening' on the interior of the labia.

²²⁰ For further discussion on the circumstances surrounding the false child sexual abuse allegations and ultimate exoneration of Sylvester Smith, see B Barrett 'Falsely accused man freed.' Available at http://injusticebusters.org/04/Smith_Sylvester.shtml. (accessed 20 April 2014).

He stated that it was his opinion that a 'male penis' caused the trauma he observed. The expert also discovered the presence of protozoa trichomonas, an organism transmitted primarily through sexual contact. The expert testified that his examination of Janell revealed marked redness and irritation, with areas of contusions around the vaginal opening. He stated that a finger or penis could have caused Janell's injuries. His examinations revealed no presence of sperm, and he noted that Gloria's hymenal ring was intact.

The accused, Smith, took the stand and denied any knowledge of the incidents. Smith's denial was rejected and he was convicted and sentenced, hence the appeal to the Supreme Court of Carolina. Given that Smith's general denial of the alleged offence had no evidential backing, his grounds of appeal revolved entirely around application of the rules of evidence. One of the grounds of appeal was that the trial court had erred in allowing, as substantive evidence, the account given by Mrs Davis of what Gloria and Janell had told about the alleged assaults. Smith contended that this evidence was inadmissible hearsay, but the Supreme Court ruled that the hearsay evidence fell within one of the exceptions to the hearsay rule.²²¹ The Supreme Court's decision could hardly be faulted as the law on hearsay exceptions was clear. Ultimately the Supreme Court concurred with the trial court, consequently dismissing the appeal.²²² But even without the objections to the hearsay evidence, the evidence against Smith was deceptively overwhelming. The likelihood of the allegations being false seemed remote to evanescent.²²³

9.2 *Sifiso Shezi case*

In 2003, in the South African case of *Sifiso Shezi*,²²⁴ two life sentences were imposed on the accused Shezi on a charge that he had raped his daughter (Dube). Many would see

²²¹ *Sylvester case supra* note 219, 839-841. For a commentary on the ruling of the court in the case of *State of North Carolina v Sylvester Smith*, see also TC Holm 'State v Smith: Facilitating the admissibility of hearsay statements in child sexual abuse cases' (1986)64 *North Carolina Law Review* 1352-1377.

²²² *Sylvester case supra* note 219, 850.

²²³ Presumably the admission of BSE would be a material aid to ruling out such errors of rectitude taking the place of justice. However, if there is an ingrained error of attitude, it is possible that it could simply be carried over to the application of BSE.

²²⁴ Judgment unreported. Similarly, findings of the court as it pertains to the newly discovered evidence are unreported in view of section 327(3) (b) of the Criminal Procedure Act, 105, 1977 of South Africa, which prohibits court from entertaining the new evidence from announcing its findings. However, for details about alleged false accusations, see M Ayanda & S Mlambo 'Dad

the sentence as just and well-earned. Shezi served ten years of his jail term, but consistently protested his innocence the while. Dube, who was eight years old at the time of the allegations only retracted her accusation in 2008 after her mother died, confessing that her mother had coerced her into lying about the abuse. Dube confessed to falsely testifying at trial because she was scared of her mother who had a bad temper. Dube also confessed to being coached by her mother to testify that her father had raped her on four different occasions. Shezi was only released in 2013, having served 10 years of the sentence.

9.3 Brief overview of the two discussed cases

It can hardly be gainsaid that '[p]unishment of the innocent may be the worst of all injustices.'²²⁵ The above two cases illustrate the fallout from false CSA allegations. They demonstrate that though uncommon, false allegations of CSA do exist. The facts in the illustrative case histories were fabricated to dovetail immaculately with the circumstances, thus creating a seamless verisimilitude, and the deception was made complete by zealous efforts to protect 'innocent' child victims. The courts therefore had no option in light of the purported facts but to sustain a conviction. The pendulum seems to have swung decisively from a clear tendency to dismiss child testimony to the opposite extreme of paying inordinate credence to such allegations, no matter how implausible or fanciful. Smith and Sifiso maintained their innocence all along but could only be freed after the victims confessed of their own volition. Mantell²²⁶ observes that the potential consequences of false CSA allegations for the child, parents, family and society as a whole are massive, long-lasting and devastating. Shanks takes a similar line:

To be wrongly convicted of child sexual abuse has immediate and long-lasting effects on the life of the accused, including lengthy prison terms, registration as a sex offender and the conditions and consequences that follow, which may include the loss of professional licenses, inability to live within certain areas, and a lifelong stigma. Given the nature of child sexual abuse, such convictions can destroy families. The individual accused is not the only victim of wrongful convictions. A spouse who refuses to believe an accusation may lose custody of the child involved

cleared of rape happy to be free' (2013). Available at <http://www.iol.co.za/dailynews/news/dad-cleared-of-rape-happy-to-be-free-1.1534796>. (accessed 20 April 2014).

²²⁵ *Jenner v Dooley*, 590 N.W.2d 463, 471 (SD. 1999).

²²⁶ DM Mantell 'Clarifying erroneous child sexual abuse allegations' (1988)58 *American Journal of Orthopsychiatry* 618-621.

or other children in the family. She herself may be [wrongly] charged criminally for refusing to 'protect' the child from abuse..²²⁷

Smith and Sifiso respectively lost 20 and 10 years of their lives in prison. Their custodial sentence has ended, but that does not necessarily end the stigma attached to it. Fortunately for Smith and Sifiso, the complainants owned up to their initial false accusations, but not many complainants are keen to set the record straight because of the legal consequences of false accusations. Greater objectivity is called for if criminal-justice systems are to relieve the plight of ACSA victims appreciably. 'There can be no benefit to society or to children in imprisoning an innocent person.'²²⁸ The consequences of false CSA allegations are disquieting as they often damage the child's direct interests and prospects, and the child's primary relationships. This dilemma seems to be clamouring for efforts by criminal-justice systems to become more objective by increasingly exploring mechanisms that ensure that the falsely accused are vindicated. Shanks rightly notes that '[i]t is imperative that improvements be made to ensure that individuals are not convicted of crimes they did not commit and that children are not the unwitting accomplices in such miscarriages of justice.'²²⁹ Sutherland J in *Evans Michael v The State*²³⁰ has similarly demonstrated the need for courts to be cautious when confronted with CSA cases, stating that it is defensible for criminal-justice systems to be zealous about holding child sexual offenders to account,

[t]here is however a real danger that our indignation at the violation of the right to dignity of the vulnerable people can cripple our critical faculties. When that happens, there is a danger that one reaches for what is thought to be the right outcome without having properly conducted the fact finding exercise upon which to create a platform to stand and assert one's values.

By all accounts therefore the argument for importation of BSE as an element of ACSA prosecution seems to be growing to a compelling weight.

²²⁷ Shanks *supra* note 209, 23.

²²⁸ DP Elder 'Investigation and prosecution of child sexual abuse cases' (1991)19 *Western State University Law Review* 285; ML Rogers 'Coping with alleged false sexual molestation: Examination and statement analysis procedures' (1990)2 *Issues in Child Abuse Accusation* 57-68.

²²⁹ Shanks *supra* note 209, 29.

²³⁰ *Evans Michael* case *supra* note 13, para 4.

10 The critical need for BSE in furthering greater objectivity in CSA prosecutions

Studies²³¹ demonstrate that attempts to vindicate the falsely accused in CSA cases are fraught with difficulties. Criminal-justice systems are presented with a dilemma of balancing the obligation to protect CSA victims against an equal obligation to protect the rights of the accused. This dilemma is exacerbated by the fact that these cases hardly have conclusive medical evidence or eye witnesses to perhaps aid in substantiation. Many of these cases are clouded by dubious elements that stand in the way of concluding whether CSA actually occurred. Many of the signs and symptoms that could be interpreted as indications of abuse might equally be indicative of quite different provenance. Again, Browne and Finkelhor²³² demonstrate that abused children may not react in any of the ways associated with abuse, to the extent that their (lack of) reaction might be called non-committal or at least unspecific. Yuille *et al.* note that in such circumstances 'the job of assessment requires more than knowledge that such symptoms do or do not exist.'²³³

As noted throughout this chapter, criminal-justice systems need to acknowledge the complexity of CSA cases and the degree of expertise required to evaluate CSA. Evaluators must possess specialised knowledge of child development, individual and family dynamics, patterns of child sexual victimisation, signs and symptoms of abuse, and the uses and limits of various psychological tests.²³⁴ They must equally be familiar with the literature on child abuse, and understand the linkage between behavioural reactions and CSA.²³⁵ Short of this, courts run the risk of arriving at uninformed decisions that may result in children being exposed to further CSA since the suspects

²³¹ Yuille *et al. supra* note 210, 24; DC Raskin & JC Yuille 'Problems in evaluating interviews of children in sexual abuse cases' in SJ Cece *et al.* (eds) *Children take the stand: Adult perceptions of children's testimony* (1989) 184-207; see also P Ash & M Guyer 'Child Psychiatry and the law: The functions of psychiatric evaluation in contested child custody and visitation cases' (1986)25 *Journal of American Academy of Child Psychiatry* 554-561; Benedek & Schetky *supra* note 212, 145-156; D Corwin *et al.* 'Child sexual abuse and custody disputes: No easy answers' (1987)2 *Journal of Interpersonal Violence* 91-105; M de Young 'A conceptual model for judging the truthfulness of a young child's allegations of sexual abuse' (1986)56 *American Journal of Orthopsychiatry* 550-559.

²³² A Browne & D Finkelhor 'Impact of child sexual abuse: A review of the research' (1986)99 *Psychological Bulletin* 66-77.

²³³ Yuille *et al. supra* note 210, 24.

²³⁴ Myers *supra* note 5, 42.

²³⁵ *Ibid.*

have not been brought to book, or worse, non-offenders have been incarcerated while real offenders walk free. The opinion of experts, especially given the specifications listed above, is quite indispensable in dealing with CSA suspects even though it must be acknowledged that they cannot distinguish faultlessly between perpetrators and non-perpetrators. Where the value of their expertise comes in is that they can effectively improve the courts' assessments of alleged abuse by placing knowledge at their disposal that would otherwise be inaccessible to them. As noted, they are not blest with failsafe methods to choose between true and false CSA allegations, but they have a better than average appreciation of the significance of children's emotional displays and the events or acts such displays they might refer to. Yuille *et al.*²³⁶ refer to a number of techniques that properly qualified experts can apply to improve assessment of CSA allegations. Three of these are behavioural checklists, recantations and credibility assessments.²³⁷

BSE specialists and/or mental health professionals (MHPs) may also render good services in assessing the competence of ACSA victims to render testimony that incriminates an accused. An expert witness could be appointed if the results of the competency hearing are ambiguous or the court feels that the child's developmental maturity is still in question. The child's competence in this regard, with particular reference to his/her ability to relate a series of events accurately, could be assessed by a child psychologist using developmentally-appropriate techniques. The expert must therefore be aware that the court is interested only in an accurate appraisal of the child's ability to testify as opposed to preparing an incompetent child to take the stand or preventing a competent one from doing so.

Current techniques to evaluate children's competence seem inadequate. Spencer observes that traditionally, an oath was sworn as proof of the competence of a witness in that the person swearing the oath declared that he/she would rather burn in hell than lie under oath.²³⁸ However, some of the current techniques applied to determine the competency of children to testify '[make] little or no attempt to accurately ascertain the child's level of developmental maturity or ability to reliably relate a series of

²³⁶ Yuille *et al. supra* note 210, 24.

²³⁷ *Ibid.*

²³⁸ JR Spencer 'Introduction' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012)6.

events.’²³⁹ Indeed, the competency rules have been the subject of contemptuous criticism and have consequently been subjected to reforms in some justice systems to the extent of abolishing the competency requirement²⁴⁰ and increasingly substituting the notion that children who are capable of communicating intelligibly can be assumed to be competent to give evidence. Although this is a welcome innovation, in some cases the pendulum has swung from reluctance to consider children competent at all to a non-reflective consideration of children as competent or incompetent.

Although it may be true as a general dictum that children who are capable of communicating intelligibly can be regarded as competent to give evidence, more probing tests should be introduced to ascertain competence beyond speculation, as far as possible. ACSA allegations are a serious matter that cannot be left at the mercy of inadvertent inaccuracies caused by a child witness’s inadequate developmental competency in rendering an account of events at issue. As Shanks notes, ‘[t]he lives of many individuals, including the child, will be changed forever as a result of the determination made at the competency hearing.’²⁴¹ However, often in carrying out this assessment, the process ‘is both startling and problematic that the typical competency hearing is comprised of the meaningless ceremony...’²⁴²

Shanks observes that ideally, ‘[t]he salient questions [in assessing the competence of children to testify should be] whether the child can observe and register what happened, whether she has memory sufficient to retain an independent recollection of the events, whether she has the ability to translate into words the memory of those observations, and whether she has the ability to understand and respond to simple questions about the occurrence.’²⁴³ Such a feat of recollection and accurate verbal expression of that recollection, if achieved as competently as required for the purposes of court procedure, would be remarkable and truly valuable in any

²³⁹ L Shanks ‘Evaluating children’s competency to testify: Developing a rational method to assess a young child’s capacity to offer reliable testimony in cases alleging child sex abuse’ (2010)58 *Cleveland State Law Review* 575. See also *S v N* 1996 (2) SACR 225 (C); *S v Seymour* 1998 (1) SACR 66 (NPD) and *S v Malinga* 2002 (1) SACR 615 (NPD), on the import and nature of an oath and its implications on evidence of children.

²⁴⁰ See e.g. section 52 of the Criminal Justice Act of England, 2003, which abolished the competence Requirement. See also South Africa’s Supreme Court of Appeal’s decision in *S v B* 2003 (1) SACR 52 (SCA), where Streicher JA observed that an understanding on the complainant’s part of the nature and import of the oath did make the evidence she gave less reliable.

²⁴¹ Shanks *supra* note 239, 576.

²⁴² Shanks *supra* note 239, 578

²⁴³ Shanks *supra* note 239, 585.

witness. Muller observes in this regard that in evaluating the competence of the child to act as a witness, there are two components to consider.²⁴⁴ The first requirement is eye witness ability. This entails the ability to report details of an observed event accurately and completely.²⁴⁵ It relates to the child's cognitive development, with particular reference to factors that influence acquisition, retrieval, retention and verbal communication of information.²⁴⁶ The second requirement is the witness's motivation to tell the truth.²⁴⁷ 'Unfortunately, [in most cases] these critical skills are rarely explored during the competency hearings... Rarely are competency hearings used to assess the types of issues that are critical in criminal cases, such as the child's understanding of the concepts of time and ability to accurately perceive and relate a series of events.'²⁴⁸ Often, questions relate to general information such as the child's residential address, his/her name, age, ability to differentiate colours amongst other general aspects. Given the general nature of information often elicited, judicial officers often consider the services of MHPs expendable in assessing the child witness's mental capacity and competency.

Unfortunately, however, competency tests for child witnesses will have to become more stringent and probing in light of the increasing prevalence of false allegations. Shanks and Muller, for example, observe that judicial officers will need to ensure that by the time the child complainant is deemed competent to testify, an attempt has been made to accurately ascertain the child's level of developmental

²⁴⁴ K Muller 'The competency examination and the child witness' in K Muller *The judicial officer and the child witness* (2002)152. See also K Muller 'Competence to testify: Children under oath' in K Muller (ed) *Prosecuting the child sex offender* (2011)122-124. Here Muller argues further that 'the test requires more than a simple distinction between truth and lies. In fact, it requires that a child should be capable of making observations and giving a coherent account of these observations. In addition, the child must be able to distinguish between fact and fantasy and understand the obligation to tell the truth. Although the primary emphasis ... is on the child's ability to differentiate truth from falsehood, there are other aspects which are included in the examination. It is also necessary for a child to have adequate cognitive skills to comprehend the event he has witnessed and to be able to communicate his memories of the event in response to questions. The test, therefore, of a child's competence involves four fundamental issue: firstly, the child must have the mental capacity at the time of the occurrence in question to observe and register the event, secondly, the child must possess memory which will be sufficient to enable him to retain an independent recollection of the observation made, thirdly, the child must have the capacity to translate the memory of these observations into words, fourthly, the child must possess sufficient intelligence to understand the obligation to speak the truth.'

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

maturity or ability to reliably relate a series of events. This will ensure that accused persons are not convicted based on possibly flawed evidence given by a child complainant whose competence is questionable for developmental or other reasons peculiar to childhood or to the child concerned. Similarly, such a broader outlook on assessment will ensure that child complainants who are capable of testifying credibly are not winnowed out of the process on the basis of generalised questions that reveal nothing about matters that are pivotal to assessing competence. However, a more stringent, probing approach may call for the services of MHPs to be enlisted to ascertain the child's ability to differentiate between fantasy and reality in a specific context, to understand the concept of truth, to understand what is meant by his/her memory, and among other more specialised traits, to differentiate between enactive representation, imaginal representation, linguistic representation, categorical representation, capacity to observe, and ability to communicate. Judicial officers can benefit from the expertise of MHPs.

Thus, in furtherance of greater objectivity in CSA prosecutions, courts should increasingly accommodate the appreciable help that BSE experts can offer. It stands to reason that the costs attending increasing accommodation of expert assistance may be significant, but these costs hardly compare to the plight of innocent victims of failure of the courts to fulfil their duty to offer the protection to which the said victims are constitutionally entitled, especially given the real possibility of tapping into existing and ever more sophisticated expertise that could greatly assist in relieving their plight.

Erroneous convictions are rare by even the strictest standards,²⁴⁹ but as the saying goes, even one is one too many in the eyes of the public who are likely to lose confidence in the whole system of law enforcement in light of the risk of random arrest and conviction whenever such a 'glitch' happens, especially since the consequences in cases of CSA are dire to say the least. Human error is inevitable, however, in face of which the justice system must do the best it can to minimise the risk, to which end increased objectivity must be pursued in the sense of in-depth, specialised knowledge that can be brought to bear to shed light on CSA cases. What this means, of course, is that the services of behavioural science experts and MHPs should be enlisted to provide

²⁴⁹ See e.g. A Green 'Lethal Fiction: The Meaning of 'Counsel' in the Sixth Amendment' (1993)78 *Iowa Law Review* 504.

greater depth to the court's probing of CSA cases that can be baffling in their complexity. Such additional resources are especially useful where medical evidence is hardly present; indeed, it may be an essential helpmeet in evaluating CSA allegations and assessing the competence of children to testify. Their expertise in dealing with issues of behaviour can improve the accuracy of the courts, however slight.

11 Conclusion

The growing body of empirical evidence affirming the paucity of medical evidence in CSA cases exerts continuing pressure by default to resort to BSE to fill the gap and add an extra dimension to the resource base at courts' disposal to deal with such cases. Courts in South Africa are exhibiting an observable trend to admit BSE in ACSA cases, while in Uganda some courts are beginning to indicate that they are prepared to allow BSE into proceedings relating to ACSA cases. However, there is uncertainty about the extent to which BSE is allowed to weigh into proceedings as a material factor that can sway inferences and decisions. As courts keep pace with new developments in behavioural science, they will need to be more accommodative of BSE and consequently to accord it full weight. This chapter has underscored the need for full weight to be accorded to BSE where it has been considered in context with the body of evidence on record. In Uganda there is an urgent need to admit duly qualified behavioural scientists to testify and be accorded due evidentiary weight in ACSA cases; and the urgency in both South Africa and Uganda is increased by the rising incidence of false allegations of ACSA, hence the discussion to that effect in this chapter.

CHAPTER FOUR: DIAGNOSTIC STANDARDS, SYNDROMES AND INTERVIEW PROTOCOLS IN ADVANCING BEHAVIOURAL SCIENCE EVIDENCE IN ACSA PROSECUTIONS

1 Introduction

The opinion of behavioural science experts can profoundly impact the decision of the court. It is therefore critical for the expert's assessment to be reliable and accurate. The ACSA victim's condition is assessed before behavioural science experts arrive at an opinion that is forensically relevant; and since subjective judgment may taint the expert's opinion it may be advisable to base the opinion on standardised diagnostic standards, syndromes or protocols. Slovenko¹ notes that standards are important in diagnosis and description of behaviour. Without them the same condition may be given different labels and consequences, thus misleading the court.² Hershkowitz *et al.*³ note, similarly, that informal and unsubstantiated judgments are too inaccurate to make forensic applications appropriate. Herman⁴ adds that because of the high likelihood of error and bias, informal judgments pose a particularly severe risk of harm and injustice as they could displace genuine CSA allegations, thereby exposing child victims to further sexual abuse.

Against this backdrop, this chapter underscores the role of selected standardised frameworks in assessing ACSA victims. The chapter demonstrates that as opposed to informal judgment, standardised frameworks impact on the accuracy of the findings of behavioural science experts. For this purpose, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), the *Child Sexual Abuse Accommodation Syndrome* (CSAAS) and the *National Institute of Child Health and Development Protocol on interviewing children* (NICHD Protocol) are discussed. The discussion is intended to delineate the exact role

¹ R Slovenko 'Introduction' in RI Simon (ed) *Post-traumatic stress disorder in litigation: Guidelines for forensic assessment* (2003)xix.

² *Ibid.*

³ I Hershkowitz *et al.* 'Improving credibility assessment in child sexual abuse allegations: The role of the NICHD investigative interview protocol' (2007)31 *Child Abuse & Neglect* 101.

⁴ S Herman 'Forensic child sexual abuse evaluations: Accuracy, ethics and admissibility' in K Kuehnle & M Connell (eds) *The evaluation of child sexual abuse allegations: A comprehensive guide to assessment and testimony* (2009)260.

and place of these frameworks with a view to effectively advancing BSE in ACSA prosecutions.

2 The Diagnostic and Statistical Manual of Mental Disorders (DSM)

Currently, the DSM stands out as one of the internationally recognised diagnostic systems that classify mental disorders. The DSM is authored by the American Psychiatric Association.⁵ It comprises a classification of mental disorders with associated criteria designed to improve the accuracy of diagnosing mental disorders. With successive editions over the years, it has become a standard reference for clinical practice. The fifth edition (DSM-V) has been in use since 2013 as the sequel to DSM IV TR of 2000 which classified mental disorders into seventeen diagnostic categories, now expanded to twenty-two under DSM-V.⁶ The DSM-V is designed for clinical practice but is expected to be readily adaptable to a variety of contexts for the benefit of all professionals, including those concerned with the forensics of mental health care.⁷

Although the classification of mental disorders can be used in legal settings, the American Psychiatric Association cautions that when the DSM-V categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood.⁸ These dangers arise because of the ‘imperfect fit’ between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.⁹ Simon and Gold¹⁰ note that the information conveyed by the DSM diagnosis may not be the information sought by

⁵ American Psychiatric Association *Diagnostic and statistical Manual of Mental Disorders* (2013) (herein after referred to as DSM-V).

⁶ See DSM-V for details on disorders Neurodevelopmental disorders, schizophrenia spectrum and other psychotic disorders, bi-polar and related disorders, depressive disorders, anxiety disorders, obsessive-compulsive and related disorders, trauma and stress-related disorders, dissociative disorders, somatic symptom and related disorders, feeding and eating disorders, elimination disorders, sleep-wake disorders, sexual dysfunctions, gender dysphoria, disruptive, impulse-control and conduct disorders, substance-related and addictive disorders, neurocognitive disorders, personality disorders, paraphilic disorders, other mental disorders, medical-induced movement disorders and other adverse effects of medication, other conditions which may be a focus of clinical attention.

⁷ DSM-V *supra* note 5, xli.

⁸ DSM-V *supra* note 5, 25.

⁹ *Ibid.*

¹⁰ RI Simon & LH Liza ‘Psychiatric diagnosis in litigation’ in RI Simon & LH Liza (eds) *The American psychiatric publishing textbook of forensic psychiatry* (2004)117.

courts, thus exemplifying the ‘imperfect fit’¹¹ referred to as the proverbial ‘square peg in a round hole’.

Frances¹² worries, for good reason, that in cautioning about the possible misuses of the DSM system, the caution itself may be misused to suggest that psychiatric diagnosis has no role in legal determinations, a claim sometimes made by lawyers. In this regard, the American Psychiatric Association categorically asseverates that while the DSM-V should be allowed its say in forensic settings, its risks and limitations should nevertheless be taken into account. Nevertheless it can be a useful aid to decision-makers to arrive at their determinations if it is applied correctly,¹³ not only for practical clinical reasons, but because of its wide professional recognition as a yardstick that guarantees reliability.¹⁴ As to its clinical relevance, its compendious format embracing the latest mental-health research may assist legal decision makers’ understanding of the relevant characteristics of mental disorders. The diagnostic literature also serves as a check on ungrounded speculation about mental disorders and about the functioning of a particular individual.¹⁵ Equally, diagnostic information regarding longitudinal course may improve decision making when the legal issue concerns an individual’s mental functioning at a past or future point in time.¹⁶

Slovenko¹⁷ has demonstrated that the caveat on the limitation of the DSM in forensic settings notwithstanding, courts generally accept and rely on the DSM. Slovenko notes that ‘the Manual is deemed the bible of psychiatry’ whose usage ought not to be excluded but rather applied with appropriate safeguards.¹⁸ Frances adds that despite its various imperfections, when used appropriately, the DSM remains the best, if not the only means to achieve reliable and accurate clinical and forensic diagnoses.¹⁹ Reid *et al.*²⁰ support this view, noting that despite its limitations in forensic settings, it

11 *Ibid.*

12 A Frances ‘The forensic risks of DSM-V and how to avoid them’ (2010)38 *J Am Acad Psychiatry Law* 13.

13 DSM-V *supra* note 5, 25.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 R Slovenko ‘The DSM in litigation and legislation’ (2011)39 *J Am Acad Psychiatry Law* 6.

18 *Ibid.*

19 A Frances & R Halon ‘The uses and misuses of the DSM in forensic settings’ (2013)6 *Psychol. Inj. & Law* 337 & 343.

20 WH Reid *et al.* ‘The use and reliability of psychiatric diagnosis in forensic settings’ (1992)15 *Beverly Psychiatric Clinics of North America* 529-537.

remains a reliable forensic helpmeet. The authors note that the clinical experience of mental health professionals can be used to advantage if it is adapted for evidentiary purposes in court settings.²¹ The legal question is not whether the child is diagnosed with a mental disorder but whether the child's behaviour as seen in psychological perspective with reference to the DSM, reflects a change from conduct that can be expected under similar circumstances, and that the change probably reflects exposure to a CSA experience. In this regard, Shuman²² makes the point that the establishment of the forensic relationship is different from establishing a therapeutic relationship. Supporting this position, Keane *et al.*²³ note that the presence of a mental disorder does not necessarily imply that the alleged child sexual offence occurred. However, it is to be noted that in all cases, the evidence based on the DSM must be applied on a case-by-case basis so as to make it relevant to the specific case before the court.

If reference is to be made to the DSM in the assessment of CSA victims' behavioural and psychological reactions, these reactions have to fall within the ambit of a 'mental disorder' as defined by the DSM. The DSM defines a mental disorder as follows:

[a] syndrome characterised by clinically significant disturbance in an individual's cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological or developmental process underlying mental findings. Mental disorders are usually associated with significant distress or disability in social, occupational or other important activities...²⁴

Emotional and behavioural manifestations associated with ACSA victims can be shown to fall within the terms of reference spelled out in the above definition of a mental disorder. Properly applied, some mental disorders under the DSM-V can be relevant in the legal setting. The DSM-V recognises a number of mental disorders that could be of legal significance in determining the factual occurrence of a CSA offence, notably depressive disorders, anxiety disorders, trauma and stressor-related disorders, and dissociative disorders. The phenomenon of post-traumatic disorder (PTSD) is discussed

²¹ *Ibid.*

²² DW Shuman 'Persistent re-experiences in psychiatry and law: Current and future trends for the role of PTSD in litigation' in RI Simon (ed) *Post-traumatic Stress Disorder in litigation: Guidelines for forensic assessment* (2003)12.

²³ TM Keane *et al.* 'Forensic psychological assessment in PTSD' in RI Simon (ed) *Post-traumatic Stress Disorder in litigation: Guidelines for forensic assessment* (2003)124.

²⁴ DSM-V *supra* note 5, 20.

in the next section as a trauma and stress-related disorder in light of the formidable volume of empirical studies on its manifestation in CSA victims and the likelihood that it will be cited in the prosecution of such offences. The emphasis should not be interpreted as minimising the forensic significance of other disorders diagnosed by a qualified expert.

3 Post-traumatic stress disorder (PTSD) under the DSM and its implications for ACSA prosecutions

PTSD is a typical consequence of exposure to catastrophic or aversive events.²⁵ The DSM-V provides comprehensive criteria for diagnosing PTSD in adults, adolescents and children.²⁶ The first question one might ask for purposes of this discussion is whether there is any evidence that PTSD exists in children. This question is addressed with reference to the empirical studies referred to as regards PTSD among CSA victims.

3.1 Evidence of PTSD among CSA victims

PTSD is a well-established element of the stress syndrome displayed by CSA victims. Kendall-Tackett *et al.*²⁷ found that sexually abused children had more symptoms of PTSD, behavioural problems, sexualised behaviour and poor self-esteem than, and generally differed significantly in terms of their psychological profile, from non-abused children, although there was no regular pattern by which to discern the former.

²⁵ DSM-V *supra* note 5, 20.

²⁶ According to the DSM-V, the essential feature is exposure to actual or threatened death, serious injury or sexual violence in one of the following ways; including, directly experiencing that traumatic event or events, personally witnessing the event as it occurred to others, learning that the traumatic event occurred to a close family member or close friend or experiencing extreme or repeated exposure to aversive details of the traumatic events. The individual must also experience at least one additional symptoms drawn from a list that includes;

- recurrent, involuntary and intrusive distressing memories of traumatic events. For children older than 6 years, repetitive play may occur in which themes or aspects of the traumatic events are expressed,
- recurrent distressing dreams in which the content and the effect of the dream are related to the traumatic events. In children older than 6 years, there may be frightening dreams without recognisable content;
- dissociative reactions in which the individual feels or acts as if the traumatic events were recurring. In children, trauma-specific re-enactment may occur in play;
- intense or prolonged psychological distress at exposure to internal or external cues that symbolise or resemble an aspect of traumatic events;
- marked physiological reactions to internal or external cues that symbolise or resemble an aspect of the traumatic events.

²⁷ KA Kendall-Tackett *et al.* 'Impact of sexual abuse on children: A review and synthesis of recent empirical studies' (1993)113 *Psychological Bulletin* 164.

Again, Paolucci *et al.* found that there was a better than even (at least 20% above average) chance that PTSD would be associated with a predisposing occurrence of CSA.²⁸ Filipas and Ullman similarly found a heightened incidence of PTSD among CSA victims,²⁹ which runs counter to the general tendency that PTSD is associated with adult sexual abuse.

Briere and Elliot indicated the prevalence of a wide range of disorders and disturbances among CSA victims, including depression, panic disorders, PTSD, phobia, sexual disorders, suicidal ideation and suicide attempts.³⁰ McLeer *et al.* examined 31 children with histories of CSA, attempting to establish the nexus between PTSD symptoms and CSA.³¹ The determination of PTSD diagnosis was made by comparing interview data to the DSM III criteria for PTSD. Of the entire sample, 48% met full diagnostic criteria. Similarly, Deblinger *et al.* reviewed the charts of children admitted to an inpatient psychiatric hospital.³² Of the 155 charts reviewed, 29 had reported histories of CSA. These 29 were matched with children who reported a history compared to others with no history of physical abuse. The highest incidence conforming to the DSM III benchmark was recorded for CSA victims. Koverola *et al.* found that 50% of a sample of 48 suspected victims of CSA presented with PTSD as defined by DSM III.³³

In some studies, the incidence of PTSD among ACSA victims was found to be even higher than among victims of abuse by strangers because the victims are traumatised by the betrayal of trust committed by the confidant turned suspect, more particularly where the confidant was a family member.³⁴ Greenwald and Leitenberg's³⁵ study

²⁸ EO Paolucci *et al.* 'A meta-analysis of the published research on the effects of child sexual abuse' (2001)135 *Journal of Psychology* 17.

²⁹ HH Filipas & ES Ullman 'Child sexual abuse, coping responses, self-blame, Post-traumatic Stress Disorder, and adult sexual victimisation' (2006)21 *Journal of Interpersonal Violence* 652.

³⁰ J Briere & DM Elliot 'Prevalence and psychological sequelae of self-reported childhood physical and sexual abuse in a general population sample of men and women' (2003)27 *Child Abuse & Neglect* 1217.

³¹ SV McLeer *et al.* 'Post-traumatic Stress Disorder in sexually abused children' (1988)27 *Journal of the American Academy of Child & Adolescent Psychiatry* 650.

³² E Deblinger *et al.* 'Post-traumatic stress in sexually abused children, physically abused, and non-abused children' (1989)13 *Child Abuse & Neglect* 403-408.

³³ C Koverola *et al.* *Post-traumatic stress disorder as a sequelae of child sexual abuse* (1990).

³⁴ SE Ullman 'Relationship to perpetrator, disclosure, social reactions, and PTSD symptoms in child sexual abuse survivors' (2007)16 *Journal of Child Sexual Abuse* 19; SE Ullman 'Social reactions to child sexual abuse disclosures: A critical review' (2002)12 *Journal of Child Sexual Abuse* 89-121; K Muller & K Hollely *Introducing the child witness* (2009)132.

³⁵ E Greenwald & H Leitenberg 'Post-traumatic stress disorder in nonclinical and nonstudent sample of adult women sexually abused as children' (1990)5 *Journal of Interpersonal Violence* 217.

indicated that sexual abuse by father figures was significantly related to PTSD symptoms. In fact innumerable studies record PTSD among sexually abused children. At this stage gaps in the different versions of DSM need to be discussed in preparation for coverage of new developments introduced by DSM-V to remedy the gaps.

3.2 Gap in the DSM IV TR on PTSD in children

The DSM IV TR, which immediately preceded DSM-V, still manifested insensitivity towards younger children. Scheeringa *et al.* were the first to empirically demonstrate that the DSM IV (1994) criteria are not suited for the younger population.³⁶ They argued that one of the biggest challenges in diagnosing PTSD in young children is the developmental insensitivity evident in the DSM IV TR criteria, presumably as a result of difficulty in detecting symptoms that are internalised and thus beyond young, preliterate children's ability to articulate. Notably, eight of the DSM IV TR (2000) criteria required verbal and subjective descriptions which only left ten items that could be used in dealing with infants.³⁷

Cohen and Scheeringa dealt with undiagnosed children in whom symptoms were nevertheless present,³⁸ noting that the DSM IV TR diagnostic criteria underestimated the true prevalence of PTSD in children who are functionally impaired by disruptive symptoms, but do not meet diagnostic cut-offs as a result of low DSM IV TR threshold values. Carrion *et al.*³⁹ also found that children and adolescents who did not meet the full criteria to be diagnosed with PTSD still showed significant impairment and distress on par with those who did meet the criteria. Carrion *et al.* note a scarcity of research on the application of DSM IV TR criteria where children are concerned.

Three problems are identifiable where the diagnostic system is insensitive to the child victims' situation: Non-diagnosis, inaccurate diagnosis, and inadequate

³⁶ MS Scheeringa *et al.* 'Two approaches to the diagnosis of post-traumatic stress disorder in infancy and early childhood' (1995)³⁴ *Journal of the American Academy of Child and Adolescent Psychiatry* 191.

³⁷ Scheeringa *et al. supra* note 36; Kaminer *et al.* 'Post-traumatic disorder in children' (2005)⁴ *World Psychiatry* 121-125.

³⁸ JA Cohen & MS Scheeringa 'Post-traumatic stress disorder diagnosis in children: Challenges and promises' (2009)¹¹ *Dialogues in Clinical Neuroscience* 91.

³⁹ VG Carrion *et al.* 'Towards an empirical definition of pediatric PTSD: The phenomenology of PTSD symptoms in youth' (2002)⁴¹ *Journal of the American Academy of Child & Adolescent Psychiatry* 166-173.

diagnosis.⁴⁰ These problems have caused many traumatised children to go unnoticed or receive inadequate attention over the years. Tara maintains that the diagnostic criteria are simply too unrefined for the purposes of picking up young children's plight.⁴¹ Such insensitivity to PTSD in children who are victims of CSA is problematic to say the least.

Decades of empirical studies on the subject have all alluded to the need for more age-specific diagnostic criteria that take into account the fact that children's symptoms are different from those evinced by adults. Proponents have consistently proposed behaviourally anchored criteria that address the plight of children up to six years who do not meet the general PTSD diagnostic threshold.⁴²

3.3 Applying DSM-5 to diagnose PTSD in children up to six years

The DSM-V introduced a unique position to the discourse by adopting the first developmentally-sensitive diagnosis of PTSD for children aged up to six years (i.e. a preschool subtype of PTSD for children ages 6 years and younger was introduced).⁴³ In diagnosing children ages 6 years and younger, the diagnostic threshold is much lower and is equally alive to the cognitive abilities and limitations of children.⁴⁴ The American Psychiatric Association rightly observes that the current DSM 'is developmentally-sensitive' to children and adolescents.⁴⁵ It follows then that the general dilemma of inaccurate diagnosis of PTSD among much younger children, coupled with the higher threshold beyond children's developmental abilities has been overcome with the advent of the DSM-V. While the DSM-V retains most of the symptoms required in diagnosing much older children and adults, the symptoms in some clusters are not applicable to children below the age of 6 years.⁴⁶ For instance, experiencing repeated or extreme exposure to aversive details of traumatic events is excluded from the cluster of exposure to trauma.⁴⁷ Likewise, recklessness or self-destructive behaviour is excluded

⁴⁰ BA van der Kolk *et al.* *Proposal to include a developmental trauma disorder diagnosis for children and adolescents in DSM-V* (2009).

⁴¹ F Tara 'Psychology PTSD in pre-school children: A review and synthesis of research on the need for a separate DSM category' (2013)36 *Concept* 10.

⁴² Scheeringa *et al. supra* note 36; Kaminer *et al. supra* note 37; Van der Kolk *et al. supra* note 40; Tara *supra* note 41; FJW Calitz *et al.* 'Children and adolescents treated for post-traumatic stress disorder at the Free State Psychiatric Complex' (2014)20 *S Afr J Psych* 15-20.

⁴³ DSM-V *supra* note 5, 272-280.

⁴⁴ DSM-V *supra* note 5, 271-274.

⁴⁵ American Psychiatric Association *Highlights of changes from DSM-IV-TR to DSM-V* (2013)9.

⁴⁶ DSM-V *supra* note 5, 271-274.

⁴⁷ *Ibid.*

from marked alterations in arousal and reactivity to traumatic events.⁴⁸ Child specific criteria are evident, for example, in evaluation of intrusive symptoms associated with traumatic events,⁴⁹ persistent avoidance of stimuli,⁵⁰ and negative alterations in cognitions.⁵¹

Although the DSM-V does not address the recommendations of proponents in their entirety, it captures the reality of the clinical presentations of children and adolescents to a great extent. The DSM-V pays more attention to the behavioural symptoms that accompany PTSD. The current criterion, cognisant of empirical studies on children's symptoms, provides certainty and consistency where there was none. The pertinent issue is whether this development should appeal to justice systems, particularly in the context of ACSA prosecutions. The perspectival advantage lent by discussion of how the new PTSD subtype eventuated should highlight the desirability of urgent discussion of acceptance of the new criteria by justice systems in prosecuting ACSA cases.

3.4 Why the new developmentally-sensitive diagnostic standard of PTSD should be welcomed

The developmentally-sensitive diagnostic standard of PTSD is of particular relevance to ACSA prosecutions because it provides reliable diagnostic criteria for much younger children. Since experts have to lay proper foundation to their opinions,⁵² the opinion of the expert is more founded and will be accorded greater weight when reference is made

⁴⁸ *Ibid.*

⁴⁹ DSM-V *supra* note 5, 273. When describing recurrent, involuntary and intrusive distressing memories of traumatic events and dreams, the DSM-V pays specific attention to children aged below six years in light of their proneness to spontaneous and intrusive memories that may not appear distressing (eg. manifesting as retrospective play-acting), yet may be covertly related to traumatic events commemorated in 'scary' content. This involuntary flash-back and dream-sequence tendency may be attributable to the limited cognitive abilities of children below six.

⁵⁰ DSM-V *supra* note 5, 273. There is a difference in kind between stimuli avoidance as it occurs respectively in children below six and other, older children and adults. For instance, the phenomenon is discernible in efforts to avoid places or physical reminders that bring back to frightening reality the memories of traumatic events and people, conversations and interpersonal situations forming part of such events.

⁵¹ DSM-V *supra* note 5, 273. This specificity is perhaps one of the commendable efforts by compilers of the DSM-V where ACSA victims' reactions are concerned. Manifestations of negative alterations in cognitions include substantially increased frequency of negative emotional states, markedly diminished interest in significant activities, socially withdrawn behaviour and persistently infrequent expression of positive emotions. The power surfeit/deficit relation between dominant suspects and vulnerable child victims is frequently the reason behind these symptomatic manifestations.

⁵² PJ Schwikkard & SE Van der Merwe *Principles of evidence* (2010)95.

to a reliable diagnostic standard. As demonstrated above, PTSD is prevalent among CSA victims including the much younger ones. Behavioural and emotional reactions characterising CSA victims may be definitive for a diagnosis of PTSD in children below six years. Available studies show that although PTSD symptoms can have causes other than sexual abuse, PTSD symptoms accompanied by testimony that brings relevant connotations into play can be justifiably construed by an expert witness as definitively consistent with sexual abuse.⁵³ Thus while evidence based on PTSD may not prove conclusively that CSA occurred, it remains critical in CSA prosecutions. Litwak *et al.* corroborates that the concern should not be whether evidence based on PTSD can conclusively prove the occurrence of CSA, but whether the evidence 'can provide the court with information, not otherwise readily available to the court, which will increase, however slightly, the accuracy of the prediction the court must make.'⁵⁴

The earlier standard set for PTSD diagnosis under the DSM IV TR allowed an objection to the effect that no proper basis existed for the diagnosis of PTSD in young children; however, given the high incidence of very young ACSA victims, the DSM-V criteria for diagnosis of PTSD in children aged up to six years is timely. It is a welcome innovation as it presents experts and justice systems alike with a basis for the furtherance of BSE for the benefit of young children. It is up to experts in the field and ultimately justice systems to rise to this occasion to make the best of this innovation.

Consider that in the absence of sufficient or any medical evidence, reliable identification of PTSD symptoms can conceivably constitute independent evidence to prove that CSA did occur and that will vindicate the victim's credibility. With the current DSM-V, it is axiomatic that experts in the field of mental health have a well-established standard upon which they can base a PTSD diagnosis among much younger children with certainty.

⁵³ JEB Myers *et al.* 'Expert testimony in child sexual abuse litigation' (1989)68 *Nebraska Law Review*1-145.

⁵⁴ Litwak *et al.* 'The proper role of psychology in child custody disputes' (1980)18 *Journal of Family Law* 282-283.

4 The Child Sexual Abuse Accommodation Syndrome (CSAAS): Implications for the criminal-justice system in ACSA prosecutions

Because of the distinctiveness of ACSA, the CSAAS is likely to be a useful standard in advancing BSE in ACSA prosecutions. The CSAAS can serve as the basis for evidence geared towards dispelling inaccurate myths about CSA and providing a context within which to evaluate the testimony of the child complainant. The CSAAS is, however, marred with controversy. It is critical to understand its exact role and place if it is to assist ACSA prosecutions to material legal effect.

The CSAAS falls within the ambit of ‘syndrome evidence.’⁵⁵ There is divided opinion on the admissibility of syndrome evidence in the prosecution of child sexual offences. Courts are split on how such testimony should be treated. Some admit evidence based on the CSAAS where the child’s credibility has been attacked while others disallow it on grounds that it cannot help determination of the fact of the alleged crime. The latter find that expert testimony used to explain the victim’s behaviour does not necessarily bear on whether the accused actually abused the child as defined by law. Scholarly and judicial divergence abounds on whether or not the CSAAS is a scientific diagnostic tool and therefore admissible in evidence. Although in terms of doctrine, there does not seem to be a difference between the views of the courts (with the relevance and admissibility of evidence based on the CSAAS dependent of the facts of each case), it is submitted that if the CSAAS is to be fully exploited as a standard in the prosecution of ACSA cases, the starting point has to be an understanding of its exact status.

4.1 Background of the CSAAS

The CSAAS was propounded by Roland Summit.⁵⁶ It is by far the most profound theoretical demonstration of the behavioural and emotional reactions of sexually abused children. Although the syndrome has not been empirically validated, it has been

⁵⁵ D McCord ‘Syndromes, profiles and other mental exotica: A new approach to the admissibility of non-traditional psychological evidence in criminal cases’ (1987)66 *Oregon Law Review* 19-108.

⁵⁶ RC Summit ‘The Child Sexual Abuse Accommodation Syndrome’ (1983)7 *Child Abuse & Neglect* 177-193.

widely applied by clinicians.⁵⁷ It has facilitated serious consideration by professionals of children's allegations of sexual abuse by illuminating obstacles to disclosure and prosecution of ACSA. The syndrome describes five reactions, namely secrecy, helplessness, entrapment and accommodation, delayed and unconvincing disclosure and retraction.⁵⁸ Secrecy and helplessness define the vulnerability of the child victim while accommodation, delayed disclosure and retraction are sequentially contingent to sexual assault. Secrecy and helplessness are critical factors that influence whether the child will disclose the abuse. While these reactions demonstrate the complex realities of child victims, each reaction equally represents a contradiction of the common myths about CSA victims.

Secrecy⁵⁹ is the first reaction described. Summit proceeds on the premise that in the vast majority of cases, sexual abuse occurs only when the child is alone with the offending adult. As such, it often remains a terrifying reality that is not to be shared. Children struggle to come to grips with the reality of trusted adults being their molesters. 'The child victim is therefore dependent on the intruder for whatever reality is assigned to the experience.'⁶⁰ Any hope of exposing the secret is countered by strong perceptions of danger and prejudicial outcomes. Offenders are cognisant of the consequences of the child's disclosure, including criminal prosecution. Attempts are therefore made to keep the abuse a secret.⁶¹ However unrealistic threats accompanying secrecy demands may be, the message they convey to child victims, given their tender and vulnerable age, effectively prevents or delays disclosure.⁶² The message imparted to the child is 'maintaining a lie to keep the secret is the ultimate virtue, while telling the truth would be the greatest sin.'⁶³ This is often contrary to the general expectation of

⁵⁷ See e.g. studies by T Sorensen & B Snow 'How children tell: The process of disclosure in child sexual abuse' (1991)70 *Child Welfare: Journal of Policy, Practice, and Program* 3-15; K Bussey & EJ Grimbeek 'Disclosure processes: Issues for child sexual abuse victims' in KJ Rotenberg (ed) *Disclosure processes in children and adolescents* (1995)166-203.

⁵⁸ Summit *supra* note 56, 177.

⁵⁹ Summit *supra* note 56, 181.

⁶⁰ Summit *supra* note 56,182.

⁶¹ Summit *supra* note 56, 181. Summit demonstrates possible threats to guarantee secrecy to include; 'This is our secret, nobody else will understand.' 'Don't tell anybody.' 'Nobody will believe you.' 'Don't tell your mother; a) she will hate you, b) she will hate me, c)she will kill you, d)she will kill me, e) it will kill her, f) she will send you away, g) she will send me away or h) it will break the family and you will end up in the orphanage', 'If you tell anymore; a) I won't love you anymore, b) I'll spank you, c)I will kill your dog, or, d) 'I'll kill you.'

⁶² Summit *supra* note 56,183.

⁶³ Summit *supra* note 56,185.

child victims to instantly disclose subsequent to the abuse. Attempts by child victims to disclose the sexual abuse to trusted adults are often shattered by adults' tendencies to trivialise the abuse, precisely on account of the costs and consequences of criminal prosecution.⁶⁴

Helplessness⁶⁵ is the second reaction in Summit's model. Summit demonstrates that persons who sexually abuse children know that dependent children are helpless to resist or disclose the sexual abuse, particularly by persons they hold in trust.⁶⁶ Children are expected to immediately disclose sexual abuse after it has occurred. This expectation often fails to take into account the helplessness of children sexually abused by authoritarian figures, as the case often is in ACSA cases. With the general tendency to view strangers as the major threats to children, sexual abuse by a trusted and authoritative figure often leaves many of the child victims in a helpless state.⁶⁷ The thought of disclosing the sexual abuse perpetrated by trusted persons seems unthinkable for children as it is perceived as a betrayal of trust on the part of the child victim.⁶⁸ Since sexual offences committed by the trusted adults are often preceded by a grooming phase, the abuse may proceed from ordinary play involving love and affection to severe child sexual acts such as sexual penetration.⁶⁹ Contrary to the general expectation that child victims will physically fend off the abuse, cry for help or escape from the attempted offensive act, the grooming process leaves child victims in a helpless situation where they feel compelled to condone the abuse despite the realisation that it is a serious violation. In the words of Summit, '[s]mall creatures do not call on force to deal with overwhelming threat. When there is no place to run, they have no choice but to try to hide. Children learn to cope silently.' Summit underscores that the common tendency of defence attorneys to insist that child victims ought to have resisted, cried out for help and immediately disclosed the abuse, 'ignores the basic subordination and helplessness of children within authoritarian relationships.'⁷⁰

⁶⁴ Summit *supra* note 56, 187.

⁶⁵ Summit *supra* note 56, 182.

⁶⁶ Summit *supra* note 56, 183.

⁶⁷ Summit *supra* note 56, 182.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

Entrapment and accommodation⁷¹ constitute the third reaction in Summit's CSAAS model. This reaction is one of the contingent reactions to sexual assault. Unlike child sexual offences perpetrated by strangers, ACSA often involves subsisting relationships between the child victim and the suspect. The subsisting relationship between the suspect and the child victim creates an environment where sexual abuse of the victim becomes repetitive, with the abuse subsisting 'either until the child achieves autonomy or until discovery and forcible prohibition overpower the secret.'⁷² It gradually dawns on the child that the abuse may continue indefinitely. This realisation makes the child victim's options seem limited, given the authoritative and often caregiving role of the suspect.⁷³ Faced with a seemingly unresolvable dilemma, children learn to accommodate the sexual abuse as the only convenient alternative available.⁷⁴ Feeling trapped, CSA victims devise means of accommodating the sexual abuse, with disclosure not being a viable option.⁷⁵ Assuming personal responsibility for the sexual abuse becomes one of the ways of accommodating the abuse.⁷⁶ In attempting to accommodate the abuse, Summit gives an array of accommodative mechanisms such as imaginary companions for reassurance, development of multiple personalities to suppress and repress memories of sexual abuse, adopting distorted beliefs concerning the suspect, and dissociation.⁷⁷

Delayed, conflicting and unconvincing disclosure,⁷⁸ as a fourth reaction within the CSAAS model becomes a last resort. According to Summit, disclosure of CSA often occurs when the accommodation mechanisms can no longer be sustained.⁷⁹ The victim's disclosure sometimes contradicts or is inconsistent with family members' reports. Sometimes, even without conflicting reports from family, the child victim's statements are in themselves unconvincing.⁸⁰ Thus the child victim sometimes fails to meet the general expectation of immediate, consistent and convincing disclosure. This reaction is

71 Summit *supra* note 56, 184.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

78 Summit *supra* note 56, 185.

79 *Ibid.*

80 Summit *supra* note 56,186-187.

understandable given the child's tender age and the relationship of trust he/she has with the suspect.

Retraction⁸¹ is the fifth reaction within Summit's CSAAS model. According to Summit, the ultimate disclosure of the sexual abuse officially demonstrates to the child victim that the consequences of exposing the secret are not mere rhetoric.⁸² It finally dawns on the child that in fact, exposure of the secret leads to loss of love and affection from the suspect, disbelief by other family members, family breakdowns or destruction, child custody and foster placement and attribution of blame to the child victim. In the words of Summit, 'the child bears the responsibility of either preserving or destroying the family.'⁸³ The role reversal continues with the 'bad' choice being to tell the truth and the 'good' being to capitulate and preserve a lie for the sake of the family. Recantation of the earlier disclosure of abuse by the child victim often presents itself as a confirmation of the myth that children's sexual abuse complaints should not be trusted. In the words of Summit, 'it restores the precarious equilibrium of the family. The children learn not to complain. The adults learn not to listen. And the authorities learn not to believe...'⁸⁴

4.2 The ideal role and place of the CSAAS in ACSA prosecutions

Generally, Summit's CSAAS model explains the most typical reactions of ACSA victims. These reactions usually do not conform to the average person's expectation of how a CSA victim should react. The second chapter demonstrated the distinctiveness of ACSA in terms of the parties involved. Often, the child victim is in a powerless position, the suspect is in a powerful and authoritative position, while non-offending adults are ambivalent about the sexual abuse. These distinctive dynamics affirm the need for Summit's theoretical exposition in understanding ACSA victims' unusual reactions. If properly applied, the CSAAS is of critical importance in the prosecution of ACSA cases. Summit's five-pronged pattern, however, continues to be the subject of inconsistent interpretation and application by experts, scholars and the criminal-justice systems alike. Uncertainty about its exact role and place could have devastating consequences. The inappropriate application of the CSAAS can either deprive the court of relevant evidence or lead to the admission of prejudicial evidence.

⁸¹ Summit *supra* note 56, 188.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

Hensley⁸⁵ contends that the CSAAS should properly be admissible in CSA prosecutions to shore up the credibility of child complainants and to establish that CSA occurred. The author argues that the syndrome qualifies as a scientific method of proof of CSA,⁸⁶ and stresses that the CSAAS can diagnose CSA. He consistently submits that an expert's diagnosis of CSAAS is a reasonable basis for an expert to state with confidence that CSA has occurred. Hensley is not alone in insisting on the CSAAS as a diagnostic tool for CSA. In the 1985 case of *People v Payan*,⁸⁷ the psychiatric expert relied on the CSAAS to bolster the credibility of the child complainant and to declare that the child complainant had been sexually abused. The expert testified that the CSAAS was a 'widely recognised and accepted medical diagnosis.' The court in *dicta*, however, limited the introduction of the expert testimony concerning CSAAS to credibility purposes only. In stark contrast to the position taken by the psychiatric expert in the case of *People v Payan*, in 1992, the Supreme Court of Pennsylvania in *Commonwealth v Dunkle*⁸⁸ held that introduction of the CSAAS was a reversible error because the CSAAS was not scientifically valid and was not generally accepted within the field of child psychology. Yet earlier in 1987, the Delaware Supreme Court in *Wheat v State*⁸⁹ had held that the introduction of the CSAAS was not a reversible error because evidence on the behaviour of sexually abused children was relevant to the issue of determining whether sexual abuse had occurred. Each of the three courts dealt differently with the legal question of admissibility of evidence based on the CSAAS. The court in *Commonwealth v Dunkle* deemed CSAAS-based evidence inadmissible because it was unscientific in the sense that it was not generally accepted in the discipline to which it belonged. The court in *Wheat v State* commented not on the scientific status of the CSAAS and rather, admitted the evidence on account of its relevance in providing a court with an explanation of the child complainant's unusual behaviour. While the Court in *People v Payan* admitted the evidence for the limited purpose of restoring the credibility of the child complainant,

⁸⁵ KL Hensley 'The admissibility of child sexual abuse accommodation syndrome in California criminal courts' (1986)17 *Pacific Law Journal* 1363.

⁸⁶ *Ibid.*, 1375 & 1379.

⁸⁷ *People v Payan* 173 Cal. App.3d 27, 220 Cal. Rptr. 126 (1985).

⁸⁸ *Commonwealth v Dunkle* 529 Pa. 168 (1992) 602 A. 2d 830.

⁸⁹ *Wheat v State* 527 A.2d 269 (1987). The Delaware Supreme Court, upholding the decision of the trial court ruled that the expert's role in advancing the CSAAS was to provide the court with a background concerning the behaviour of the alleged child abuse victim based on the expert's experience and training so that the court might place the child complainant's testimony in a proper context.

the court equally did not make a finding on whether or not the CSAAS was a scientific method. At present, the exact place of the CSAAS remains in balance with the inconsistencies sometimes being resolved in favour of its exclusion. Generally, some courts are excluding the CSAAS evidence on grounds that it is not a scientific diagnostic tool.

The American Psychiatric Association's Diagnostic Statistical Manual of Mental Disorders defines a mental disorder as a 'syndrome.'⁹⁰ In *Dorland's Illustrated Medical Dictionary* a syndrome is described as '[a] set of symptoms which occur together...'⁹¹ The term 'syndrome' derives from a Greek word meaning 'concurrence.'⁹² Spranger *et al*⁹³ define a syndrome as 'a pattern of multiple anomalies thought to be pathogenically related and not known to present a single sequence of polytopic field defect.' In *DeGowin's Diagnostic Examination* the authors expand on the distinction between disease and syndrome, noting that after thousands of years of recording their observations and clinical trials in practicing their profession,⁹⁴ physicians have developed an awareness from the vast body of accumulated facts at their disposal that there are disordered patterns of bodily structure and function,⁹⁵ some of which recur with such frequency as to suggest a common cause, which has accordingly become known as a disease to which a specific name has been attached.⁹⁶ Other clusters of attributes, 'not clearly related to a single cause', but known by a combination of features, are called syndromes.⁹⁷ Myers⁹⁸ adds that diseases and syndromes share the medically and forensically important feature of diagnostic value. That is, diseases and syndromes point with varying degrees of certainty to particular causes.⁹⁹ Thus, with diseases, the relationship between symptoms and aetiology is clear. With syndromes, by contrast, the relationship is often unclear or unknown. Despite this lower degree of diagnostic certainty, syndromes are suggestive of particular causes.

⁹⁰ DSM-V *supra* note 5, 20.

⁹¹ Dorland's Illustrated Medical Dictionary, thirty-second edition (2011)1819.

⁹² *Ibid.*

⁹³ J Spranger *et al.* 'Errors of morphogenesis: Concepts and terms' (1982)100 *Journal Of Pediatrics* 160-165.

⁹⁴ RL Degowin *et al.* *DeGowin's Diagnostic Examination* (2008)2.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ JEB Myers 'Expert testimony describing psychological syndromes' (1993)24 *Pacific Law Journal* 1453 & 1462.

⁹⁹ *Ibid.*, 1449, 1453.

In light of the scientific definition of the term ‘syndrome’ the CSAAS may well be mistaken for a diagnostic tool. Myers¹⁰⁰ distinguishes diagnostic and non-diagnostic syndromes. Diagnostic syndromes relate directly to the relevant pathological conditions while non-diagnostic syndromes do not. Non-diagnostic syndromes do not tell a professional whether a child has been sexually abused, for example. They only explain the behaviour of a child assumed to have been sexually abused. Thus, the CSAAS does not constitute a diagnostic tool and cannot be relied on to prove the occurrence of CSA. The Supreme Court of Kentucky underscored this position in the case of *Hellmstrom v Commonwealth of Kentucky*,¹⁰¹ stressing that ‘syndrome as a group of signs or symptoms that collectively indicate or characterise a disease, psychological disorder, or other abnormal condition’ is a scientific term, and the CSAAS does not constitute scientific proof. Summit himself set the record straight in a subsequent article in 1993,¹⁰² stressing that the CSAAS is not a diagnostic tool but proceeds on a presupposition that CSA has eventuated. Summit intended the CSAAS to afford insight into the behaviour of children who are known to have been sexually abused. The CSAAS notices that the copying behaviour of CSA victims tends to contradict society’s expectations of how CSA victims should react. Summit therefore seeks to explain the origins of these supposedly unusual behaviours with a view to negating the inference that they disprove the CSA allegation.

In sum, the CSAAS is not directly relevant to the issue whether CSA occurred because it lacks the status of a diagnostic tool in a legally acceptable scientific sense. A critical issue is whether it should have any place in the courtroom. The court in *Commonwealth v Dunkle*,¹⁰³ for instance, totally excluded evidence based on the CSAAS on grounds that it could not qualify as scientific diagnosis in the arena of child psychology. In the case of *People v Payan*,¹⁰⁴ the expert appears to have misled the court in opining that the CSAAS was diagnostic of CSA. It is submitted that the CSAAS, though not constituting a scientific diagnostic tool, should have a limited role of explaining unusual behavioural reactions of child complainants to a court without preemptively

¹⁰⁰ *Ibid.*, Myers observes that if the syndrome is non-diagnostic, it should not be admissible to prove that a person’s symptoms result from a particular cause.

¹⁰¹ *Hellmstrom v Commonwealth of Kentucky* 825.S.W.2d 612 (1992).

¹⁰² RC Summit ‘Abuse of the Child Sexual Abuse Accommodation Syndrome’ (1993)1 *Journal of Child Sexual Abuse* 153-164.

¹⁰³ *Commonwealth v Dunkle supra* note 88.

¹⁰⁴ *People v Payan supra* note 87.

suggesting that CSA occurred. Since the CSAAS is not a diagnostic tool its use should be confined to enabling behavioural science experts and criminal-justice systems to explain the symptom presentation, on condition that other evidence independently indicates the fact of sexual abuse (Note cautiously also that complainants' failure to conform to commonly expected behaviour patterns ought not to be considered definitive in deciding that CSA did not occur). The court in *State of Hawaii v Batangan* underscored the limited role of the CSAAS as follows:

child victims of sexual abuse have exhibited some patterns of behaviour which are seemingly inconsistent with behavioural norms of other victims of assault. Two such types of behaviour are delayed reporting of offences and recantation of allegations of abuse... while expert testimony explaining seemingly bizarre behaviour of child sex abuse victims is helpful to the jury and should be admitted, conclusory opinions that abuse did occur and that the child victim's report of abuse is truthful and believable is of no assistance to the jury, and therefore, should not be admitted.¹⁰⁵

The court added that '[o]nce the jury has learned the victim's behaviour from the evidence and has heard experts explain why sexual abuse may cause delayed reporting, inconsistency, or recantation',¹⁰⁶ the court does not need an expert to explain that the victim's behaviour is consistent or inconsistent with CSA. Consequently, the fact that the CSAAS is not a diagnostic tool does not render it irrelevant in addressing other issues collateral to arriving at the ultimate decision. It is critical however, for courts to winnow opinion that explains the complainant's unusual behaviour categorically from opinion that points diagnostically to the actual occurrence of CSA.

5 The National Institute of Child Health and Development Protocol interview guide (NICHD Protocol): Implication for accurate and objective findings

Arriving at more accurate assessments of 'appreciable help' to a court calls for an appropriate interview process. It would be premature to discuss the NICHD Protocol without a brief introductory exposition of the state of affairs in which reliance on the

¹⁰⁵ *State of Hawaii v Batangan* 799 P.2d 48, 52 (1990).

¹⁰⁶ *Ibid.*

NICHD Protocol is clearly indicated. The *McMartin* Preschool abuse trial has often been cited to serve as a cautionary tale for experts in interviewing and assessing alleged CSA victims.¹⁰⁷ In this case all charges against the accused resulted in acquittals or were eventually dropped. The facts were that in 1983 seven teachers at the *McMartin* Preschool in the Los Angeles suburb of Manhattan Beach allegedly kidnapped children and flew them to an isolated farm where the children saw animals tortured and were forced to engage in group sex. All charges were eventually dropped against five of the teachers, including several elderly women. The remaining two accused persons, Peggy *McMartin* Buckey and her son Raymond Buckey were tried in one of the reportedly longest and most expensive criminal cases in Californian history. Peggy Buckey was acquitted on all charges and Raymond on most charges. After juries in two separate trials failed to reach a decision on the remaining counts against Raymond, prosecutors dropped all charges against him in 1990. The prosecutors in the *McMartin* case relied heavily on videotaped interviews conducted with children. However, these very interviews eventually undermined the prosecution's case.

After the trial, jurors publicly criticised the interview techniques as highly leading and having the counterproductive effect of reducing the perceived credibility of the children who reported sexual abuse.¹⁰⁸ The jurors publicly singled out experts for blame in the *McMartin* trial.¹⁰⁹ The interview techniques of the experts attracted withering criticism from social scientists and scholars as evident in the formidable volume of literature on the subject.¹¹⁰ On the whole studies have shown that the

¹⁰⁷ The full judgment could not be obtained. However, the brief facts are available in P Eberle & S Eberle *The abuse of innocence: The McMartin Preschool trial* (1993).

¹⁰⁸ R Reinhold 'How lawyers and media turned the *McMartin* case into a tragic media circus' *New York Times*, 25 January 1990; L Timnick & C McGraw 'McMartin verdict: Not guilty' *Los Angeles Times*, 19 January 1990; T Wilkerson & J Rainey 'Tapes of children decided the case for most jurors' *Los Angeles Times*, 19 January 1990.

¹⁰⁹ *Ibid.*

¹¹⁰ A Tubb *et al.* 'Effects of suggestive interviewing and indirect evidence on child credibility in a sexual abuse case' (1999)29 *Journal of Applied Social Psychology* 1111-1127; Eberle & Eberle *supra* note 107; RD Hicks *In pursuit of Satan* (1991); D Nathan & M Snedeker *Satan's silence* (1995); C Tavris 'A day-care witch hunt tests justice in Massachusetts' *Los Angeles Times*, 11 April 1997; EW Butler *et al.* *Anatomy of the McMartin child molestation case* (2001); SJ Ceci & M Bruck 'Suggestibility of the child witness: A historical review and synthesis' (1993)113 *Psychological Bulletin* 403-439; SJ Ceci & M Bruck *Jeopardy in the courtroom* (1995); S Garven *et al.* 'Allegations of wrongdoing: The effects of reinforcement on children's mundane and fantastic claims' (2000)85 *Journal of Applied Psychology* 38-49; S Garven *et al.* 'More than suggestion: The effect of interviewing techniques from the *McMartin* Preschool case' (1998)83 *Journal of Applied Psychology* 347-359; R Green *Sexual science and the law* (1992); WJ Wyatt 'What was under the

interview techniques derived from transcripts of the *McMartin* case were substantially effective at inducing preschool children to make false allegations. Some scholars, however, continue to take the view that these cases were genuine and involved actual ritual abuse.¹¹¹ These arguments notwithstanding, the techniques applied in interviewing children in the *McMartin* case exposed the need for more reliable techniques in interviewing alleged child abuse victims.

An extensive body of research arising in the wake of the *McMartin* trial has substantiated on the gaps in the interview techniques in the *McMartin* case. These gaps proffer useful insight for experts to draw on and to be cautious about. Schreiber *et al.*¹¹² note that the *McMartin* case interviewers were quite likely to (a) introduce new suggestive information into the interview, (b) provide praise, promises, and positive reinforcement, (c) express disapproval, disbelief, or disagreement with children, (d) exert conformity pressure, and (e) invite children to pretend or speculate about supposed events.

It seems reasonable in light of the contemptuous criticism of the interview techniques in the *McMartin* case to submit that behavioural science experts should make increasing use of a standardised protocol when interviewing ACSA victims. Although assessments can be based on informal clinical judgments, a standardised protocol seems warranted as a means of gaining greater objectivity, increasing accuracy, and consequently protecting children and the falsely accused. There is a common tendency afoot among mental health professionals to rely on informal clinical judgments.¹¹³ However, experts in the field demonstrate that reliance on such judgments entails an enhanced risk that accuracy and objectivity will be compromised

McMartin Preschool? A review and behavioural analysis of the “tunnels” find’ (2002)12 *Behaviour and Social Issues* 29-39.

¹¹¹ KC Faller ‘Interviewing children who may have been abused: A historical perspective and overview of controversies’ (1996)1 *Child Maltreatment* 83-95; RC Summit ‘The dark tunnels of McMartin’ (1994)21 *The Journal of Psychohistory* 397-416.

¹¹² N Schreiber *et al.* ‘Suggestive interviewing in the McMartin Preschool and Kelly Michaels day-care abuse cases: A case study’ (2006)1 *Social Influence* 16. See also JM Wood *et al.* *Interviewing techniques in the McMartin Preschool and Kelly Michaels cases: A quantitative analysis* (1997).

¹¹³ Informal discussion with Louw Hatzenberg, a qualified psychologist in South Africa (Gauteng Province-Pretoria). The methodology of informal discussions was not envisaged in the methodology section. However, the insight obtained from the expert informs the further discussion on the general need for a standardised protocol in interviewing ACSA victims and children.

in such cases.¹¹⁴A standardised protocol offers at least the potential of improving the interview process and thus the outcomes in CSA prosecutions.

A useful protocol in this regard is the National Institute of Child Health and Development Protocol on interviewing children (NICHD Protocol),¹¹⁵ which was developed by researchers at the NICHD. The Protocol operationalised the recommendations from researchers to help forensic investigators to conduct developmentally-appropriate interviews with children. The protocol encompasses a number of subjects that can be of insight to experts, such as introducing the child to the interview process, rapport building, and training in episodic memory. A useful guide is offered on how to proceed from rapport building to the substantive interview and investigation of specific incidents, for example performing the delicate operation of eliciting information that the child has not mentioned and guiding without being suggestive as in the *McMartin* case (e.g. by making appropriate use of open-ended and focussed questions), and by responding appropriately if the child's testimony takes an unexpected course. Guidelines are also offered on managing breaks (often neglected) and closing the interview. On the whole the protocol is both specific and flexible enough to allow interviewers to adapt their approach appropriately to individual cases.

The NICHD Protocol has certainly conduced to more accurate results from interviewing, for which it deserves high praise.¹¹⁶ According to Lamb *et al.*¹¹⁷ its effectiveness is unsurpassed, and studies generally have concluded that experts will

¹¹⁴ *Ibid.*

¹¹⁵ For a detailed insight on the content of the NICHD Protocol see copy of the Protocol available at <http://nichdprotocol.com/NICHDProtocol2.pdf> (Accessed 10 May 2014).

¹¹⁶ M Cyr & ME Lamb 'Assessing the effectiveness of the NICHD investigative interview protocol when interviewing French-speaking alleged victims of child sexual abuse in Quebec' (2009)33 *Child Abuse & Neglect* 257-268; I Hershkowitz *et al.* 'Trends in children's disclosure of abuse in Israel: A national study' (2005)29 *Child Abuse & Neglect* 1203-1214; I Hershkowitz *et al.* 'Improving credibility assessment in child sexual abuse allegations: The role of the NICHD Investigative Interview Protocol' (2007)31 *Child Abuse & Neglect* 99-110; I Hershkowitz *et al.* 'The relationships among interviewer utterance type, CBCA scores and the richness of children's responses' (1997)2 *Legal and Criminological Psychology* 169-172; ME Lamb *et al.* *Tell me what happened: Structured investigative interviews of child victims and witnesses* (2008)1-355; ME Lamb *et al.* 'Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol' (2007)31 *Child Abuse & Neglect* 1201-1231; KJ Sternberg *et al.* 'The relation between investigative utterance types and the informativeness of child witnesses' (1996)17 *Journal of Applied Developmental Psychology* 439-451; KJ Sternberg *et al.* 'Use of a structured investigative protocol enhances young children's responses to free recall prompts in the course of forensic interviews' (2001)86 *Journal of Applied Psychology* 997-1005.

¹¹⁷ ME Lamb *et al.* (2007) *supra* note 116, 1201.

increasingly be able to make use of it to arrive at objective assessments, provided of course that they remain alert to their ethical obligations, particularly in ACSA cases. Evaluations should be objective, taking into account alternative hypotheses on the cause of symptoms and behavioural patterns displayed by the alleged ACSA victim.¹¹⁸ This is particularly important because the application of the NICHD Protocol does not necessarily constrain experts' discretion in arriving at an opinion,¹¹⁹ hence the critical need for more than the guidance of the protocol, the DSM-V or the CSAAS. An opinion that is informed and objective not only passes the test of scrutiny by the courts, but helps the accuracy of their decisions. In this regard, adherence to ethical principles and guidelines is a prerequisite for objectivity¹²⁰ and by the same token the roles of therapist and forensic interviewer should certainly not coincide, that is, be performed by the same person¹²¹ since the court's purpose could be critically compromised in the event of such a dual relationship.

¹¹⁸ Herman *supra* note 4, 260-261.

¹¹⁹ On the aspect of choice, see discussion by Swanepoel. M Swanepoel 'Ethical decision-making in forensic psychology' (2010)75 *Koers* 853. See also M Swanepoel 'Law, psychiatry and psychology: A selection of constitutional, medico-legal and liability issues' (2009) *Unpublished LLD thesis: University of South Africa* 336-337. The author discusses, in detail, the obligation of experts in the field of behavioural sciences such as psychologists to act in accordance with the Ethical Code of Professional Conduct for psychologists, failing of which renders psychologists liable.

¹²⁰ Swanepoel *supra* note 119, 853. Swanepoel observes that '[i]n clinical and forensic practice, situations often arise in which there is no right answer or right course of action. The psychologist is then guided by a set of ethical principles that lay different emphases on different components of the problem...'; RR Cottone & RE Claus 'Ethical decision-making models: A review of the literature' (2000)78 *Journal of Counselling and Development* 275-283; K Kuehnle 'Ethics and the forensic expert: A case study of child custody involving allegations of child sexual abuse' (1998)8 *Ethics & Behaviour* 1. Kuehnle observes that mental health professionals who participate as forensic evaluators in cases involving child sexual abuse allegations must possess advanced assessment skills and a thorough knowledge of child development, child sexual abuse, and child interviewing techniques. The author demonstrates that inaccurate decisions become inevitable when mental health professionals exceed the limits of their role as independent evaluators and neglect their ethical obligations; P Appelbaum 'A theory of ethics for forensic psychiatry' (1997) 25 *J Am Acad Psychiatry Law* 233-247.

¹²¹ LH Strasburger *et al.* 'On wearing two hats: Role conflict in serving as both psychotherapist and expert witness' (1997)154 *Am J Psychiatry* 455. Strasburger *et al.* discern a clear and distinct difference between the roles of therapist and forensic expert. A therapist is a clinician hired to provide psychotherapy or treatment. An expert witness or forensic consultant is a paid consultant who chooses to become involved in the case and is retained by an attorney, judge, or litigant to provide evaluation and testimony to aid the legal process. Unlike a therapist, an expert may offer opinions about legal questions. This role typically involves participation in a trial. Strasburger *et al.* recommend that in view of the associated inherent conflict of interest mental health professionals should under no circumstances assume a dual role; SA Greenberg & DW Shuman 'Irreconcilable conflict between therapeutic and forensic roles' (1997)28 *American Psychological Association* 50. Elaborating further on the said role separation the authors observe that it is a safeguard to secure both the efficacy of therapy and the accuracy of judicial determination.

It is notable that there has been significant conflict between behavioural sciences and the law in recent years. In some cases, lawyers have taken behavioural experts to task for overblown claims and bending their testimony to serve social or financial motives.¹²² Bersoff¹²³ once said this of experts in psychology: 'In our courtroom, psychology is still seen as a mysterious inexact discipline... populated by hired guns who will switch sides and proffer opinions for the right fee and the greatest notoriety.' Hagen went a step further to give the impact of psychologists in the courtroom a sensational twist, observing that their opinions are brim-full of 'anecdotes, errors, flaming overgeneralisations, and inflammatory charges.'¹²⁴ Hagen in fact suggested that justice systems should 'throw the experts out.'

However, the opinions of criminal-justice professionals have relented towards behavioural sciences and their expert practitioners over the years. Gudjonsson observes that getting forensic psychology accepted in courts was not easy.¹²⁵ It took years of research, and even then experts' credibility remained an obstacle to admissibility. Gudjonsson attributes the eventual breakthrough in forensic admissibility to the development of standardised tools and procedures.¹²⁶ This hard-won acceptance of behavioural sciences should not be jeopardised by neglecting the guidelines laid down over time; after all, acceptance can never be taken for granted since it stands and falls by the discipline and professional probity it maintains in assisting the courts. Thus it seems fair to conclude from the discussion in this chapter that successful collaboration and trust between behavioural sciences and criminal-justice systems is ultimately contingent on the development of and adherence to rational, practical standards and procedures, and above all to careful observance of ethical considerations. It is not enough for experts to make use of the NICHD Protocol, the DSM-V or the CSAAS. Their objectivity as guided by professional ethics is indispensable if an accurate assessment, of relevance to the court, is to be achieved.

¹²² JC Brigham 'What is forensic psychology, anyway?' (1999)23 *Law & Human Behaviour* 285.

¹²³ DN Bersoff 'Preparing for two cultures: Education and training in law and psychology' in R Roesch & SD Hart (eds) *Psychology and law: The state of the discipline* (1999)375-401.

¹²⁴ S Fulero 'Babies, bathwater and being 'hoisted by own petart' (1997)6 *National Psychologist* 10.

¹²⁵ GH Gudjonsson 'Psychology brings justice: The science of forensic psychology' (2003)3 *Criminal Behaviour and Mental Health* 160.

¹²⁶ *Ibid.*, 161.

6 Conclusion

If BSE is to make an impact in the prosecution of ACSA prosecutions, experts in the field need to guard against inaccurate conclusions as these can wreck the justice process. Standardised frameworks such as the DSM-V, CSAAS and NICHD Protocol are useful guides in informing the conclusions and approaches of behavioural science experts. However, standardised frameworks will hardly impact on the assessment process if experts do not exercise their discretion objectively, in accordance with established ethical standards. Thus, in applying the discussed standards, objectivity ought to be a golden thread running through the assessment process. Further, pertaining to the DSM-V and the CSAAS, the broad indication in light of the jurisprudence and the literature is that their role and application are still hampered by difficulties in mutual understanding and application. If these standards are to be fully exploited in taking due forensic cognisance of BSE in ACSA prosecutions it follows that both parties, that is, behavioural and criminal-justice experts, must know and adhere, albeit collaboratively, to the exact limits of their respective domains in the forensic context.

CHAPTER FIVE: THE EXACT PLACE OF SELECTED RULES OF EVIDENCE IN ADVANCING BEHAVIOURAL SCIENCE EVIDENCE IN ACSA PROSECUTIONS

1 Introduction

Like any other form of evidence, BSE is subject to the rules on admissibility of evidence. It is therefore worthwhile to discuss the exact place of rules of evidence in advancing BSE in ACSA prosecutions. This discussion is particularly critical because, where the opinion of a behavioural science expert does not satisfy the rules of evidence, it can be excluded. Further, even when BSE is admitted, the courts may fail to assign appropriate weight to the admitted evidence where the rules of evidence are not appropriately interpreted and applied. This is the background that informs the present discussion in the context of admitting BSE as a material evidentiary element in the prosecution of ACSA cases, as well as cautionary rules to observe in dealing with children's testimony. This discussion is particularly significant because BSE may be of limited relevance in ACSA prosecutions where the cautionary rule is dogmatically applied. On balance, the discussed rules of evidence in their evolved form are sound and flexible enough to allow greater forensic relevance for BSE; however, the courts now have to step up to the plate by interpreting the rules correctly and flexibly in context with the latest developments in behavioural sciences.

2 The principle of relevance and behavioural science evidence

Relevance is 'regarded as the basic criterion of admissibility.'¹ Generally, relevant evidence is admissible while irrelevant evidence is inadmissible. Zeffert and Paizes note that relevance is 'a matter of reason and common sense', with its foundation based on the facts, circumstances and principles of each particular case.² Schwikkard and Van der Merwe add that relevance is generally hard to describe in the abstract.³ In the words of Stephen, relevance means

¹ DT Zeffert & AP Paizes *The South African law of evidence* (2009)237.

² *Ibid.* See also A Keane *Modern law of evidence* (1989)15.

³ PJ Schwikkard & SE Van der Merwe *Principles of evidence* (2010)46.

Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other factors proves or renders probable the past, the present or the future existence or non-existence of the other.⁴

According to Rule 401 of the Federal Rules of Evidence of USA, relevant evidence is

[e]vidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.⁵

Generally, 'evidence, even if highly relevant and even if it happens to be the only available evidence, must be excluded where', for example, it is evidence of opinion.⁶ Where such evidence is based on observed behaviour and psychological reactions of CSA victims it is inadmissible in principle, but admissibility dawns if, and only if, it proceeds from a knowledge and skills base that renders it more authoritative in pronouncing on the matter at issue than the authority that the judicial officer can bring to bear.⁷ The need to consult such opinion follows self-evidently since, inevitably, 'there are some subjects upon which the court is usually quite incapable of forming an opinion unassisted.'⁸ As Wigmore puts it, the crux of admission of opinion evidence is whether the court can derive 'appreciable help' from it.⁹

The principle of relevance is crucial in gaining admission for BSE in ACSA prosecutions. The manner in which the principle is applied to new developments in behavioural sciences will profoundly impact whether and to what extent BSE is admitted and accorded due weight. As noted, relevance as a basic criterion for admissibility of evidence is a matter of logic that must be applied individually to suit the case at issue. Thus judicial officers will exercise discretion in deciding whether BSE on offer is relevant in light of the particulars of a given ACSA case, to which end new developments in scientific evidence will have to be considered on recommendation of expert opinion. Slovenko notes in this regard that

⁴ J Stephen *Digest of the law of evidence* (1914)1.

⁵ See generally Federal Rules of Evidence of the United States of America, 1975.

⁶ Schwikkard & Van der Merwe *supra* note 3, 45; A Bellengere *et al. The law of evidence in South Africa: Basic principles* (2013)255.

⁷ Zeffert & Paizes *supra* note 1, 237 & 321.

⁸ *Ibid.*

⁹ JH Wigmore *A treatise on the Anglo-American system of evidence* (1940)1923.

the potential use of expert testimony expands with wider knowledge of the world and as the world becomes complicated. As the modern age continues to become more complex, it is not surprising that modern litigation requires more expert evidence than ever before. Not only is reliance on expert witnesses increasing, but new types of experts are developing.¹⁰

Behavioural science knowledge has grown exponentially in recent decades. As evidence mounts of an increasing functional rapprochement between criminal-justice systems and science, the prosecution of ACSA cases stands to benefit as the admission of BSE for the purposes of prosecuting such cases improves, at least potentially, the court's insight into the ACSA phenomenon and the behaviour of ACSA victims. Its increasing prominence and prestige would also make it a prime candidate to stand in for the perennial lack of medical evidence that militates against the chances of adducing proof that CSA has occurred. Many studies have shown a well-defined associative linkage between recognisable behavioural and emotional manifestations in ACSA victims and the possibility that they have been subjected to CSA. However, it is unlikely for criminal-justice systems to be able to derive the best out of BSE in ACSA prosecutions without applying the principle of relevance in step with new developments.

3 The basis rule and behavioural science evidence

Experts need to provide a basis upon which their evidence is founded. A properly founded opinion impacts on the value and the weight that is accorded to it. An example of founded opinion is where experts provide supporting data that explain how the expert arrived at the proffered opinion in a given case. Schwikkard and Van der Merwe¹¹ corroborate the view that experts 'need to lay foundation' to their opinion. They have not done so, especially where ACSA victims are concerned, but such a foundation is recommended, particularly since they need it as a base from which to assess ACSA victims' behavioural reactions that are indicative of CSA. It is submitted further that behavioural science experts should be accorded wide latitude to provide the requisite scientific basis for their field of expertise. Reference to foundational information in advancing expert opinion is advocated categorically in *S v Kimimbi*:

¹⁰ R Slovenko *Psychiatry in law, law in psychiatry* (2009)6.

¹¹ Schwikkard & Van der Merwe *supra* note 3, 95.

No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the reported data of fellow scientists learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men ...[T]o reject a professional physician or mathematician because the fact or some of the facts to which he testifies are known to him only upon the authority of others, would be to ignore the accepted methods of professional work and to insist on impossible standards.¹²

Gross¹³ describes two forms of information that experts can rely on. An expert can rely on the general body of knowledge that constitutes the expert's field of expertise, published tables, reported experiences and established principles. Schwikkard and Van der Merwe¹⁴ note that an expert can refer to textbooks as authoritative sources in proffering basis to their opinion. Gross¹⁵ notes further that an expert witness can rely on other people's observations to form opinion. According to Zeffert and Paizes,¹⁶ when the expert relies on textbooks '[t]he court is not entitled to treat the author of the book as another witness...'; however the data referred to must be reasonable. In this regard Epps¹⁷ notes that the assertion of 'reasonableness' must be applied with caution since it does not follow in virtue of the fact that experts among themselves have habitually relied on the information offered. This would clearly be a false premise that precludes reason. Instead the persuasiveness of the matter would have to hinge on a real element of reason.¹⁸

While it may be untenable for experts to arrive at an opinion without relying on data in the field, it is critical for this wide latitude not to be misused. Behavioural science experts should demonstrate application of their expertise to the 'facts on the ground', namely the substantial particulars of the matter at issue. Oliver¹⁹ advises that courts should vigilantly and meticulously ensure that experts do not merely regurgitate

¹² *S v Kimimbi* 1963 3 SA 250 (C) 251H-252A.

¹³ SR Gross 'Expert Evidence' (1991) *Wisconsin Law review* 1155.

¹⁴ Schwikkard & Van der Merwe *supra* note 3,101.

¹⁵ Gross *supra* note 13, 1155.

¹⁶ Zeffert & Paizes *supra* note 1, 325.

¹⁷ JA Epps 'Clarifying the meaning of Federal Rule of Evidence 703' (1994)36 *Boston College Law Review* 81.

¹⁸ *Ibid.*

¹⁹ RA Oliver 'Testimonial hearsay as the basis for expert opinion: The intersection of the confrontation clause and Federal Rule 703 after *Crawford v Washington*' (2004)55 *Hastings Law Journal* 1558 & 1559.

formulaic utterances in common circulation but evince genuine application that demonstrates their subject specific expertise. Wigmore notes that

Where, under the pretext of affording a basis for an opinion, not merely the fact of a patient's statement, but the details of it, are so offered that its use for that purpose is a mere pretence, and its real use and predominating effect would be that of hearsay testimony of the victim, then it should be excluded.²⁰

There are notable cases where the defence has advanced objections to the effect that the opinion of a behavioural science expert should not be admissible because reference was made to underlying data without calling witnesses that authored such data.²¹ This is where the basis rule warrants sound and flexible application to ensure that BSE opinion is not accorded less weight merely on grounds of data that are not admitted in evidence. The dynamics of ACSA warrant a sound and flexible application of the basis rule. To form a reliable opinion an expert not only observes but questions and takes statements from, and depending on circumstances, also from persons known to the child victim. Furthermore, if there is a shortfall in the expertise proffered, further relevant expertise and/or published data may be called upon to fill the gap. Summit's²² Child Sexual Abuse Accommodation Syndrome; Sorensen and Snow's²³ empirical stage-based model of disclosure; Bussey and Grimbeek's²⁴ Social-cognitive model; Finkelhor and Browne's²⁵ theory of the traumatic impact of CSA, and Finkelhor, Wolak and Berliner's²⁶ two-stage model of reporting child crime; all constitute reliable and well-researched data on understanding the behavioural dynamics of ACSA.²⁷ The Diagnostic and Statistical

²⁰ J Wigmore *supra* note 9, 1720-71.

²¹ See e.g. the argument of defence counsel in *S v The State* (423/11) [2011] ZASCA 214 para 19; *Godi v S* (A683/09) [2011] ZAWCHC 247 para 19.

²² RC Summit 'The Child Sexual Abuse Accommodation Syndrome' (1983)7 *Child Abuse & Neglect* 177-193.

²³ T Sorensen & B Snow 'How children tell: The process of disclosure in child sexual abuse' (1991)70 *Child Welfare: Journal of Policy, Practice, and Program* 3-15.

²⁴ K Bussey & EJ Grimbeek 'Disclosure processes: Issues for child sexual abuse victims' in KJ Rotenberg (ed) *Disclosure processes in children and adolescents* (1995)166-203.

²⁵ D Finkelhor & A Browne 'The traumatic impact of child sexual abuse: A conceptualisation' (1985)55 *American Journal of Orthopsychiatry* 530-541.

²⁶ D Finkelhor *et al.* 'Police reporting and professional help seeking for child crime victims: A review' (2001)6 *Child Maltreatment* 17-30.

²⁷ All these authors have produced literature concerning psychological reactions and behavioural manifestations observable in children that can serve a useful referential purpose in pursuing prosecutions where child victims have been or are harmed or at risk. It follows that if the basis rule is applied conventionally the court would be deprived of the appreciable help that can be

Manual of Mental Disorders-V (DSM-V) is another source for the referencing of expert opinion. To limit the expert's basis of opinion to personal knowledge would be to deprive the ACSA prosecution process of reliable scientific data that could assist informed court decisions. It is therefore submitted that judicial officers should allow expert witnesses proffering BSE in ACSA cases to base their testimony on reliable data that may not have been admitted in evidence in the prosecution of said cases.

4 The ultimate issue rule and behavioural science evidence

In principle, the ultimate issue rule hinges on the notion that an expert cannot testify on the ultimate issue to be decided by the court because to do so would be to usurp the function of the jury. This rule has now developed into the imposition of a technical restriction on the kind of language that the expert may use in expressing opinion. Some courts express the fear that expert conclusions that implicate the ultimate issue may overawe the presiding officer who may therefore defer to the expert opinion and thereby abdicate his/her decision making duties by simply agreeing with the expert. Wigmore²⁸ understandably dismisses this view as a 'bit of empty rhetoric' as the court is not bound by expert opinion. Zeffert and Paizes²⁹ retort that the courts' expressed misgiving merely obfuscates 'the true principle.' Morgan³⁰ terms the proposed stricture 'sheer nonsense' while McCormick³¹ declares it 'unduly restrictive', 'pregnant with close questions of application, and often unfairly' obstructive of 'the party's presentation of his case.' Adherents of the rule offer nothing in substantiation of their expressed misgiving, however. Wigmore³² notes that it is 'simply one of those impossible and misconceived utterances which lack any justification in principle.' Studies by Kalven and Zeisel,³³ as well as Simon,³⁴ indicate that jurors and judges are not overawed by expert testimony. The authors express confidence and faith in courts to independently arrive at decisions without relinquishing their decision making powers. Bonnie,³⁵ a defender of

drawn from well-researched bases such as these. Ultimately a restrictive approach to the basis of opinion would afford CSA victims limited or no protection.

²⁸ Wigmore *supra* note 9, 1920-2556.

²⁹ Zeffert & Paizes *supra* note 1, 315.

³⁰ E Morgan *Basic problems of evidence* (1962)218.

³¹ C McCormick *Handbook of the law of evidence* (1954)12-26.

³² Wigmore *supra* note 9, 1920-2556.

³³ H Kalven & H Zeisel *The American jury* (1971)177.

³⁴ R Simon *The jury and the defence of insanity* (1970)169-170.

³⁵ RJ Bonnie 'Morality, equality and expertise: Renegotiating the relationship between psychiatry

psychiatric participation in the criminal process contends that it is incumbent on the courts to reach out with a view to lending substance to evidence before them rather than to impose restrictions on how evidence is presented.

Strictly speaking, in theory, the ultimate issue rule is no longer part of the contemporary law of evidence. There are decisions, in the case of South Africa, which have clearly delineated its exact position concerning the application of BSE in CSA prosecutions is concerned.³⁶ The rule has, however, been invoked in a number of cases.³⁷ The latter position is therefore an issue of application and not principle. Again, courts' exact positioning of this rule when dealing with BSE in CSA prosecutions is critical, failing which BSE could be excluded or accorded less weight than it deserves. Expert opinion in CSA cases often touches upon the ultimate issue of determination before the court, namely the guilt or innocence of the accused. It was demonstrated in the second chapter that it is not unusual for an expert to adopt the position that the behavioural and affective manifestations observed and attested in ACSA victims are consistent with CSA. The discussion of case law in the third chapter confirmed that where the courts applied this rule to sound effect, objections proceeding from the ultimate issue rule were overruled and due weight was assigned to the admitted expert opinion. It is therefore recommended that persistent invocation of this rule be renounced at once as it is out of step with current practice in presenting forensic evidence.

Even if expert testimony bears on an ultimate issue before the court, the court remains obligated to attach the same weight to it as it would to any other admitted evidence and consequently arrive at an independent decision. This premise remains active when preliminary objections dealing with the ultimate issue rule are raised, in that courts need to set these objections aside and instead prioritise the helpfulness of

and the criminal law' (1984)12 *Bull. Am. Acad. Psychiatry & L* 5. See also discussion by GP Stevens 'The role of expert evidence in support of the defence of criminal incapacity' (2011) *Unpublished LLD thesis: University of Pretoria* 14 & 676. Stevens argues that 'the fact remains that it is still within the court's own discretion to decide what weight should be attached to such evidence.'

³⁶ See e.g. *Godi case supra* note 21, paras 19-25. See also *S v Harris* 1965(2) SA 340 (A), in which Ogilvie Thomson JA ruled as follows: '....in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the court itself. In determining that issue, the court-initially the trial court; and, on appeal, this court- must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.'

³⁷ *S v The State case supra* note 21, para 19.

the expert's opinion. Judicial officers should allow behavioural science experts to present opinion in terms that are as readily intelligible and accessible as possible, regardless of whether it impacts the ultimate issue rule. In any case, the judge has the final say as to which portions of evidence can be considered admissible and which are deserving of a lesser weight.

5 The expertise rule and behavioural science evidence

The trite position with regard to the admission of opinion evidence is that the court must be able to derive 'appreciable help' from expert evidence, to which end the expert must possess sufficient skill, training or experience to render such 'appreciable help'. Addleson J confirmed this position as follows in *Menday v Protea Assurance Co Ltd*:³⁸

In essence the function of an expert is to help the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable...However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience, he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of the degrees and diplomas - are untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field ...

Special training, knowledge, skill or experience are yardsticks against which judicial officers assess the expert's qualifications. These elements merely illuminate the judicial officer's decision; consequently there is no standard criterion against which judicial officers can judge expertise. It is a matter of the trial judge's discretion, which should be exercised with due reference to the evidence placed before the court. The lack of a standardised criterion to apply in assessing experts' qualifications stands to reason given the prohibitive divergence existing in the range of fields that have to be subjected to standardisation. Moreover judicial officers are not necessarily apprised of the full range of expertise on offer, with the result that they will not necessarily be able to sift out the expertise that is most appropriately qualified to present BSE in ACSA cases. In Uganda specifically, where this kind of evidence has never been admitted, the courts

³⁸ *Menday v Protea Assurance Co Ltd* 1976 1 SA 565 (E) 569.

have hardly any practical guidelines by which to deal with CSA cases. For justice systems like South Africa where BSE has been admitted increasingly over the years, it stands to reason that the role of BSE can be expanded to accommodate a greater range of relevant expertise.

Myers³⁹ has observed that where the expert is to render an opinion which has the ultimate relevance of establishing that CSA has occurred, the qualification threshold should be much higher because of the degree of expertise necessary to arrive at such an opinion. More particularly, Myers⁴⁰ advises that the expert who offers an opinion that effectively establishes occurrence of CSA should have a thorough grasp of child development, memory and suggestibility, normal sexual development, the impact of sexual abuse, normal and abnormal psychology, medical evidence of CSA, proper and improper interview methods, prevalence rates of various symptoms in abused and non-abused children and the strengths and weaknesses of clinical judgment. The qualification threshold of experts rendering opinions with the ultimate relevance of providing court with a context within which to evaluate the testimony of the child victim can be much lower. The expert does not need to have met the child victim to be qualified to render opinion of this calibre. Where the expert offers opinion on unusual behavioural reactions among sexually abused children, Myers⁴¹ observes that such an expert does not necessarily need to meet the ACSA victim. The expert in this instance can recapitulate the literature on unusual behavioural reactions among sexually abused children. However as noted, it is critical for the expert not to merely recite the literature in court, although that may suffice with the relatively lower qualification threshold, but then the application of expertise must at least accompany recitation of the literature. Moreover, the value and weight of evidence gained where the expert meets and evaluates the child face to face is bound to benefit significantly from the encounter because the resultant opinion will have proceeded 'from the horse's mouth' in the sense that the direct encounter bears, or at least seems to bear the hallmark of authenticity.

The fact that expertise varies depending on the nature of the opinion at issue, confirms the notion that there is a range of expertise available that can be of appreciable

³⁹ JEB Myers 'Expert testimony in child sexual abuse litigation: Consensus and confusion' (2010)14 *UC Davis Journal of Juvenile Law & Policy* 42.

⁴⁰ *Ibid.*

⁴¹ Myers *supra* note 39, 46.

help to the court. Lonsway⁴² notes that expert evidence of this nature can be presented by psychiatrists, psychologists, clinical social workers, law enforcement officers and child or victim advocates. Lonsway⁴³ advises that generally, law enforcement officers and victim advocates should be able to advance BSE based on their considerable experience in dealing with CSA cases, and that from that vantage point will be able to lay to rest the myth that victims in such cases will invariably show signs of physical injury and/or hysterical reactions.⁴⁴ Victim advocates can be useful too by helping courts to understand the perplexing dynamics of child sexual offences, but Kovera *et al.*⁴⁵ warn that such advice should be treated with circumspection because it could be biased.

On balance it seems reasonable for criminal-justice systems to admit testimony provided by law enforcement authorities and victim advocates in CSA cases on grounds of their extensive experience in that domain. However, this observation must not be construed as an implied indication that psychiatrists, psychologists and clinical social workers cannot present opinion on unusual behavioural reactions with the same probity as the said parties. There can be no doubt in that quarter, but at the same time a distinction is apposite between the former and the more professionally qualified group to say that opinion bearing directly on the issue whether CSA occurred should be a matter for the latter since experience alone may not meet the case where conclusive proof of CSA is required. The same applies where syndromes and mental disorders are concerned, which are generally also beyond the ken of non-professionals such as law enforcement officers and victim advocates.

To ensure that BSE in CSA cases is fully exploited, it is again critical for the expertise rule to be soundly and flexibly applied. There is a need to accommodate as broad a spectrum as possible of professionals for this type of evidence to be fully exploited. Psychiatrists, psychologists and clinical social workers are indispensable if courts are to receive appreciable opinion on matters falling under the rubric of these disciplines. As noted, however, this is not to say that the more 'pedestrian' types of expertise (i.e. law enforcement, victim advocates etc.) are at all inadmissible. Addleson J

⁴² KA Lonsway 'The use of expert witnesses in cases involving sexual assault' (2005) *Violence Against Women* 4.

⁴³ *Ibid.*, 11.

⁴⁴ *Ibid.*

⁴⁵ MB Kovera *et al.* 'Do child sexual abuse experts hold pro-child beliefs?: A survey of the international society for traumatic studies' (1993)6 *Journal of Traumatic Stress* 383-404.

in *Menday v Protea Assurance Co Ltd*⁴⁶ notes that ‘...a recital of the degrees and diplomas [that is] untested by knowledge or practice’ cannot in and of itself persuade the court that testimony delivered by the holder will help its cause in matters such as ACSA. To put the matter in perspective, if the only available expert on the dynamics of ACSA is a police officer and the alternative is that a judicial officer has to arrive at a decision with no expertise at all, then it seems reasonable for the opinion of a law enforcement officer to be admitted.

6 Uncertainty affecting courts’ decision to apply rules of evidence soundly and flexibly: The case for codification

Since it can be shown conclusively at the present juncture that the rules on admissibility of expert evidence have found acceptance among most criminal-justice systems, as evidenced by the fact that these systems have kept up with new developments in scientific evidence in particular and expert evidence generally; hence there is no pressing need for reform in that quarter. Indeed some South African scholars submit that the traditional rules of exclusion (e.g. the ultimate issue rule) are not really part of South Africa’s modern law,⁴⁷ yet some criminal-justice professionals still apply them without true justification as if they are.⁴⁸ Thus, even though common law is currently up to date with advances in scientific evidence, widespread uncertainty seems to linger anachronistically across courts and the ranks of criminal-justice professionals, which probably explains the calls for codification.

Codification is the process by which the whole body of law, be it common law, case law or statutory law, is systematised by statute or executively.⁴⁹ Codification serves many functions, one of which is the ordering function. Codification in furtherance of the ordering function presupposes that generally, there are rules in place that meet current needs.⁵⁰ The object of codification is therefore not to correct conflicts between common law and prevailing social norms, but to clarify the law for the benefit of all

⁴⁶ *Menday v Protea Assurance Co Ltd supra note 38*, 569.

⁴⁷ A Allan & DA Louw ‘The ultimate opinion rule and psychologists: A comparison of the expectations and experiences of South African Lawyers’ (1997)15 *Behavioural Sciences and the Law* 307-320; A Allan & DA Louw ‘Lawyers’ perception of psychologists who do forensic work’ (2001)31 *S. Afr. J. Psychol* 12-20.

⁴⁸ *Ibid.*

⁴⁹ C Ilbert *The mechanics of law making* (1914).

⁵⁰ HA Hayek *Law, legislation and liberty: Rules and order* (1973).

concerned.⁵¹ Codification is needed to address the problem that although the rules of evidence subsumed under common law have kept up with developments in forensic evidence, uncodified common law is out of touch with current practice where admission of BSE into court procedure is concerned and is therefore creating uncertainty that needs to be addressed by codification.

Proponents of codification of laws have long made the point that codification furthers accessibility, certainty and uniformity.⁵² Although arguments on the need for codification have largely been general, the concept of codification specifically concerns rules relating to expert evidence. Further, since the idea of sound and flexible application of the rules of evidence has gained general acceptance it seems justified to assume that the time is ripe for codification to provide definitive clarity that can lay to rest the outdated or otherwise unsound and inflexible application of these rules.

Arguments that judges and legal practitioners might simply persist in their recalcitrant ways are essentially substantial because inconsistencies across the jurisprudence not only confirm the limits of the argument, but also demonstrate that judicial officers and legal practitioners are still at sea with the concept of sound and flexible application of the rules of expert evidence when it comes to admitting BSE in court procedure. The fact that some judicial officers and legal practitioners persist in making up and enforcing rigid exclusionary rules where none exist demonstrates the need for codification as a viable alternative.

Although the development of common law should be allowed to advance in easy steps (i.e. at an unhurried pace), one of those steps has to be codification because courts still apply such rules despite the realisation that they are outdated and baseless. It seems reasonable, therefore, to assume that codified rules on admissibility of expert evidence would pressurise judicial officers to relinquish unsound and inflexible rules because they will no longer have the cloak of ambiguities in the law to cover their impervious stance. With codified rules on admissibility of expert evidence, all criminal-justice professionals and all experts interfacing the criminal-justice system would be able to view the law on admissibility of expert evidence through the same lens. It is also to be noted cautiously that advocacy for codification ought not to be understood as

⁵¹ *Ibid.*

⁵² MA Berger 'The Federal Rules of Evidence: Defining and refining the goals of codification' (1984)12 *Hofstra Law Review* 255-277.

cutting through judicial discretion (which risks affecting ethical standards). Rather, codification should be seen as limiting the discretion of judicial officers in respect of exclusionary rules that are of step such as the consistently mentioned ultimate issue rule.

Codification is by no means a guarantee that greater latitude as regards the admissibility of BSE in ACSA prosecutions will lead to the sought-after increase in conviction rate. Indeed, even the soundest codified system relating to the rules of evidence, such as that of the USA, has not eliminated uncertainty completely,⁵³ which goes to show that codification does not provide all the answers to evidence problems. But as Saltzburg puts it, 'the fact remains that [codified] rules can be most useful.'⁵⁴ When objections are raised in accordance with the traditional rules of exclusion, legal practitioners can fall back on the codified rules of evidence to clear up the ambiguity. Moreover, behavioural science experts who consistently interact with criminal-justice systems would be well aware of the limits set by codification beyond which they cannot venture in proffering their testimony. Adherence to these limits is therefore bound to improve the collaboration between behavioural science experts and criminal-justice systems.

7 The cautionary rule on children's evidence

The cautionary rule applicable to testimony rendered by children does not fall under expert evidence but should nevertheless be discussed in light of the need to apply it soundly and flexibly to ensure that BSE will have the desired effect on the prosecution of ACSA cases. As indicated in the third chapter, BSE can provide background information as a context within which to evaluate the ACSA victim's evidence to advantage by bearing out the material particulars of that testimony and thus lending substance to his/her credibility, in which regard it is apposite to note that under the laws of evidence of both South Africa and Uganda the evidence of a single witness can found a conviction if it is satisfactory in all material respects,⁵⁵ thus ruling out the need

⁵³ See divergence in court decisions in *People v Jeff* 204 Cal. App. 3d 309, 251 Cal. Rptr. 135 (5th Dist. 1988); *People v Bowker* 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (4th Dist. 1988); *Re Sara M* 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (3d Dist. 1987), amongst others.

⁵⁴ SA Saltzburg 'The Federal Rules of Evidence and the quality of practice in Federal courts' (1978) 27 *Cleveland State Law Review* 173-194.

⁵⁵ Section 133 of the Evidence Act Chapter 6 of the Laws of Uganda; Section 208 of the Criminal

for corroborating testimony if such evidence can be adduced. However, if the cautionary rule is applied dogmatically, despite the evidence of a single CSA witness that is satisfactory in all material respects, then a conviction would not be sustained in the absence of corroborative evidence, which means that the potential supporting role of BSE would be vitiated in the absence of further substantiation.

The discussion in light of the above does not lead to the conclusion that the rule in its entirety has lapsed; instead the gist of the argument is that the rule should be soundly and flexibly applied, with common sense running through the assessment process like a golden thread. This advocacy proceeds in light of the realisation that criminal-justice systems in South Africa as well as Canada, Ireland and England have lent their support to the idea of implementing a sound and flexible application of the rule, which Uganda would do well to emulate, while South Africa could take pointers from Ireland and England to improve its own system in this regard.

7.1 Cautionary rules of practice under the law of evidence

The cautionary rule evolved in England where judges warned juries to exercise caution when considering the evidence of certain witnesses, particularly young children, accomplices and complainants in sexual-offence cases. In its 'sound' sense, the 'purpose of the cautionary rule is to assist the court in deciding whether or not guilt has been proven beyond a reasonable doubt.'⁵⁶ It therefore 'exists only to provide guidance in answering this overriding question.'⁵⁷ This emphasis has gained particular significance in our time because cautionary rules 'seem to have become something of a fetish' over the years.⁵⁸ As Zeffert *et al.* put it, it has become a mechanical test which 'automatically answers the question of guilt or innocence.'⁵⁹ Thus, although the cautionary rule was born out of judicial experience, it has regrettably become a 'victim' of inappropriate interpretation and application; in fact its misapplication may well be the reason why it is commonly considered a candidate for abolition as far as the law of evidence is concerned.

Procedure Act 51 of 1977 of South Africa.

⁵⁶ DT Zeffert *et al.* *The South African law of evidence* (2003)793.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Zeffert *et al.* *supra* note 56, 798.

However, evidence scholars are increasingly showing that it is still relevant provided it is applied correctly. Sebba holds that the rule or practice cannot be slated as anomalous simply because it enjoins judicial officers to be cautious.⁶⁰ It is indefensible, however, that what was once a rule of practice has been denatured to the point that it often supplants the rule of common sense. This situation has arisen gradually over the years as application of the rule has drifted away from its original intent and purpose. Often, its application seems to proceed on the premise that the evidence of children is inherently suspect. This popular yet unsubstantiated notion exemplifies the notion that children's testimony is naturally suspect because children are inherently prone to lying, suggestibility, fantasy and exaggeration.⁶¹ As Goodman puts it, many professionals are still convinced that children are 'the most dangerous of all witnesses.'⁶² The expression of such extreme bias unfairly undermines children's probity as a rule that brooks no exception, yet by all accounts the bias persists.

Although validation of the cautionary rule by corroborative evidence is not an absolute requirement, such evidence will most likely serve to validate the rule in any case,⁶³ which is probably the underlying reason why some criminal-justice systems expressly require corroborative evidence when dealing with the evidence of children of tender years (i.e. the presence of corroborative evidence is deemed to be validation in principle whether or not it is an express requirement). During trial dogmatic application of the rule requires that a presiding officer be aware of the dangers inherent in assessing a child's evidence; consequently the court will require corroborative evidence for a conviction to be sustained. The South African case of *R v Manda*⁶⁴ provides a practical example of how the courts treat children's testimony with suspicion. Schreiner

⁶⁰ L Sebba 'The requirement of corroboration in sex offences' (1968)3 *Israel Law Review* 86.

⁶¹ J Spencer & R Flin *The evidence of children: Law and psychology* (1990)286-287. Spencer and Flin identified the six main objections to relying on children's evidence as follows: (a) children's memories are unreliable; (b) children are egocentric; (c) children are highly suggestible; (d) children have difficulty distinguishing fact from fantasy; (e) children make false allegations, particularly of sexual assault; and (f) children do not understand the duty to tell the truth. According to Spencer and Flin, this belief accords with societal and 'expert' views that were prevalent until the 1960s.

⁶² GS Goodman 'Children's testimony in the historical perspective' (1984)40 *Journal of Social Issues* 9.

⁶³ In the case of *R v Baskerville* (1916) 2 K.B 658, Lord Reading stated that corroborative evidence denotes '... independent testimony which affects the accused by connecting or tending to connect him with the crime, i.e. it must be evidence which implicates him, meaning that the evidence which confirms in some material particular, not only the evidence that the crime has been committed, but also, that the accused committed it.'

⁶⁴ *R v Manda* 1951 (3) SA 158 (AD) 162.

JA observed that '[t]he imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion ...' Similarly, in the Zimbabwean case of *S v S*,⁶⁵ Ebrahim J stated that the credibility of a child witness must be tested against the shortcomings in his or her evidence. Judge Ebrahim referred to Spencer and Flin⁶⁶ who listed six main objections to relying on a child's evidence, namely that children have unreliable memories, are egocentric, are highly suggestible, have difficulty distinguishing fact from fantasy, make false allegations, particularly of sexual assault, and do not understand the duty to tell the truth.

Consider in this regard that although corroboration was never considered a prerequisite for sound application of the cautionary rules of practice, the present dogmatic application in some instances seems to proceed from a misinterpretation of the rule to the unfortunate effect that the application flies in the face of the principle of universal equality before the law. .

7.2 The status of the cautionary rule applicable to children's testimony in Uganda

In Uganda, currently the cautionary rule on the evidence of children is not merely a rule of practice as in other jurisdictions. The requirement has attained statutory backing in the country's domestic laws. Section 40 (3) and section 101(3) of the Trial on Indictments Act (TIA) and the Magistrates Court Act (MCA) respectively, both provide as follows:

Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.⁶⁷

⁶⁵ *S v S* 1995 (1) SACR 50 ZS.

⁶⁶ Spencer & Flin *supra* note 61, 286-287.

⁶⁷ Magistrates Court Act Chapter 16 and the Trial on Indictments Act Chapter 23 are applicable in the Magistrates Courts and High Courts respectively. Their formulation of the mandatory requirement for corroboration when dealing with the evidence of children is, however, identical.

Thus the courts are enjoined to treat young children's testimony with caution by requiring corroboration. A discussion of a CSA judgment in Uganda seems instructive in placing the dilemma of the dogmatic application of the cautionary rule in context.

7.3 Reflections on the 2009 case of *Ssenyondo Umar v Uganda (Ssenyondo case)*⁶⁸

Since calls for reform must be patently concerned with deficiencies in the current framework, it follows that the deficiencies should be outlined before the argument for reform is initiated; to which end a judgment in a case of defilement is reviewed. As noted in the third chapter, CSA in Uganda is essentially confined to the classification of 'defilement'. Under section 129 of Uganda's Penal Code Act Chapter 120 the offence of defilement is committed when a person 'performs a sexual act with another person who is below the age of eighteen years.'

The *Ssenyondo* case was an appeal to the Supreme Court of Appeal of Uganda against the conviction and sentence passed by the High Court sitting at Masaka in which the appellant was convicted of the offence of defilement in contravention of section 129(1) of the Penal Code Act and was sentenced to life imprisonment. The brief facts of the case were that on 12 July 1997 in Masaka District, the complainant's mother, PW2, left a girl of 7 months in the care of her son X. As soon as she left, the appellant sent X to collect a herb to flavour tea for him. The appellant then took the child to his house and defiled her. PW1 who happened to be returning home to check on the child found the appellant flagrantly engaged in the act of defilement and reported the fact to PW2, the mother of the victim, who in turn alerted the authorities; consequently the appellant was arrested and charged with the offence. At the trial he pleaded grudges with the mother of the victim, as well as an alibi. The plea was dismissed and sentence passed as indicated, hence the appeal to the Supreme Court. The Memorandum of Appeal raised one ground of appeal, namely that '[t]he learned trial judge erred in law and fact when he convicted the appellant on the basis of uncorroborated unsworn evidence of a single eye witness of a child of tender years.'

⁶⁸ *Ssenyondo Umar v Uganda* Criminal Appeal 267 of 2002. Unreported case but available at <http://www.ulii.org/ug/judgment/court-appeal/2009/4> (accessed 20 August 2014).

At the hearing of the appeal, the appellant's attorney submitted that the evidence on record did not prove the indictment against the appellant. He submitted that the only evidence on which the conviction was based was that of the 12 year old, PW1, who testified that he found the appellant defiling the victim. Though the defilement itself was not disputed, PW1's attestation of the accused person's identity was never corroborated; and besides, the evidence was not given under oath and therefore not fit to serve as a basis for conviction since it emanated from a single witness.

In reply to the submission made by the defence the Supreme Court ruled unanimously that after careful review of the body of evidence it was satisfied that the age of the victim and the fact of defilement were given correctly (i.e. confirmed by PW1, PW2 and PW4). However, the court was concerned about the finding by the learned trial judge that it was the appellant who had defiled the victim since the finding was based on the sole unsworn evidence of PW1 who was himself a child of tender years and was allowed to give unsworn testimony after a *voire dire* in which the judge found that he did not understand the meaning of an oath. He was the only purported eye-witness who reported the appellant's alleged offence, while neither PW2 nor PW4 (both adults) noticed the act in contention, but merely reported their awareness of the particulars of PW1's account. The court therefore concluded that the unsworn evidence of a single witness as a child of tender years amounted to no corroborative evidence at all.

The Supreme Court made reference to the British cases of *R v Campbell* (*Campbell case*)⁶⁹ in which Lord Goddard summed up the law as follows:

the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given.

⁶⁹ *R v Campbell* (1956)2 ALLER 272, 276.

In applying the dictum in the *Campbell* case to the apparent case, the Supreme Court observed that no amount of self-warning or warning of the assessor can justify convicting an accused on the unsworn evidence of a single identifying witness of a child of tender years. The Supreme Court made reference to section 40(3) of the TIA on the requirement of corroboration. The Court accordingly ruled that the trial judge was wrong to base a conviction on the unsworn evidence of PW1 who was the sole identifying witness against the appellant, and which evidence was never corroborated to boot.⁷⁰ The appeal was therefore allowed, the conviction was quashed and the sentence of life imprisonment was set aside.

This case has served to set the stage for the practical implication of the cautionary rule, particularly its dogmatic application on the prosecution of child sexual offences in Uganda. It suffices to note that in this case the credibility of PW1 was of little concern. What the court was concerned about was whether PW1's evidence passed the statutory test of corroboration as entrenched in section 40(3) of the TIA. The *Ssenyondo* case demonstrates how deeply ingrained the dogmatic application of the cautionary rule is in Uganda's present law. Having discussed the current formulation of the cautionary rule in Uganda, due attention should now be paid to its implication for ACSA cases, with particular reference to its impracticability in that context.

7.4 The impracticability of dogmatic application of the cautionary rule in ACSA cases

The express Ugandan law requiring corroboration of young children's testimony is irreconcilable (does not rhyme) with the nature of ACSA offences. To reiterate: corroborative evidence for the purposes of Ugandan courts subsists in either medical evidence or an eye-witness account. As noted earlier (chapter 2) however, corroboration by these means is rarely available⁷¹ Since ACSA offences are committed

⁷⁰ See *Uganda v Ochwo Laston* HCT-00-CR-SC-0301 of 2010. In this case Mugenyi J observed that '[t]he import of [section 40(3) of the TIA] would appear to be that generally the evidence of a child prosecution witness requires corroboration before being relied upon for a conviction.'

⁷¹ S Estrich 'Rape' (1986) 95 *Yale Law Journal* 1175. Estrich points out that corroboration is not a neutral requirement. 'In a rape, corroboration may be difficult to find. In most cases there are no witnesses. The event cannot be repeated for the tape-recorder as bribes or drug sales are. There is no contraband, no drugs, no marked money, no stolen goods. Unless the victim actively resists,

clandestinely (i.e. cloaked in secrecy), however, eye-witness accounts are rare indeed, as is medical evidence⁷² for lack of timely disclosure,⁷³ which allows typically rapid healing of genital injuries that might otherwise serve as corroborative medical evidence.⁷⁴ Thus the prosecutor is left as a last resort with the CSA victim's own testimony which is normally ruled out of order as Ugandan law requires corroborating evidence to support a decision to prosecute,⁷⁵ which means axiomatically that prosecution is precluded regardless of the CSA victim's probity in his/her own right but merely because his/her testimony is that of a child of tender years and cannot therefore qualify as satisfactory evidence under Ugandan law. The prospects for admission of BSE as a helpmeet in the prosecution of ACSA cases seem bleak with these express statutory provisions in place. And it should be considered, furthermore, that the case of *Ssenyondo* as discussed above hardly gives an inkling of the severity of constraints imposed on the administration of Ugandan law in this regard.

To cut to the chase, then, in service of the universal right to equality, evidenced (probably, or at least partly) by the increasing erosion of myths concerning the unreliability of children, does Uganda still need a cautionary approach that overrides common sense and insists on corroborative evidence? Is it feasible to argue that in this era of equality before the law the only yardstick that should consistently apply is whether a case has been proved beyond reasonable doubt? Perhaps, nay surely, the time has come for Uganda to adopt a standard where the evidence of a single CSA victim can sustain a conviction if such evidence is satisfactory in all material respects? Further, reasons were given in the second chapter to interpret the term 'fair trial' in the sense that fairness should extend especially to addressing the plight of the victim(s). By the same token, then, it seems reasonable to propose that strict insistence on corroboration of children's testimony may be unfair to CSA victims in Uganda.

her clothes may be 'untorn' and her body unmarked.... On the surface, at least, rape seems to be a crime for which corroboration may be uniquely absent.'

⁷² S Herman 'The role of corroborative evidence in child sexual abuse evaluations' (2010)7 *Journal of Investigative Psychology and Offender Profiling* 191.

⁷³ See chapter two for a detailed discussion.

⁷⁴ See chapter two for a detailed discussion on this aspect.

⁷⁵ WA Walsh *et al.* 'Prosecuting child sexual abuse: The importance of evidence type' (2010)56 *Crime and Delinquency* 436-438.

In Uganda the Evidence Act currently provides that a conviction may be founded on the evidence of a single witness,⁷⁶ provided however, that no 'other law in force' has a countermanding effect in the matter.⁷⁷ To be more explicit, although the general rule is that the evidence of a single witness is sufficient to prove any fact in a case, more than one witness may be required where 'any other law in force' provides for an exception. In principle, therefore, the evidence of a child of tender years can prove a fact in a case, but such evidence cannot prevail without corroboration in CSA matters, which are subject to the stricture of corroboration imposed by sections 40(3) and 101(3) of the TIA and MCA respectively. Uganda's dogmatic application of the cautionary rule, as noted, is a far cry from sound application because it allows the accused to go free in defiance of the principle that the evidence of a single child witness may be sufficient to prove a child sexual offence beyond reasonable doubt. Spencer notes the egregious disregard of fairness implied by the Ugandan approach in the distinct possibility that the automatic exclusion imposed by the Ugandan version of the rule means that 'a person [can] indecently assault a series of young children, or a collection of them each in the presence of the others, and do so with impunity if they were all too young to take the oath.'⁷⁸

Properly considered it follows that unregenerate insistence on corroborating evidence to satisfy the cautionary rule effectively abrogates the rule and instead imposes an additional implacable rule in the law of evidence to the effect that regardless of how satisfactory a child's evidence is in its own right, it cannot sustain a conviction unless it is supported by corroborating evidential material. Indeed, the effect of insistence on corroboration is strikingly exemplified in *Ssenyondo*.

The reason for the unbending Ugandan approach compared to its English provenance is hard to fathom. If the evidence before the court is confined to the satisfactory evidence of a child of tender years and the alternative is to acquit the accused it seems reasonable to assume that satisfactory evidence tendered by a child witness should constitute sufficient grounds for conviction, more especially that adherence to the cautionary rule should preclude corroboration. Caution, it is

⁷⁶ Section 133 of the Evidence Act of Uganda Chapter 6 of the Laws of Uganda.

⁷⁷ *Ibid.*

⁷⁸ JR Spencer 'Introduction' in JR Spencer & ME Lamb (eds) *Children and Cross-examination: Time to change the rules?* (2012)3.

submitted, should merely guide the courts in ensuring that convictions are based on proof beyond a reasonable doubt. In essence, the argument here is that caution in its objective sense should be retained. However, as Diemont J puts it in *S v Sauls*, the caution should not be allowed to displace common sense and the long established requirement of proving a case beyond reasonable doubt.⁷⁹

Empirical studies and theoretical arguments have been advanced to demonstrate the effect of the strict requirement of corroboration on CSA case disposition. Results show that since prosecution authorities have discretionary power to close a case where conviction is patently unlikely, a lack of corroborative evidence has been critical for years in motivating closure.⁸⁰ Nevertheless, in many instances competent verdicts have not been impeded by absence of corroboration.⁸¹ Nevertheless again, law enforcement officers are hesitant to investigate CSA cases where there is little likelihood of securing corroborative evidence in the form of medical evidence and eye-witness accounts.⁸² Thus, insistence on corroboration, though not necessarily pivotal in charging decisions under Ugandan law, can have profound repercussions for the actions of criminal-justice professionals.

Thus, while Uganda's current legal framework implicitly creates a corroborative rule for the cautionary rule to be satisfied in dealing with evidence of children of tender years, little regard is accorded to offences such as ACSA which are supported by little more than the ACSA victim's testimony. Studies show that the consequence of insisting on corroboration is that CSA suspects will not be charged for lack of it, or if charged will probably not be convicted, for the same reason. Furthermore, even if BSE were to substantiate evidence of ACSA to the extent that it is satisfactory in all material respects, sections 40(3) and 101(3) of the TIA and the MCA respectively would still prevent conviction.

⁷⁹ *S v Sauls* 1981 (3) SA 172 (A), 180E.

⁸⁰ See e.g. Walsh *et al. supra* note 75, 436-454; Sebba *supra* note 60, 69-74.

⁸¹ *Ibid.*

⁸² *Ibid.*

7.5 Status of the cautionary rule as applied to children's evidence in South Africa: Possible lessons for Uganda

Some criminal-justice systems have chosen to soundly and flexibly apply the cautionary rule rather than reject it in its entirety. South Africa is one notable example. Unlike the position in Uganda where the cautionary rule is statutorily entrenched, in South Africa, there is no statutory requirement for the evidence of children of tender years to be corroborated. Nevertheless, as in Uganda, children's evidence has been and still is treated with caution in South Africa, except that the application is somewhat different from that in Uganda.

Over the years, South Africa's application of the rule has evolved to accommodate the growing body of research on children's credibility and reliability. In *Woji v Santam Insurance Co Ltd*, Diemont, JA, stated as follows:

The question which the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness ... depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe.' Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has the 'capacity to understand the questions put, and to frame and express intelligent answers... There are other factors ... Does he appear honest ... is there a consciousness of the duty to speak the truth... At the same time the danger of believing a child where evidence stands alone must not be underrated.⁸³

Although the dictum in the *Woji* case was a significant step forward in the matter of dealing with children's evidence, it was still criticised for proceeding on the premise that children's credibility is inherently less trustworthy than that of their adult counterparts. The decision of the court in *S v Jackson (Jackson case)*, though pertaining to an adult rape case, brought into focus the need to eliminate the irrational but widespread tendency to treat children's testimony as inherently suspect. Olivier J in the *Jackson* case stated as follows:

⁸³ *Woji v Santam Insurance Co Ltd*, 1981 (1) SA 1020 (A), 1028B-D.

The notion that women are habitually inclined to lie about being raped is of ancient origin. In our country judges have tried to justify the cautionary rule by relying on ‘collective wisdom and experience.’ ... This justification lacks any factual or reality-based foundation and can be exposed as a myth simply by asking: whose wisdom? whose experience?...[empirical research has refuted the notion that] ‘women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses.’⁸⁴

Indeed in *Director of Public Prosecutions v S (DPP case)*,⁸⁵ Kirk-Cohen J voiced the concern that the same approach might be equally and timeously relevant where children were concerned.⁸⁶ He conceded that children’s testimony cannot be declared exempt from problems, but explained: ‘These problems arise, not from an unwarranted distinction as was rejected in *Jackson’s* case, but from the very fact that witnesses are young.’⁸⁷ It is worth noticing that in elaborating on the obligation to treat child witnesses with caution Kirk Cohen J pronounced as follows in the *DPP* case:

It does not follow that a court should not apply the cautionary rules at all or seek corroboration of a complainant’s evidence. In certain cases caution, in the form of corroboration, may not be necessary. In others a court may be unable to rely solely upon the evidence of a single witness. This is so whether the witness is an adult or a child.⁸⁸

The import of the court’s stance in the *DPP* case is that the solution does not lie in rejecting caution. Corroboration may be necessary depending on context and application. Judicial officers should be able to exercise common sense on a case-by-case basis without sacrificing their critical faculties of evaluation on the altar of corroboration at all costs. For instance, insisting on corroboration as an absolute condition for conviction would be counterproductive where the evidence of a single CSA complainant is satisfactory in all material respects, while conversely corroboration would be a justifiable requirement if the child’s testimony were flawed. Schwikkard and Van der Merwe note in this regard that ‘[e]ach case must be considered on its merits and this might involve a finding on whether the evidence of the child witness concerned

⁸⁴ *S v Jackson* 1998 (1) SACR 470 SCA.

⁸⁵ *Director of Public Prosecutions v S* 2000 (2) SA 711 TPD.

⁸⁶ *Ibid*, 713D-F.

⁸⁷ *Ibid*.

⁸⁸ *Director of Public Prosecutions v S supra* note 85, 716 B-D.

is such that it can for purposes of a conviction safely be relied upon.’⁸⁹ Meintjes, in reflecting on the decision in the *DPP* case adds that ‘in approaching such cases with a single-minded eye towards seeking corroboration, the courts tend to lose sight of the reasons for seeking it...the mere fact that the witness is a child does not provide a ground for seeking corroboration.’⁹⁰

The case of *S v Sauls & others*⁹¹ is also instructive in guiding the courts. Here Diemont J notes as follows:

There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule ... may be a guide to a right decision but it does not mean ‘that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well founded.’ ... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

The consensus in South Africa must be that on the whole the cautionary rule has not been rejected; instead a sound and flexible approach based on common sense that is not burdened by misguided prejudice against child witnesses has been adopted as alternative to the former mechanical application of the cautionary rule. The Ugandan system could benefit by emulating this approach.

The South African approach is mirrored by that prevailing in Canada where cases are treated with due consideration of their individual merits as shown in the 1992 decision of *R v W*,⁹² where the Supreme Court of Canada rejected dogmatic application of the cautionary rule together with the notion that children’s testimony should be deemed inherently unreliable and therefore needs to be treated with special caution. The Supreme Court conceded that children are not miniature adults but should nevertheless be treated as the fully rounded individuals with unique sets of characteristics, each in his/her own right. Wilson J asserts the following in this regard:

⁸⁹ Schwikkard & Van der Merwe *supra* note 3, 552 & 553.

⁹⁰ R Meintjes ‘A call for a cautionary approach to common sense: The Director of Public Prosecutions v S’ (2000)1 *CARSA* 43.

⁹¹ *S v Sauls & others supra* note 79, 180E.

⁹² *R v W (R)*, (1992) 74 CCC (3d) 134.

The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than adults'⁹³

Similarly, in the Canadian case of *R v W (R)*,⁹⁴ McLachlin J states the following:

these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilty, whether the complainant be an adult or child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J called a 'common sense' basis, taking into account the strengths and weaknesses which characterise the evidence offered in the particular case.

The common sense approach was clearly demonstrated in the 1991 case of *R v K (V)*⁹⁵ where Wood, JA stated as follows:

The range of circumstances that can arise in the criminal trial process is infinite, and it would be not only impossible but positively self-defeating, to attempt any precise guidelines for the exercise of the discretion in favour of giving the caution... The focus of the new discretion, which has replaced the old common law-rules of practice, is the potential for the witness's evidence to be unreliable. No automatic assumptions of unreliability arise because of age, or the nature of the complaint. There must be an evidentiary basis upon which it would be reasonable to infer that the witness's evidence is or may be unreliable.

In essence, while the courts in Canada underscore the need to discard ancient myths about the credibility of children, they do not lose sight of the need to weigh the evidence of child witnesses to ensure that a finding of guilt is solidly founded on a case-by-case basis. This balanced approach can be conceivably regarded as a commendable safeguard to protect the interests of the complainant as well as the accused.

⁹³ *R v W (R)*, (1992) 74 CCC. (3d) 134, 142 & 143.

⁹⁴ *R v W (R)*, (1992) 2 SCR. 122, 134.

⁹⁵ *R v K (V)* (1991) 68 CCC. (3d) 18 (BCCA), 29 & 30.

7.6 The status of the cautionary rule applicable to children's evidence in England and Ireland: Possible lessons for South Africa

Common law in Uganda and South Africa has British colonial roots where the cautionary rules of practice have their origin, so it may be interesting to know that in England the cautionary rule concerning children's evidence was abrogated in terms of section 34(2) of the Criminal Justice Act of 1988.⁹⁶ Spencer notes that abolishing the corroboration rules has had the significant effect that perpetrators of CSA can now be convicted in instances where they would have escaped retribution before.⁹⁷ A similar position is evident in Ireland⁹⁸ where abolition has even been proclaimed by statute, whereas it had been entrenched in case law and scholarly writings before. Of course in the case of Uganda abolition is justified by claiming that it proceeds from statutory backing of the dogmatic approach to the cautionary rule. In the absence of such provision in South Africa where the sounder approach is exemplified in case law express abolition of the dogmatic approach should be pursued as in England.

The argument can be raised that in South Africa there is no need to abolish by statute since common law has already eliminated dogmatic application of the cautionary rule, in response to which the point can be made that the rule was never meant to be applied dogmatically in the first place and the reasonable recommendation can be made that the South African criminal-justice system adopt and apply the sound and flexible approach exemplified in case law and scholarly writings. This ostensibly sound argument has had its critics, however. Viljoen notes that although the common-sense approach seems clear under case law it 'does not restrain the discretion decision makers have to weigh up evidence and make findings. This process is based on fixed patterns of behaviour and sociological factors. Such a change may also not alter the decision to prosecute, which could still be based on a *de facto* requirement of corroboration before energy is poured into criminal proceedings.'⁹⁹ In light of the

⁹⁶ Section 34(2) of the Criminal Justice Act 1988 provides as follows: 'Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated.'

⁹⁷ Spencer *supra* note 78, 4.

⁹⁸ See also the Irish position. Section 28 of the Criminal Evidence Act, 1992 of Ireland provides as follows: 'The requirement in section 30 of the Children Act, 1908, of corroboration of unsworn evidence of a child given under that section is hereby abolished.'

⁹⁹ F Viljoen 'Removing insult from injury: Reviewing the cautionary rule in rape trials' (1992) *Journal of South African Law* 747.

situation as it has evolved, mounting pressure has been brought to bear by the South African Law Reform Commission (SALRC) to have the position as it stands codified as a precaution to obviate the risk of mechanical application of the rule.¹⁰⁰ In support of the SALRC's position Schwikkard¹⁰¹ cites the decision of *S v Van der Ross*¹⁰² as a case in point where statutory abolition of dogmatic application of the rule is called for. Whereas statutory backing was absent in England as well as South Africa, the former has taken formal steps - possibly to eliminate any remaining risk that the dogmatic approach might still creep into court procedure despite vigorous opposition - to ensure abolition in the form of section 34(2) of the Criminal Justice Act of 1988, an example that South Africa might consider to shore up its own position.

In South Africa, since the dogmatic approach has been abolished by common law it follows that there is no constitutional issue in this regard, except that judicial officers' failure to exercise discretion soundly and flexibly constitutes a just cause for concern that despite the common law disposal of the matter, the child witness may yet be exposed to infringement of the right vouchsafed to children acting as CSA witnesses to be protected against discrimination on grounds of age. Hence despite case law precedents, it could be argued that children's right to equality before the law is infringed and should therefore be shored up with more encompassing protection by enshrining abolition of dogmatic application of the rule in statutory law.

7.7 Uganda's constitutional obligation to embrace legal reform

The added advantage of ensuring that reform is premised on constitutionally-guaranteed rights is that by that token reform becomes a binding obligation instead of a discretionary matter; since the Constitution in Uganda, as in most other constitutional dispensations, is that its authority takes precedence over all other legislation, thus automatically voiding any conflicting legislation by rendering it unconstitutional.¹⁰³ As noted, in Uganda corroboration is codified in sections 101(3) and 40(3) of the MCA and

¹⁰⁰ See South African Law Reform Commission Project 107 Sexual offences report (2002).

¹⁰¹ PJ Schwikkard 'Backwards to the cautionary rule: *S v Van der Ross* 2002 (2) SACR 362 (C)' (2003)19 *South African Journal of Human Rights* 256.

¹⁰² *S v van der Ross* 2002 (2) SACR 362 (C).

¹⁰³ Article 2 of the Ugandan Constitution states categorically that it is the supreme law of the country and that any law or custom that is inconsistent with it is void.

TIA respectively. The issue here is whether the constitutionality of these provisions might be considered questionable on closer inspection.

The putative reasons for the need to apply the cautionary rules mechanically when dealing with the evidence of children of tender years include the following: They (children) are suggestible, imaginative, have poor memory, are prone to lying, and tend to exaggerate incidents, hence their credibility is deemed suspect *ab initio*. This seems to be the premise that informed judgment in the *Ssenyondo* case. As noted, however, there is a growing body of social research that takes issue with this largely dismissive attitude adopted towards children. In fact, it seems increasingly unreal in light of the preponderance of evidence to the contrary,¹⁰⁴ especially in light of the constitutional guarantee of equality before the law.

Article 21 (1) provides that '[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.' Article 21(3) prohibits any kind of discrimination against any particular category of persons. By natural extension this provision prohibits discrimination against children who would be classified as non-persons by default if they were excluded. It is worth noting, though, that the rights guaranteed in the Constitution are not absolute¹⁰⁵ but can be limited, provided the curtailment is justifiable in a free and democratic society.¹⁰⁶ The discriminatory content of sections 101(3) and 40(3) of the MCA and TIA respectively seems arbitrary and indefensible in a free and democratic society.¹⁰⁷ Research has tested these assumptions

¹⁰⁴ SJ Ceci & M Bruck 'Suggestibility of the child witness: A historical review and synthesis' (1993)113 (3) *Psychological Bulletin* 403-439.

¹⁰⁵ See article 43 of the Constitution of Uganda, 1995.

¹⁰⁶ *Ibid.*

¹⁰⁷ For a detailed discussion on the reliability of children as witnesses, See generally studies and arguments of the following: L Berliner 'The child and the criminal justice system' in AW Burgess (ed) *Rape and sexual assault* (1985)199-208; B Ackerman 'Speaker bias in children's evaluation of the external consistency of statements' (1983)35 *Journal of Experimental Child Psychology* 111-127; SJ Ceci *et al.* 'Children's long term memory for information incongruent with their knowledge' (1981)72 *British Journal of Psychology* 443-450; SJ Ceci 'Some overarching issues in the child suggestibility debate' in JL Doris (ed) *The suggestibility of children's recollections* (1991)1-9; SJ Ceci *et al.* 'Age differences in suggestibility' in D Cicchetti & S Toth (eds) *Child abuse, child development, and social policy* (1993)117-137; SJ Ceci *et al.* 'Age differences in suggestibility: Psychological implications' (1987)117 *Journal of Experimental Psychology: General* 38-49; SJ Ceci *et al.* 'On remembering...more or less' (1988)118 *Journal of Experimental Psychology: General* 250-262; CB Cole & EF Loftus 'The memory of children' in SJ Ceci *et al.* (eds) *Children's eyewitness memory* (1987)178-208; D Davidson *Children's recognitions and recall memory for typical and atypical actions in script-based stories*, Paper presented at the bi-annual meeting of the Society for Research in Child Development, Seattle (1991); GM Davies *et al.* 'Close

and found that children are not intrinsically unreliable,¹⁰⁸ which not only makes mechanical application of the rule redundant, but furthers acquittal of CSA suspects regardless of satisfactory evidence provided by a child witness, whereas it is actually meant to reduce error. The child's interest is therefore harmed instead of being protected, thus betraying a trust to the preservation of which Uganda is constitutionally committed.

It also betrays Uganda's constitutional commitment to upholding respect for the dignity of all regardless of provenance. A further absurdity is that in Uganda, application of the cautionary rule on children's evidence in CSA cases is mandated for no other reason than the nature of the alleged offence. A recent (2010) decision is instructive in this regard.¹⁰⁹ Automatic caution subsumes three qualities, namely that complainants must be children, must be sole witnesses, and must be addressing the matter of sexual abuse. The cautionary stricture thus qualified is imposed despite dismissal of the cautionary principle in South Africa, Canada and England (among others) in light of preponderant evidence that it is groundless, i.e. based on a false premise that children's evidence is suspect *per se*. Uganda should draw inspiration from this example and set its constitutional house in order by abolishing the cautionary rule and thus meeting its

encounters of a witness kind: Children's memory for a simulated health inspection' (1989)80 *British Journal of Psychology* 415-429; H Dent & GM Stephenson 'An experimental study of the effectiveness of different techniques of questioning child witnesses' (1979)18 *British Journal of Social and Clinical Psychology* 41-51; JH Flavell *et al.* 'Young children's knowledge about the apparent-real and pretend-real distinction' (1987)23 *Developmental Psychology* 816-822; R Gelman *et al.* 'Young children's numerical competence' (1986)1 *Cognitive Development* 1-29; Goodman *supra* note 62; G Goodman 'The child witness: Conclusions and future directions for research and legal practice' (1984)40 *Journal of Social Issues* 157-175; GS Goodman *et al.* 'Children's memory for stressful events' (1991)37 *Merrill Palmer Quarterly* 109-158; GS Goodman & RS Reed 'Age differences in eyewitness testimony' (1986)10 *Law and Human Behaviour* 317-332; GS Goodman *et al.* 'Children's concerns and memory: Issues of ecological validity in the study of children's eyewitness testimony' in R Fivush & J Hudson (eds) *Knowing and remembering in young children* (1990)249-284; RV Kail *The development of memory in children* (1989); G Melton 'Children as partners for justice: Next steps for developmentalists' (1992)57 *Monographs of the Society for Research in Child Development* 153; EE Perris *et al.* 'Long term memory for a single infancy experience' (1990)67 *Child Development* 1796-1807; K Saywitz *et al.* 'Effects of cognitive interviewing, practice, and interview style on children's recall performance' (1992)77 *Journal of Applied Psychology* 744-756; K Saywitz *et al.* 'Children's memory for genital exam: Implications for child sexual abuse' (1991)59 *Journal of Consulting and Clinical Psychology* 682-691; W Schneider & M Pressley *Memory development between 2 and 20* (1989); R Taylor & M Howell 'The ability of 3-4 and 5-year-olds to distinguish fantasy from reality' (1973)122 *Journal of Genetic Psychology* 315-318; Spencer & Flin *supra* note 61.

¹⁰⁸ *Ibid.*

¹⁰⁹ See e.g. the decision of *Uganda v Anyolitho* Session case 0074 of 2010 where the court made reference to the decision of *Chila & Another v R* (1967) EA 722. In the case of *Chila*, the need for caution was underscored merely on account of the offence being of a sexual nature.

commitment to protect children's rights to equality, as well as personal integrity and dignity. In this new era of equality and respect for guaranteed rights, the yardstick in assessing children's evidence should be whether the burden of proof has been discharged beyond reasonable doubt, to which end the evidence of a single CSA witness should be sufficient to found a conviction, provided the testimony is satisfactory in all material respects. Such an approach, it is submitted, would be a furtherance of the rights that Uganda deems fundamental.

As matters stand, though, the cautionary rule as applied puts Ugandan criminal-justice professionals in the quandary that a conviction cannot be sustained on grounds of a young child's testimony that is unsworn and uncorroborated, for example by eye-witness accounts and medical evidence, the latter being typically rare in ACSA cases, the practice in some other criminal-justice systems demonstrates a departure from the mechanical application of the cautionary rule with these systems preferring a common sense approach when dealing with evidence of children. A mechanical application of the cautionary rule that insists on corroborative evidence is slanted in favour of the accused. An approach that is based on common sense as opposed to a dogmatic insistence on corroboration restores the balance that was lacking. By expressly codifying the requirement of corroboration when dealing with evidence of children, the architects of the current TIA and the MCA effectively precluded the possibility of a common sense approach. The dictum in the *Ssenyondo* case affirms the notion that even when the judge or magistrate in Uganda is convinced beyond reasonable doubt that the CSA complainant's testimony is satisfactory in all material respects, a conviction cannot be sustained. It is submitted that the current position is not justified in this age and era of equality before the law. Despite the readiness of some judges and magistrates to depart from this outdated position,¹¹⁰ sections 40(3) and 101(3) of the TIA and MCA

¹¹⁰ *Uganda v Peter Matovu* Cr. Case 146 of 2001. The reasoning of Lugayizi J represents the readiness of some judges to displace the unsubstantiated myths about the reliability of certain categories of witnesses. In this case the accused was indicted for defilement. The particulars of the indictment were that on 18 July 2001 Peter Matovu had carnal knowledge of the complainant who was below the age of 18 years. In substantiating on the long established East African precedent of *Chila v R* (1967) EA 722, in which the need to approach the evidence of sexual abuse complainants with caution was underscored. Lugayizi J made interesting and memorable observations. The learned Judge observed that 'court has not come across any empirical data or basis for the belief that women are greater liars than men or, for that matter that they are much more likely to lie than say the truth in matters concerning sexual allegations.' The learned judge consequently concluded that these are myths that discriminate against women and ought to be discarded. Of note however, the learned judge's commendable articulation was only capable of

respectively imply that the common sense approach is illegal and any decision based on this approach can be successfully appealed. If the mechanical approach to the cautionary rule is abolished, Uganda's criminal-justice system has great potential in successfully holding child sexual suspects to account. However, the corroborative evidence requirement remains a serious challenge. It is therefore necessary for sections 40(3) and 101(3) to be abolished. The longer the delay in abolishing them the longer and louder the alarm bells will ring about the consequences of imposing strictures on founding a conviction on the uncorroborated evidence of a single ACSA witness, and BSE will hardly impact on the prosecution of ACSA cases because even with BSE, convictions will still be sustainable on the satisfactory evidence of the single ACSA witness.

Note that advocacy of abolition of the cautionary rule should not be interpreted as an indication that caution can be relaxed where children of tender age are concerned in ACSA cases. They may be able to give coherent evidence that proves sexual offending beyond a reasonable doubt, but cognitive limitations may prevent them from giving evidence that is satisfactory in all material respects. Thus on a case-by-case basis, common sense should be a useful guide in dealing cautiously with the evidence of children as in the case of adults. Similarly, review of the cautionary rule should not prevent the prosecution from taking exhaustive steps to gather proof as a safeguard against the possibility that convictions may be set aside on appeal as a result of insufficient evidence. Reformulation does not necessarily mean that convictions will be automatically sustained 'on a silver platter', so to speak. Failing corroborative evidence,

displacing the precedent in *Chila v R* because there was no statutory requirement in Uganda to treat the evidence of sexual abuse complainants with caution and consequently insist on corroborative evidence. In fact Lugayizi J, categorically observed that for 'any law in force' to require corroboration of the evidence of a single witness, such law must be a creature of statute. Indeed, since the requirement of corroborative evidence when dealing with evidence of sexual abuse complainants is not statutorily entrenched in Uganda's legislation, the court duly disregarded the precedent in *Chila v R*. However, the requirement of corroborative evidence when dealing with the evidence of children of tender years is created by statute. Thus while Lugayizi J's ruling is commendable and a giant stride in the right direction, it may nevertheless not prevail against the powerful hold exercised by TIA and MCA as regards assessment of the evidence of children of tender years. It seems apposite to reiterate the inference noted earlier that the pronouncement in *Uganda v Peter Matovu* to fend off discrimination against women should be applied by extension to children with a view to securing the repeal of sections 40(3) and 101(3) of the TIA and MCA respectively on similar grounds that they serve the phantom interest of a myth that detracts from children's credibility as witnesses, with particular reference to ACSA cases - a structural, (i.e. built-in) detractor, notably rejected by the learned judge in the case of *Uganda v Peter Matovu*.

the evidence of the single CSA witness will need to be satisfactory in all material respects. Indeed, corroborative evidence, if available, remains helpful in removing doubt. It can be therefore be concluded that the only benefit that prosecutors gain from the reformulation is that they do not have to concern themselves with the possibility of acquittal due to a lack of corroborative evidence where the CSA victim's evidence is satisfactory in all material respects. Thus reformulation of the cautionary rule does not displace the established standard of proving child sexual offending beyond reasonable doubt.

Uganda has much to gain from taking a leaf or perhaps an entire tree out of South Africa's book as regards its common-sense approach to the evidence of children; however, in its turn South Africa can learn from studying other legal systems such as England's and Ireland's, as noted.

8 Conclusion

Rules of evidence are indispensable in dealing coherently with evidence, which can either promote or detract from the effectiveness achieved in using the evidence. As noted, extant rules of evidence originated in England but were not preserved intact as they became more accommodating over time in some criminal-justice systems to allow a more sound and flexible application. However, the fact that in most instances this adaptation has not been made apparent in legislation is cause for persistent concern. Indeed there are instances where the dogmatic approach remains apparent despite clear establishment of a common-sense approach. To make matters worse, in Uganda dogmatic application of some rules even has statutory backing. This chapter has sought to demonstrate throughout that the rules of evidence have been applied soundly and flexibly in terms of South African common law, thus paving the way for full exploitation of BSE, which would conceivably benefit even more if sound and flexible application of the rules were formally codified.

Propagation of the need to discard some rules of evidence, such as the ultimate issue rule and the dogmatic cautionary rule, should not prevent the court from exercising due caution or discarding evidence that touches upon the ultimate issue where it seems indicated in the circumstances. After all, in the final instance the idea propagated throughout is that courts should apply the rules of evidence without any

deference whatsoever to archaic and unsubstantiated assumptions. The court's application of the rules should be guided by common sense and the overriding principle of relevance.

CHAPTER SIX: STRIKING A BALANCE BETWEEN TESTING THE EVIDENCE OF ACSA VICTIMS AND MINIMISING THEIR TRAUMATIC EXPERIENCE

1 Introduction

In the second chapter, it was demonstrated that the distinctive dynamics of Acquaintance Child Sexual Abuse (ACSA) warrant the need for protection of ACSA victims from undue strain that might result from the trial process. Presently, cross-examination, though ideally intended to test the evidence of witnesses, is by far the most traumatising process in the prosecution ACSA and child sexual abuse (CSA) offences generally. Not only are CSA victims traumatised, but the accuracy of their evidence is unnecessarily jeopardised in the process. Thus, in practice, there is often a disconnect between the essence on the one hand and the techniques of cross-examination on the other. The purpose of this chapter is to explore mechanisms of striking a humane balance between testing the credibility and reliability of the evidence of ACSA victims through cross-examination, and minimising the negative experience of ACSA victims' exposure to evidentiary probing as practised in court. The need to strike this balance is particularly critical because emotional stability is indispensable if credible and reliable evidence is to be obtained from ACSA victims. In the absence of appropriate safeguards, inappropriate cross-examination techniques can upset ACSA victims' emotional balance. While emphasising the continued relevance of cross-examination in testing the evidence of ACSA victims, the need is stated unequivocally to rigorously regulate this process in adversarial systems. The chapter covers the role and limitations of protective measures in addressing the challenges arising from inappropriate cross-examination techniques and draws on the practice maintained in inquisitorial systems that are selected in preference to systems with shortcomings.

2 Available studies on the impact of inappropriate cross-examination techniques on children's emotional stability and accuracy

The extract below, as drawn from the case of *S v Nozazaku*¹ serves to cast some light on some of the problematic styles of cross-examination that are preferred by legal practitioners.

- I'm going to put it to you that you are fabricating this now, Tuliswa. That the impression that you gave to this court the whole time was that the vehicle was locked and that you never unlocked or attempted to unlock that vehicle.
- Now, if your aunt said to the court yesterday that it is a busy shebeen and that while she was there she saw people coming in and leaving the shebeen and she described that she can't say how many but she gave the indication that they were a lot of people. What would you say to that?
- Now, I'm going to put it to you that if necessary there will be people that will say when you told the police inside the charge office at Motherwell, giving a description when or where and how you were raped, you told the police you were raped at the Smirnoff board at Zwide.
- Can you tell His Worship what the blanket is used for? You are fabricating now, Tuliswa.
- You see why I'm asking you the question, Tuliswa... my learned friend, when she led you in evidence in chief, she put two questions to you.

These were the questions that were put to the child victim of sexual abuse in the case of *S v Nozazaku*. With such a style of cross-examination, ACSA victims will most likely leave the court traumatised, besides which it is debatable whether the questioner would extract worthwhile evidence in this way, which is calculated to unsettle the child's frame of mind rather than testing the evidence. Since arguments are often advanced in the abstract, with no empirical basis, it is important to consult selected empirical research on cross-examination of children to better inform the debate going forward.

Cashmore and Triboli's² study was conducted in four District Courts in Sydney (USA) in which they analysed the perception of 277 jurors, particularly on how child complainants were treated. The results indicated that the jurors had gained the impression from observing the complainants that they found the purport of the

¹ *S v Nozakuzaku* 1995, case no. RC 6/68/95(E) (unreported). Extracts obtained from K Muller *Prosecuting the child offender* (2011)161 & 162.

² J Cashmore & L Trimboli 'Child sexual assault trials: A survey of juror perceptions' (2006)102 *Crime and Justice Bulletin* 1-20.

questions put to them by the defence lawyers impenetrable, and that the questioning style took little if any cognisance of the capacity of the complainants, given their immaturity as young children, to appreciate the full significance of what they were being asked. Jurors generally considered the questions to be confusing, ambiguous, repetitive, or not appropriate to the child's age-related mental capacity.

Brennan's³ study, using interview and observation methods, analysed and cross-referenced transcript data to define and describe the 'strange language' to which child victims/witnesses are subjected during their court appearance. Results indicated that when child complainants are cross-examined in an 'adult' criminal court they are subjected to a range of punitive linguistic strategies. The meaning and essence of the witnesses' own experiences are systematically denied. This process is created by and viewable through linguistic activity, having the consequence of unduly reducing child complainants' credibility. Linguistic tactics are in themselves a norm within adversarial justice system. Brennan's study confirms the general lack of linguistic match between cross-examiners and child witnesses. Another study by Brennan,⁴ though not empirical, identifies a series of themes that cross-examination is directed at in dismantling the credibility of child victims in their capacity as witnesses. According to Brennan, cross-examination often proceeds from the premise that children are inveterate liars who are incapable of distinguishing between fact and fantasy, whose memories are defective, and whose motives are obscure. Brennan notes that this style of questioning often yields inconsistent answers proceeding from the themes that the cross-examination is directed at, and that are considered indicative of a lack of credibility. Brennan concludes that regardless of the motive behind the questions posed, cross-examination, on account of its style and content, unduly and systematically destroys the credibility of the child.

Brennan's contentions correspond closely with the findings of Westcott and Page⁵ who analysed extracts from cross-examinations conducted with alleged CSA victims. The analysis of the extracts presented children as un-childlike, instigators, and

3. M Brennan 'The discourse of denial: Cross-examining child victim witnesses' (1995)23 *Journal of Pragmatics* 71-91.

4. M Brennan 'The battle of credibility: Themes in the cross-examination of child victim witnesses' (1994)7 *International Journal for the Semiotics of Law* 51-73.

5. HL Westcott & M Page 'Cross-examination, sexual abuse and child witness identity' (2002)11 *Child Abuse Review* 137.

poor witnesses. The study concluded that the trauma of exposure to the court environment was worsened by cross-examination.

Similarly, an experiment by Zajac *et al.*⁶ analysed court transcripts in which children aged five to thirteen years of age provided the key evidence in sexual abuse trials. The experiment developed two separate coding schemes for lawyers' questions and children's responses. The results indicated that cross-examining defence lawyers asked a higher proportion of complex, grammatically confusing, challenging, leading, and closed questions than prosecution lawyers. It was further found that child witnesses rarely asked for clarification and often attempted to answer questions that were ambiguous or did not make sense. Over 75% of such witnesses changed at least one aspect of their testimony during cross-examination.

Children's general tendency to change their testimony as indicated in Zajac *et al.*'s study above is supported by Zajac and Cannan⁷ who used court transcripts to investigate the questions asked and answers given during cross-examination. Although defence lawyers appeared to make some concessions for children they nevertheless did ask a high proportion of challenging questions that took a heavy toll on the complainants. Changes to testimony mainly resulted from leading questions or questions that attacked witnesses' credibility. The authors asserted that cross-examination affected witnesses' ability to provide accurate details of their past experiences.

Like Zajac and Cannan, Zajac and Hayne⁸ found that 85% of child witnesses changed at least one of their original responses while one-third changed all their original responses; moreover that the changes did not reflect improvements but declining accuracy, which set in after cross-examination. In fact, changes were just as likely to affect previously correct as incorrect answers, hence they concluded that besides not revealing wrong answers, cross-examination actually caused a reduction in the accuracy rate achieved by children after they had given correct answers before they were cross-examined. These studies confirm the hypothesis that children who give

⁶ R Zajac *et al.* 'Asked and answered: Questioning children in the courtroom' (2003)10 *Psychiatry, Psychology and Law* 199-209.

⁷ R Zajac & P Cannan 'Cross-examination of sexual assault complainants: A developmental comparison' (2009)16 *Psychiatry, Psychology and Law* 36-54.

⁸ R Zajac & H Hayne "I don't think that's what really happened": The effect of cross-examination on the accuracy of children's reports' (2003)9 *Journal of Experimental Psychology* 187-195.

accurate answers may somehow be influenced or persuaded, during cross-examination, to change their previous accurate accounts of what had happened.

It turns out, therefore, that techniques employed in cross-examination may be counterproductive where children's evidence is concerned, hence the 'negative press' received by such techniques to the effect that they rely on coercion, intimidation, and obfuscation with the aid of language calculated to 'lose' the witness in maze-like syntax and arcane (i.e. 'technical') terminology that is either hard to follow but squeaks by on meaning, or that leads the witness into a merry dance yet dumps him/her like a babe in the wood. Consequently these techniques have understandably earned the reputation that instead of testing evidence their object is to confuse the witness.⁹ Cossins, for example, observes that 'rather than being a method for uncovering the untruthful child witness, empirical evidence shows that it is a process that manufactures inaccurate evidence.'¹⁰ Often, the mode of questioning by some lawyers is characterised by closed and leading questions that may fail to further truth finding.¹¹ Ellison¹² notes that the process of cross-examination can be gruelling, littered with unduly vigorous objections, warnings, reminders, repetition of questions and insistence on proper answers. These techniques fail to take account of the plight of vulnerable child witnesses. For children, these techniques have been found to be brusque and peremptory, frustrating and degrading to the child witness, achieving the opposite of intended effect by dramatically narrowing the scope for clarification, explanation and elucidation.¹³ The process is also compounded by undue focus on peripheral issues, and often only vaguely incidental to the ultimate issue for determination,¹⁴ whereas research demonstrates that children tend to be unable to account for the directly relevant details of incidents, let alone those that are peripheral.¹⁵ Thus, what Wigmore¹⁶ once termed as the 'greatest engine ever

⁹ L Ellison 'The mosaic art?: Cross-examination and the vulnerable witness' (2001)21 *Legal Studies* 354-360.

¹⁰ A Cossins 'Cross-examining the child complainant: Rights, innovations and unfounded fears in Australian context' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012)111.

¹¹ *Ibid.*

¹² Ellison *supra*, note 9, 359; Muller *supra* note 1, 138-169.

¹³ Ellison *supra* note 9, 359. See generally JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012)1-291.

¹⁴ *Ibid.*

¹⁵ GS Goodman & VS Helgeson 'Child sexual assault: Children's memory and the law' (1985)40 *University of Miami Law Review* 186; JR Christiansen 'The testimony of child witnesses: Fact, fantasy, and the influence of pretrial interviews' (1987)62 *Wash. L. Rev.* 705-721; JC Yuile 'The

invented for the discovery of truth' has in some cases turned out to be the greatest engine of distorting the accuracy of evidence elicited from child witnesses. Muller notes (correctly in the writer's view) that 'it would appear...that cross-examination has much to do with a battle between the two parties and very little to do with the need to establish the truth.'¹⁷

Despite the inappropriate techniques applied by some legal practitioners in conducting cross-examination, the procedure remains indispensable, particularly in ACSA cases. Presently, to preserve the essence of the mechanism of cross-examination, its detrimental effects are being addressed through protective measures in most adversarial systems. The next section discusses the role and limitations of protective measures in addressing the detrimental effects of inappropriate cross-examination of child witnesses.

3 The effectiveness of protective measures in addressing the problems arising from inappropriate cross-examination

In their international context states are obliged to protect child victims of crime from the trauma arising from the trial process. The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the United Nations General Assembly in 1985,¹⁸ urges states to treat victims with compassion and respect for their dignity, including access to the mechanisms of justice and redress for the harm that they have suffered.¹⁹ The *United Nations Guidelines on the Role of Prosecutors*²⁰ were adopted in 1990. A major obligation entrenched in the guidelines pertains to prosecutors'

systematic assessment of children's testimony' (1988)²⁹ *Canadian Psychology* 247-262. All these authors affirm that it is possible for detailed and accurate testimony to be elicited from a child victim. The authors, however, observe that generally, children tend to recollect less than adults do. When appropriately questioned, the authors contend that children are more likely to answer correctly questions about central actions than questions about peripheral/tangential matters.

¹⁶ JH Wigmore *A treatise on the Anglo-American system of evidence in trials at common law* (1940) 1367, 29.

¹⁷ Muller *supra* note 1, 146.

¹⁸ United Nations General Assembly 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' The resolution was adopted by the General Assembly on 29 November 1985. Available at <http://www2.ohchr.org/english/law/victims.htm> (accessed 10 April 2014).

¹⁹ Articles 3, 17 & 6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

²⁰ See Office of the United Nations Human Rights Commissioner 'Guidelines on the Role of Prosecutors as adopted by the Eighth United Nations Congress on the prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.' Available at <http://www2.ohchr.org/english/law/prosecutors.htm> (accessed 10 April 2014).

responsibility to protect crime victims' human dignity in the process criminal proceedings.²¹ The *United Nations Guidelines for Action on Children in Criminal Justice* reinforced prosecutors' commitment to ensure that children are protected against secondary victimisation.²² In 2001 the International Centre for Criminal Law Reform and Criminal-Justice Policy (ICCLR) drafted 'Model Guidelines for the Effective Prosecution of Crimes against Children.'²³ The protective mechanisms encapsulated by the guidelines include intermediary services, closed-circuit television surveillance, one-way screens, support persons and relaxation of courtroom formality. Although the ICCLR is a private organisation it has been formally affiliated to the United Nations, in which capacity the ICCLR has helped the United Nations Office on Drugs and Crime to develop guidelines to bring about a process of legislative reform to align national legislation with international standards.

The *United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses*, adopted in 2005 by the Economic and Social Council,²⁴ represent a major breakthrough as regards international recognition of mechanisms for the protection of child victims as witnesses. These guidelines have been adopted in response to concerns about the tendency of criminal-justice systems to disregard the rights of crime victims.²⁵ Accordingly, the United Nations is trying to cause a radical shift away from this widespread traditional tendency, observing that a fair, effective and humane

²¹ See articles 12 & 13 of the Guidelines on the Role of Prosecutors.

²² Guidelines on the Role of Prosecutors as recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997. Specifically see article 8 requiring prosecutors to respect the dignity of child victims and witnesses. On the meaning of secondary victimisation, see United Nations, Office for Drug Control and Crime Prevention *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999)9. According to this handbook, the UN notes that victimisation occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim. The failure of criminal-justice systems to protect children against the ravages of trauma following the offence suffered at the hands of the suspect amounts to secondary victimisation. The victim is tainted and stigmatised by the violation he/she has suffered – the insult to his/her human dignity is irremediable.

²³ See the International Centre for Criminal Law Reform and Criminal-Justice Policy 'Model guidelines for the prosecution of crimes against children.' Available at <http://www.icclr.law.ubc.ca/Publications/Reports/Children2.PDF> (accessed 10 April 2014).

²⁴ United Nations (UN) Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20 of 22 July 2005 (UN Guidelines). Available at <http://www2.ohchr.org/english/law/victims.htm> (accessed 10 April 2014).

²⁵ Preamble, UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime; United Nations *Handbook for Professionals and Policy makers on Justice in matters involving child victims and witnesses of crime* (2009)1.

criminal-justice system respects the fundamental rights of suspects as well as victims.²⁶ The need to adequately recognise victims and treat them with respect and dignity is underscored.²⁷ Such protection is of the essence for children who are vulnerable, either as a result of personal characteristics or circumstances of the crime.²⁸ The United Nations²⁹ envisages protection of victims from secondary victimisation³⁰ and by the same token enhancing victims' capacity to contribute to the justice process. For example the United Nations recommends the use of screens to block out the accused from the victim's field of vision, live television links, video recorded evidence-in-chief, employing the services of intermediaries, and communication aids to enable such witnesses to give their evidence to best advantage.³¹ Other appropriate measures to promote and enhance the quality of the child's testimony include the following: freeing the child from the onerous burden of confronting the accused, limiting the child's contacts with the justice process, ensuring child-sensitive questioning, preventing intimidation, judicial intervention in cases of inappropriate questioning, and sensitising legal professionals on appropriate questioning.³²

3.1 Enlisting the services of intermediaries to remediate inappropriate cross-examination in South Africa

Israeli, English, Welsh and South African justice systems employ the services of intermediaries. The focus in the present discussion will be on the role and limitations of this practice in South Africa.

The Criminal Procedure Act of South Africa provides for a number of commendable protective measures. These include freeing child victims as witnesses from the burden of confronting the accused,³³ and more specifically, employing

²⁶ *Ibid.*

²⁷ Chapter III, paragraph 8 of the UN Guidelines.

²⁸ See Chapter VI, paragraph 17 of UN Guidelines; enjoining the provision of special services and protection in certain cases to take account of the divergent offences to which children are prone, such as sexual assault.

²⁹ Chapter VI, paragraph 18 & Preamble to the UN Guidelines.

³⁰ On the meaning of secondary victimisation, See *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power supra* note 22, 9.

³¹ See Chapter VI, paragraph 18 of the UN Guidelines; UN Handbook *supra* note 22, 78-152.

³² See generally UN Handbook *supra* note 25, 1-152.

³³ See generally, sections 153, 158 & 170A of the Criminal Procedure Act, 51, 1977 of South Africa (Criminal Procedure Act or CPA).

intermediaries to transmit evidence to eliminate the imposition of undue stress on the child where it seems that the child would be at risk of suffering such stress in the trial process.³⁴ The use of intermediaries, as applied to criminal proceedings before court³⁵ is a commendable measure. The approach enables the child to give testimony through an intermediary and all examination, cross-examination or re-examination is conducted through the appointed intermediary³⁶ who conveys the 'general purport' of any relevant question to the child.³⁷ The child can be heard and seen in court, but is sheltered from direct confrontation with persons in the courtroom through the medium of other electronic devices.³⁸ Presently, an objection to the use of intermediaries cannot be raised on grounds that it interferes with the accused's right to fair trial.³⁹

It is widely accepted that the use of intermediaries in receiving the evidence of child witnesses in South Africa plays an inestimable role in reducing the stress and trauma that would otherwise be experienced by children.⁴⁰ Studies have also indicated that the practice has effectively promoted the accuracy of children's evidence.⁴¹ Studies

³⁴ See generally section 170A of the Criminal Procedure Act.

³⁵ Section 170A (1) of the Criminal Procedure Act.

³⁶ Section 170A (2) (a) of the Criminal Procedure Act.

³⁷ Section 170A (2) (b) of the Criminal Procedure Act.

³⁸ Section 170A (3) of the Criminal Procedure Act.

³⁹ This issue was addressed in *K v The Regional Magistrate NO and others* 1996 1 SACR 434 (E). The constitutionality of section 170(A) was put to question. In this case the defence argued two points: that the use of intermediaries impairs proper cross-examination, thereby infringing on the accused's right to a fair trial, and that the physical separation of the child from the accused violates the accused's right to a public trial. After examining the purpose of section 170(A), the court found that ordinary procedures in the criminal-justice system are inadequate to meet the child's special needs and that the section was designed to address these special needs. The court equated the role of the intermediary to that of an interpreter and found that the use of an intermediary does not exclude the accused's right to cross-examine the child. The court further found that the accused's right to a public trial is not violated by the separation of the child from the court. The court also ruled that allowing a witness in terms of section 170A of the Act to testify through the medium of an intermediary, who together with the witness may be placed in a room outside the presence of the accused, does not constitute a violation of the accused's right to a fair trial.

⁴⁰ See *S v Vumazonke* 2000 (1) SACR 619 (CPD), where a 10-year-old rape victim, a mildly retarded girl, gave evidence about the incident which occurred when she was only eight years old. The prosecutor applied for the girl's evidence to be led through an intermediary, including the use of closed-circuit television (CCTV). The prosecutor informed the presiding officer that at the age of ten her mental development was that of a five- to six-year-old. The girl was acquainted with the accused. Given these circumstances she would have suffered undue stress if the request had been denied. The prosecutor offered to lead evidence to substantiate the plea for the requested indulgence, and the defence did not object; consequently the request was granted; K Muller & K Hollely *Introducing the child witness* (2009)14-19; Centre for Child Law *Making room: Facilitating the testimony of child witnesses and victims* (2015)1-61.

⁴¹ *Ibid.*

have shown that young witnesses, particularly victims of abuse, have been given an opportunity to participate in the justice process by this means.⁴²

Intermediaries and other similar protective mechanisms have been introduced in sexual offences courts (SOC), notably in 1993 for the first time at the Wynberg Magistrate's Court in South Africa.⁴³ The Wynberg SOC patently achieved its aim of reducing secondary victimisation and at the same time increased its conviction rate to eighty per cent in just one year by this expedient. It could therefore be chalked up as an unqualified success.⁴⁴ The success of the Wynberg SOC in Western Cape Province in South Africa, proved the value of SOCs as a pilot project that motivated the establishment of a second SOC in Bloemfontein, Orange Free State, in 1999,⁴⁵ followed later by a number of additional SOCs and by 2005 there were seventy-four of them across the country.⁴⁶ These courts were equipped and staffed for the particular purpose of protecting victims of sexual offending to minimise trauma (e.g. arrangement of physical amenities, including CCTV, and employment of the services of intermediaries).⁴⁷ Studies show that the decline in secondary victimisation since the establishment of SOCs is largely attributable to the use of CCTV and the services of intermediaries, victim support services and specialised infrastructural amenities provided by the courts.⁴⁸ The specialised amenities provided by SOCs are designed to be conducive to effective protection for CSA victims, with the envisaged result that the effectiveness of their testimony can be optimised.⁴⁹ In a study undertaken by Walker

⁴² K Muller *Baseline success indicators for training social workers involved with children in preparation for young witnesses*. unpublished paper (UNESCO) 2002.

⁴³ SP Walker 'The Court for Sexual Offences: Perceptions of the parties involved' (2002) *Unpublished LLD thesis: University of the Free State* 13.

⁴⁴ Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO) report *on the re-establishment of sexual offences courts* (2013)18; South African Human Rights Commission *Report on the enquiry into sexual violence against children: Does the criminal justice system protect children?* (2002)29.

⁴⁵ MATTSO report *supra* note 44, 18.

⁴⁶ MATTSO report *supra* note 44, 22.

⁴⁷ See the blueprint generally. The blueprint can be found as an annexure to the article by HB Kruger & J Reyneke 'Sexual Offences Courts in South Africa: *Quo vadis?*' (2008)33 *Journal for Juridical Science* 73-75. These details were canvassed in the blueprint, which set out the essential requirements for the Sexual Offences Courts; covering both personnel requirements and equipment and location requirements.

⁴⁸ M Sadan *et al.* *The sexual offences court in Wynberg and Cape Town and related services: A pilot assessment* (2001)37-38; JM Reyneke & HB Kruger 'Sexual Offences Courts: Better justice for children?' (2006)31 *Journal for Juridical Science* 94.

⁴⁹ *Ibid.*

and Louw⁵⁰ to ascertain CSA victims' impressions of SOCs it was found that they attested largely positive experiences of attendance at these courts. The effectiveness of using intermediaries' services has, however, been found wanting in scope and subject to inconsistent implementation.

3.2 Deficiencies in intermediaries' services as regards remediation of inappropriate cross-examination in South Africa

Deficiencies in the services of intermediaries in South Africa need to be discussed in context with similar services in England and Wales where personnel employed for this purpose are highly qualified communication specialists who are involved at three stages in the criminal process. First they assess the child's communicative competence and needs at an early stage in the police investigations and may assist in their capacity as communicators during such investigations where necessary.⁵¹ Secondly, they present a written report to the prosecutor in which protective measures deemed necessary at trial are detailed to inform judicial rulings about questioning.⁵² Thirdly, they also appear at the trial with the child witness to monitor the questioning and to advise the court on problems that might arise.⁵³ The implication is that they are well-qualified by their skill-set to intervene by remediating inappropriate questioning. Further, they are remedially instrumental in dealing with stress and trauma issues throughout the three stages of their involvement, including the pre-trial stage.

Similar functionaries in South Africa are not required to have professional qualifications; instead they are merely required to fall within the ambit of the specified professions that are assumed to be familiar with children⁵⁴ and that subsume the following skills and competencies:⁵⁵

⁵⁰ SP Walker & D Louw 'The Court for Sexual Offences: Perceptions of the victims of sexual offences' (2005)28 *International Journal of Law & Psychiatry* 231.

⁵¹ E Henderson 'Alternative routes: Other accusatorial jurisdictions on the slow road to best evidence' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012)66-67.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Under section 170(A)(4) (a) of the Criminal Procedure Act, '[t]he Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.' One of the categories falling within the ambit of the foregoing section is educators or teachers.

⁵⁵ UWC Schoeman 'A training programme for intermediaries for the child witness in South African

- basic knowledge of criminal law, court procedure and rules of evidence;
- appreciation of the difference between leading and non-leading questions;
- a working knowledge of how the court functions;
- independence, objectivity and impartiality;
- ability to establish rapport with a child in a short space of time; to assess the developmental stage of the child; to assess what language is age appropriate for the child; to assess the child's language development; and to determine whether the child has a disability;
- general knowledge of child development and language acquisition;
- awareness of the effect that testifying may have on the child;
- knowledge of the anatomically-detailed dolls and how to use them;
- capacity for prolonged concentration;
- patience with child witnesses; and
- ability to work in a team.

Henderson persuasively observes that because of their lack of specialised skills, South Africa's intermediaries may not appreciate the extent to which questions should be simplified.⁵⁶ Henderson's arguments find support in a 2014 report of the Centre for Child Law of the University of Pretoria. The Centre has observed that during its survey, some of the intermediaries under the survey lacked the abovementioned requisite skills.⁵⁷ In some instances former teachers who are advanced in age experience difficulty in relating to very young traumatised children.⁵⁸ Thus, in some cases, intermediaries may not have the requisite expertise to maximise communication.

It suffices to note that in South Africa, the intermediary performs a 'translator' function, 'reinterpreting' lawyers' complex language into a more developmentally-appropriate and therefore accessible form, as well as explaining the child victims' answers, where necessary to the court.⁵⁹ Under section 170A of the Criminal procedure

courts' (2006) *Unpublished LLD thesis, University of Pretoria.*

⁵⁶ Henderson *supra* note 51, 68.

⁵⁷ Centre for Child Law *supra* note 40, 21.

⁵⁸ *Ibid.*

⁵⁹ The restricted role of intermediaries was affirmed by Court in the decision of *K v The Regional Magistrate NO and others supra* note 39, where, in ruling that the use of intermediaries did not violate the accused's rights, the court equated the role of the intermediary to that of an

Act, the intermediary merely conveys the ‘general purport’ of any question to the child witness.⁶⁰ In practice, the intermediary does not alter the content of the question. The intermediary must convey the content and meaning of what was asked in a language that is accessible to the child. In not altering the content the intermediary does little to remediate inappropriate questioning and therefore does not filter out any traumatising effect; besides which the innumerable permutations of misleading, developmentally-inappropriate and confusing cross-examination may be beyond the capacity of even the most skilled intermediary. As Henderson notes, ‘[although they] can correct problems with individual questions, they cannot deal with the use of sequences and strings of questions to manipulate witnesses, such as repetitive questioning, sudden changes between subjects, closed questions which deliberately prevent the witness giving information that might qualify an apparent admission, or the illicit, but highly popular technique of comment.’⁶¹

It would be expected that the limitations of protective measures can automatically be surmounted with specialisation in the prosecution of CSA cases. Therefore, some justice systems may assume that specialisation in itself could provide holistic protection to ACSA victims without the need to confront some aspects of the adversarial justice system. However, the limitations of protective measures in South Africa’s justice systems have been felt in mainstream courts as well as the specialised SOCs. The findings of the study by Walker and Louw⁶² on selected SOCs in South Africa are instructive on the limited potential of protective measures to reduce secondary victimisation. As regards cross-examination, some victims in Walker and Louw’s study indicated that intimidatory tactics employed by defence counsel was profoundly traumatising despite protective measures,⁶³ thus illustrating the limitations of protective measures. Furthermore ‘the intermediaries that are currently in use are not a means by which a child witness can be questioned inquisitorially rather adversarially.’⁶⁴

interpreter and found that the use of an intermediary does not exclude the accused’s right to cross-examine the child.

⁶⁰ Section 170A (2) (b) of the Criminal Procedure Act.

⁶¹ Henderson *supra* note 51, 71.

⁶² SP Walker & DA Louw ‘The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspectives of victims, their families and the professionals involved’ (2004) 17 *SACJ* 289.

⁶³ *Ibid.*, 303-304.

⁶⁴ JR Spencer ‘Introduction’ in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012) 16.

The intermediary mechanism of South Africa has been subjected to mordent criticism because of its inconsistent implementation which has taken a toll by depriving some child witnesses of the protection they were entitled to. This limitation is aptly illustrated by the 2009 decision of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others (DPP case)*,⁶⁵ and by *S v Makoena; S v Phaswane*.⁶⁶

Section 170A(1) of the Criminal Procedure Act should be quoted verbatim to be clear about the context :

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

The consolidated cases of *S v Makoena (Makoena case)* and *S v Phaswane (Phaswane case)* resulted from circumstances which were illustrative of the lack of uniformity in magisterial decision-making on when the services of intermediaries should be employed. Bertelsmann J of the High Court was required to consider two very similar convictions in different magistrate's courts which came before him simultaneously for sentencing. The *Makoena* case involved an 11-year-old who was allegedly raped by the accused. At the hearing of the matter in the Regional Magistrate's Court in Bethal the prosecutor applied for and was granted the services of an intermediary.⁶⁷ In the *Phaswane* case the alleged rape victim was a 13-year-old girl, junior to her sister who was living with the accused. When called upon to testify it was plain to see that the complainant experienced the interrogation concerning the accused with whom she was well-acquainted as stressful and distressing.⁶⁸ Neither the magistrate nor the prosecutor had even considered appointing an intermediary.⁶⁹ The two cases were

⁶⁵ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* (2009) ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC).

⁶⁶ *S v Makoena; S v Phaswane* 2008(2) SACR 216 (T).

⁶⁷ *Ibid* para 4.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

consolidated in the judgment in the High Court because they needed the same constitutional pronouncement.

Among the issues which Bertelsmann J then proceeded to identify was whether the present availability of intermediaries and electronic devices to enable a child to testify otherwise than in the presence of the accused is constitutionally compatible.⁷⁰ In particular, Bertelsmann J found that ‘the ordinary procedures of the criminal-justice system are inadequate to meet the needs and requirements of the child witness.’ He also had difficulty with the fact that the use of the word ‘may’ in section 170A (1) empowered presiding magistrates to refuse appointments even where the ground was proved. Bertelsmann J therefore ordered that section 170A (1) should be reworded as follows:

whenever criminal proceedings are pending before any court in which any witness under the biological or mental age of eighteen years is to testify, the court shall appoint a competent person as an intermediary for each witness under the biological age of 18 years in order to enable such witness to give his or her evidence through that intermediary as contemplated in this section, unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of the proceedings; and the court may appoint a competent person for a witness under the mental age of eighteen years in order to give his or her evidence through that intermediary.⁷¹

According to the commentaries of various scholars, the default position created by Bertelsmann J was that child witnesses appearing before magistrates in criminal proceedings would have the benefit of intermediaries unless there were strong reasons to the contrary.⁷² This construction, it is persuasively argued, affords broader protection to child witnesses and victims.⁷³

⁷⁰ *Ibid.*, para 21.

⁷¹ *S v Makoena; S v Phaswane supra* note 66.

⁷² CR Mathias & N Zaal ‘Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa’ (2011)19 *International Journal of Children’s Rights* 251-269; J Prinsloo ‘In the best interest of the child: The protection of child victims and witnesses in the South African criminal-justice system’ (2008)9 *Child Abuse Research* 49-64; K Muller ‘The competency examination and the child witness’ in K Muller (ed) *The judicial officer and the child witness* (2002)152; PJ Schwikkard ‘The abused child: A few rules of evidence considered’ (1996) *Acta Juridica* 159. Schwikkard argues that the discretionary nature of section 170A of the Criminal Procedure Act of South Africa causes problems since it views those children who testify via closed-circuit television as being the exception rather than the norm. Schwikkard recommends that for this section to be more effective, it should require the court to make use of

The rewording ordered by Bertelsmann J was dismissed by the Constitutional Court, however, and instead the Constitutional Court directed that to overcome the problem of inconsistency in the application of the intermediary mechanism in the future, it would be mandatory for all child complainants called to testify in sexual offence matters to be assessed to establish whether they needed an intermediary. The court ordered that '[j]udicial officers are ... obliged to apply the best interests' principle by considering how the child's rights and interests are, or will be affected by allowing the child complainant in a sexual offence case to testify without the aid of the intermediary. It follows from this therefore that where the prosecutor does not raise the matter, the judicial officer must, of his or her own accord, raise the need for an intermediary.'⁷⁴

As years go by it seems increasingly clear that the concerns expressed by Bertelsmann J are being confirmed, even after the Constitutional Court's directions. The recent (2012) case of *Ndwandwe v S*⁷⁵ is instructive. This case was an appeal in the High Court of Pietermaritzburg against conviction and sentence in a child rape case. The proceedings in the trial court were riddled with irregularities. The complainant was 17 years old when she testified. Her sister, the second state witness, was 15 years old when she testified. One of the irregularities concerned the complainant's cross-examination. Pillay J observed that defence counsel had to be cautioned on at least two occasions that his questioning was inappropriate and developmentally-insensitive.⁷⁶ He continued to ask long, rambling, multiple questions which even the interpreter sometimes had difficulty in understanding. Another irregularity was that neither the prosecutor nor the magistrate took steps to secure the evidence of the child witnesses through an intermediary. Pillay J in substantiating on this irregularity made reference to the decision in the *DPP* case expressing disappointment in the failure of the trial magistrate and prosecutor to draw from the substantiation made by the Constitutional Court. Pillay J stated as follows:

closed-circuit television in all cases where a child complainant has to testify; Muller & Hollely *supra* note 40, 20-28.

⁷³ *Ibid.*

⁷⁴ *DPP v Minister of Justice and Constitutional Development supra* note 65, para 113.

⁷⁵ *Ndwandwe v S* (AR 99/12) (2012).

⁷⁶ *Ibid.*, para 16.

The Constitutional Court's judgment, issued on 1 April 2009, should have been fresh in the minds of the learned magistrate and prosecutor in September 2009 when this trial commenced. Clearly, neither s 170A nor the CC's judgment featured in the proceedings at all.⁷⁷

This case follows direction by the Constitutional Court in the *DPP* case. It goes to show that in some cases ACSA victims continue to suffer the plight of inappropriate cross-examination on account of failure by some prosecutors and judicial officers to appropriately exercise their discretion to appoint intermediaries.

The problem that arises in the intermediary mechanism of South Africa in many cases is not so much in the legislative standard, but in its implementation which is hampered by acute shortages of intermediaries (most of whom are appointed on contract) throughout the nine provinces of South Africa, as well as inadequate intermediary facilities in some instances.⁷⁸ Lack of job security and low pay have contributed to the shortages, which are naturally not insurmountable over time, but which effectively make life difficult for ACSA victims who have to put up with inappropriate cross-examination.⁷⁹

On balance the intermediary mechanism has significantly reduced secondary victimisation in South Africa, but fundamentally flawed cross-examination can nevertheless take a toll on the effectiveness of intermediaries' services.

3.3 Judicial intervention to remediate inappropriate cross-examination in Uganda

Unlike the position in South Africa where protective measures include a range of mechanisms, such as intermediaries, CCTV and one-way mirrors, Uganda offers no more

⁷⁷ *Ibid.*, para 5.

⁷⁸ Centre for Child Law *supra* note 40, 54-57; G Jonker & R Swanzen 'Intermediary services for child witnesses testifying in South African criminal courts' (2007)4 *International Journal of Human Rights* 91-113. Jonker and Swanzen report gaps in the expertise of South African intermediaries and the absence of government training or oversight. There are also significant criticisms of implementation with technological support seriously lacking; F Coughlan & R Jarman, 'Can the intermediary system work for child victims of sexual abuse?' (2002)83 *Families in Society* 541-546. According to Coughlan and Jarman the intermediary system is only used in main city centres of South Africa, such as East London, Cape Town, Port Elizabeth, Johannesburg, Pretoria, Durban and Pietermaritzburg. There are no such facilities in rural courts. In addition, in cities like East London, the service was not provided as social workers at the time refused to continue to offer the service. Intermediaries were inadequately trained and had to deal with anxieties and emotions regarding the court process and the child's trauma.

⁷⁹ *Ibid.*

than judicial intervention in cases of inappropriate questioning. In Uganda child victims have to give live testimony in court, which entails direct confrontation with the accused in the course of proceedings. However the Ugandan Constitution does allow the court to exclude the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.⁸⁰ On the other hand, though, article 28(5) of the Constitution provides that the accused cannot be tried *in absentia* unless his/her conduct is so disorderly as to render his/her presence at the trial impracticable; in principle the child, irrespective of age, should attend the main hearing and be heard directly in court and in the presence of the accused. And in the event of inappropriate questioning the remedy for which there is hardly any alternative must be judicial intervention, as noted, in which case the Evidence Act imposes the following procedure on the judge:⁸¹

150. Indecent and scandalous questions.

The court may forbid any question or inquiries which it regards as indecent or scandalous, although the questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

151. Questions intended to insult or annoy.

The court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.

It follows that although cross-examination is permitted to test the veracity of the child witness, a judicial officer can intervene by forbidding indecent, scandalous, insulting and annoying questions that detract from the goal of testing veracity. In practice, some courts in Uganda have played a commendable role in protecting child witnesses, particularly in CSA cases where it has become apparent that questions were, and continue to take an inappropriate turn. Similar instances are on record in South Africa, but at the same time a wealth of research has shown that in some instances judicial officers, particularly in adversarial systems, are reluctant to intervene when inappropriate questioning as described in the provisions cited above supervenes. The

⁸⁰ Article 28(2) of the Constitution of the Republic of Uganda, 1995.

⁸¹ Evidence Act of Uganda Chapter 6 of the Laws of Uganda.

remedy of judicial intervention becomes largely ineffectual in such instances of non-compliance with the noted provisions, with the result that ACSA victims are deprived of the protection to which they are entitled in law. This limitation is now discussed.

3.4 Limitations that undermine the effectiveness of judicial intervention as a remedy to curb inappropriate cross-examination

Uganda is a typical example of an adversarial system of justice. In the adversarial process the role of umpire is assigned to the judge.⁸² The principle of party autonomy dictates that the parties develop and present their respective cases, and the trial judge is expected to afford advocates and attorneys considerable latitude in their presentational roles. According to Schwikkard and Van der Merwe,⁸³ the adversarial tradition of equating neutrality and passivity has further encouraged the role of the umpire that sees the trial judge as detached and somewhat aloof from the party contest. Frankel⁸⁴ adds that 'the judge views the case from the peak of Olympian ignorance.' In the words of Lord Denning in *Jones v National Coal Board*

The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition, to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the judge and assumes the role of an advocate; and the change does not become him well.⁸⁵

Lord Denning's description is similar to that of Lord Justice Clark-Thomson, describing the role of the adversarial judge as follows: 'Like referees at boxing contests they see that the rules are kept and count the points.'⁸⁶ Undoubtedly, the truly passive judge seems to be a 'creature of theory rather than practice.'⁸⁷ Generally, the judge has an overriding duty to ensure fairness of criminal proceedings. As demonstrated in *R v*

⁸² CR Snyman 'The accusatorial and inquisitorial approaches to criminal procedure: Some points of comparison between the South African and continental systems' (1975)8 *CILSA* 104.

⁸³ PJ Schwikkard & SE Van der Merwe *Principles of evidence* (2002)447.

⁸⁴ ME Frankel 'The search for truth: An umpireal view' (1975)123 *University of Pennsylvania Law Review* 1042; ME Frankel 'The adversary judge' (1976)54 *Texas Law Review* 465-487.

⁸⁵ *Jones v National Coal Board* (1957) CA.

⁸⁶ *Thomson v Glasgow Corporation* 1961 SLT 137.

⁸⁷ J McEwan *Evidence and the adversarial process* (1998)13.

Hepworth,⁸⁸ the judge's position in a criminal trial should not merely be that of an umpire. Rather, a judge ought to be an administrator of justice, being able to direct and control proceedings, as opposed to being a mere figurehead. Although this observation seems self-evident the 'umpire' position seems to persist in adversarial criminal-justice systems,⁸⁹ which inhibits intervention to curb inappropriate questioning.

It has to be acknowledged that judicial intervention in cases of inappropriate questioning of children has increased over the years. Sometimes judges recognise the difficulty that children in the justice system are subjected to and intervene accordingly. This, however, is uneven across courts. Studies show that many developmentally-inappropriate questions directed at children go unchallenged. Developmental appropriateness is the key in this chapter to conceptualising an approach to questioning that is predicated on how children develop and learn. Judges attending a 2011 seminar based on a young witness were concerned that they are hemmed in by advocates' persistent pressure of improper questioning.⁹⁰ For example, one judge at the seminar observed that: 'I did intervene quite a lot but it's very difficult. The defence could argue I was interfering.'⁹¹ Another judge stated: '[y]ou can only interrupt... so many times. If I interrupt four out of seven questions, I can't do it again... [and even if poor practice is brought to the attention of the head of chambers] they come back and do it in exactly the same way. Their role is to get the client off and they will.'⁹² Another judge was convinced that '[w]e won't get this right until defence counsel are ticketed. Some shouldn't be doing it.'⁹³ In similar vein Marcus,⁹⁴ observes that if a judge is found to

⁸⁸ *R v Hepworth* 1928 AD 265, 277.

⁸⁹ Schwikkard & Van der Merwe *supra* note 83. Schwikkard and Van der Merwe, however, point out that despite the fact that judicial officers are authorised to take control of court proceedings, many still play a passive role and remain aloof due to their fear of being seen to be partial. The authors make the further point that their ability to have control over proceedings seems inhibited by the accusatorial nature of trial which traditionally depicts judges as umpires; K Muller & A Van der Merwe 'Judicial management in child abuse cases: Empowering judicial officers to be "the boss of the court"' (2005)18 *SAJC* 44. Muller and Van der Merwe acknowledge that the intervening role of judges in adversarial systems is a very complicated one, with many judges hardly exercising the power to intervene.

⁹⁰ J Plotinkoff & R Woolfson *Young witnesses in criminal proceedings: A progress report on measuring up?* (2011).

⁹¹ *Ibid.*, 11.

⁹² *Ibid.*

⁹³ *Ibid.*, 13.

⁹⁴ M Marcus 'Above the fray or into the breach: The judge's role in New York's adversarial system of criminal justice' (1992)57 *Brooklyn Law Review* 1199-1206.

have interfered detrimentally with the advocate's presentation a conviction may be overturned.

Further, the Ugandan provision on judicial intervention in cases of inappropriate questioning specifically permits inappropriate questions if the court is satisfied that the questions relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.⁹⁵ In the first place, the idea that inappropriate questioning is permissible in special circumstances cannot be countenanced in principle considering its effect on the emotional state and accuracy of the complainant. In such exceptional circumstances judges who are cautious about intervening too readily may arbitrarily refrain from intervening in the circumstances.

Criticism that protective measures are inadequate often have no empirical basis, in which case it is important to consult the research literature to inform the criminal-justice reform agenda as regards the limits set for judicial officers to intervene to protect children from inappropriate questioning. The findings of a study conducted by O'Kelly *et al.*,⁹⁶ for instance, indicated no significant differences between the judicial treatment of vulnerable witnesses and witnesses in general. In particular, judges did not intervene more frequently to simplify lawyers' questions, they did not call for breaks, suggest methods by which a witness could reply, ask lawyers to simplify their questions, prevent oppression of the witness and ensure the witness could understand the question.

Research by Davies *et al.*⁹⁷ was conducted in New Zealand, a typical example of an adversarial system. Four analyses were conducted on the nature of the evidence-in-chief and cross-examination of child complainants of sexual abuse. The analyses were conducted on the questions asked by evidential interviewers, prosecutors and defence lawyers, and the sequence and content of questions asked in cross-examination. It was found that defence lawyers asked questions that children had difficulty understanding and that judges did not intervene to protect the child complainants from inappropriate questioning.

⁹⁵ Section 150 of the Evidence Act of Uganda Chapter 6.

⁹⁶ CME O'Kelly *et al.* 'Judicial intervention in court cases involving witnesses with and without learning disabilities' (2003)8 *Legal and Criminological Psychology* 229.

⁹⁷ E Davis & FW Seymour 'Questioning child complainants of sexual abuse: Analysis of criminal court transcripts in New Zealand' (1998)5 *Psychiatry, Psychology & Law* 47.

In another study, Kebbell *et al.*⁹⁸ found no particular difference in the questioning of vulnerable witnesses and witnesses in general, and that responses to inappropriate questioning were barely adequate despite a general obligation to intervene in such cases. Moreover questioning was particularly ineffectual in eliciting rehearsal from memory in the case of vulnerable witnesses who tended to abridge and tailor accounts to agree with leading questions.

Westcott and Page's⁹⁹ study analysed extracts from cross-examinations with child witnesses who were alleged victims of CSA. The study demonstrated the manner in which cross-examination presents challenges to children. The analysis of the cross-examination extracts presented children as un-childlike, instigators, and poor witnesses. The study concluded that cross-examination is unhelpful to CSA victims and causes undue stress, yet courts are reluctant to intervene, with the result that the ordeal in court begins to resemble the trauma of the sexual abuse itself. Cashmore and Bussey,¹⁰⁰ among others, found that harsh questioning was allowed by judges.

On balance, there is no doubt that protective mechanisms in the form of intermediary facilities and judicial intervention are significantly reducing the secondary victimisation of children and equally ensuring that the best evidence is obtained from child witnesses. This is particularly critical in cases where inappropriate techniques of cross-examination are applied. However, reforms focussing on protective mechanisms are unlikely to have substantial effect on the protection of ACSA victims unless the inappropriate techniques of cross-examination are strictly regulated. Presently, the emphasis on protective measures within an adversarial context addresses the symptoms of reluctance of some judicial officers to intervene. Henderson is presumably right to observe that 'cross-examination is unlikely to be corrected by judicial policing alone... [and that] lawyers are unlikely to change their practices on their own initiative.'¹⁰¹ Within adversarial systems, reluctance to intervene by some judicial officers is not necessarily a lack of appreciation of the challenges that ACSA victims encounter. As Ellison¹⁰² puts it, the problem is one of 'the tension that exists between

⁹⁸ MR Kebbell *et al.* 'Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?' (2004)9 *Legal and Criminological Psychology* 23-35.

⁹⁹ Westcott & Page *supra* note 5, 137.

¹⁰⁰ J Cashmore & K Bussey *The evidence of children* (1995)19.

¹⁰¹ Henderson *supra* note 51, 70.

¹⁰² Ellison *supra* note 9, 370.

these powers and the role of the trial judge within an adversarial process.’ Equally, administrative measures requiring lawyers to abide by the appropriate techniques of examining witnesses merely address the symptoms. The tendency of some lawyers to insist on inappropriate techniques in the course of cross-examination is not necessarily caused by their lack of knowledge of appropriate techniques. For lawyers, the problem finds root in the role of an advocate in the adversarial process. They tend to be biased as a result of their partisan role and tailor their questioning accordingly. Spencer observes that in most cases the witness is examined by a person whose objective is to extract a story that fits his/her ready-made ratiocination about the case.¹⁰³ It may be hard to persuade such persons to adopt a more sensitive approach.

It may seem tempting to argue that cross-examination of child witnesses should be relinquished, but that would be impracticable, as will be shown in the next section.

4 Cross-examination in essence and why it is indispensable in ACSA cases

Inappropriate questioning of child witnesses is well documented to the extent that raises the issue whether the cross-examination should be dispensed with when dealing with ACSA victims and child witnesses generally. Schwikkard notes that ‘in measuring whether a rule is good or bad in the context of any particular jurisdiction, it must surely be the values to which the rule gives expression that are ultimately decisive.’¹⁰⁴ The crux of the matter is surely whether the values expressed in questioning the witness serve the legal purpose, and whether the purpose can be served better by other means than inappropriate questioning.

Cross-examination is a centrepiece of adversarial trial procedure. According to Davies it is the strategy of words and actions employed by the opposition to cast doubt on the presentation of the other party.¹⁰⁵ More particularly the general purpose is to test the accuracy of evidence presented. Zeffert and Paizes observe that ‘the purposes of cross-examination are, first, to elicit evidence which supports the cross-examiner’s case,

¹⁰³ Spencer *supra* note 64, 15.

¹⁰⁴ PJ Schwikkard ‘Convergence, appropriate fit and values in criminal process’ in P Roberts & M Redmayne (eds) *Innovations in evidence and proof* (2007)344.

¹⁰⁵ LE Davies *Anatomy of cross-examination* (1993)3.

and second, to cast doubt upon the evidence given for the opposing party.’¹⁰⁶ Ellison adds that ‘[i]nordinate faith is placed in the capacity of the skilful cross-examiner to expose the dishonest, mistaken or unreliable witness, and to uncover inconsistency and inaccuracy in oral testimony.’¹⁰⁷

Spencer, however, paints a vivid picture of the dilemma of dealing with very young children as witnesses:

Meaningful communication often proves impossible, particularly with little children. Sometimes they cannot be persuaded to say anything intelligible, even though they managed to communicate intelligibly during the video-interview that has now taken the place of their evidence in chief. Sometimes they are able to communicate intelligibly, but cannot be cross-examined to any useful purpose because by the time of trial they have forgotten all about the incident. And sometimes they cannot be cross-examined because they are scared out of their wits and unable to communicate at all: like a little girl in a case..., who got up from her chair as soon as the cross-examination started and just ran away.¹⁰⁸

In light of Spencer’s observation it may seem desirable to dispense with cross-examination, but since the overriding argument is that the intrinsic purpose is to test the accuracy and reliability of evidence, the practice must stand. In this regard Henochsberg AJ declared the following in *Carroll v Carroll*:

The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.¹⁰⁹

Thus, ‘[f]ailure to allow cross-examination constitutes a gross irregularity.’¹¹⁰ The court has no right to prevent cross-examination regardless of any attempt to protect the witness. In *S v Manqaba*,¹¹¹ a magistrate prevented cross-examination of a child witness on the purport of the child’s earlier statements to the police on grounds that the child

¹⁰⁶ DT Zeffert & AP Paizes *The South African law of evidence* (2009)909.

¹⁰⁷ L Ellison ‘The protection of vulnerable witnesses in court: An Anglo-Dutch comparison’ (1999)3 *International Journal of Evidence & Proof* 35.

¹⁰⁸ Spencer *supra* note 64, 11.

¹⁰⁹ *Carroll v Carroll* 1947 (4) SA 37 (W) 40.

¹¹⁰ PJ Schwikkard & SE Van der Merwe *Principles of evidence* (2010)366.

¹¹¹ *S v Manqaba* 2005 2 SACR 489 (W) paras 55 & 58.

might be traumatised by the procedure. Satchwell J found that this refusal was an irregularity which negated the right of the accused to a fair trial because the refusal 'was predicated upon an express intention by the magistrate to protect the complainant at the expense of the accused.' Mandondo J took a similar position on cross-examination in *S v Mgudu*:

section 35(3) of the constitution guarantees the right to a fair trial. The weight of decided cases supports the view that there can be no fair trial without the exercise of the right to cross-examine witnesses called by the opposing party, unless the right is or has been waived by the party concerned.¹¹²

A pervasive sentiment in this regard could be that the credibility of the child should in no way be questioned, but the obligation to test the accuracy of testimony has to be respected in any case, hence cross-examination cannot be ruled out of order, but then the process must be strictly regulated to eliminate the possibility of its being used to promote inaccuracy and myths about CSA, such as that children are liars, that they are suggestible, and that they fantasise about being sexually abused. It is incumbent on the cross-examiner in light of these facts that questioning should conform to the child's developmental abilities and vulnerabilities in order to enable the child to give the best evidence of which the child is capable without encroaching on the accused's right to a fair trial.¹¹³ Zeffert and Paizes note that the credibility of a witness resides in his/her honesty, powers of perception, as well as powers of recall and accuracy of narration commanded by the witness.¹¹⁴ Questioning must therefore perforce be tolerated, unpleasant though it may be, in the interest of arriving at the truth of the matter at issue in ACSA cases. In this regard the England and Wales Court of Appeal ruled as follows in *R v Barker* (2010):

[w]hen the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility.

¹¹² *S v Mgudu* 2008 1 SACR 71 (N) para 28.

¹¹³ J Plotinkoff & R Woolfson 'Kicking and screaming: The slow road to be evidence' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012)30.

¹¹⁴ Zeffert & Paizes *supra* note 106, 910.

Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed ...'¹¹⁵

Similarly, in *President of the Republic of South Africa and others v South African Rugby Football Union & Others* the Constitutional Court ruled as follows in *Brown v Dunn*:¹¹⁶

The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct.¹¹⁷

In essence, flaws as noted above should be brought to the court's attention without fail as should characteristics that enhance the witness's credibility, so that the innocent will be protected against erroneous conviction while diminishing the credibility of testimony characterised by incompetence, dishonesty and inaccuracy.

The possibility of wrongful conviction is sufficient reason to proceed with cross-examination, particularly since false allegations in this regard are on the increase. The child's evidence-in-chief needs to be 'qualified or coloured by cross-examination.'¹¹⁸ The two cases discussed in chapter three¹¹⁹ illustrate the possibility that wrongful conviction can lead to lengthy prison sentences, and that CSA cases can be rendered particularly critical (as in this instance) by a lack of medical evidence and the fact that only one witness, the complainant, can provide an eye-witness account and may actually

¹¹⁵ *R v Barker* (2010) EWCA Crim 4 para 42.

¹¹⁶ *Brown v Dunn* (1893) 6 The Reports 67 (HL).

¹¹⁷ *President of the Republic of South Africa and others v South African Rugby Football Union & Others* CCT 16 (1998) paras 61 & 62.

¹¹⁸ Per Kgomo J in *S v Agliotti* SACR 2011 (2) 437 SGHC para 32.

¹¹⁹ *State of North Carolina v Sylvester Smith* 337 S.E.2d 833 (1985) 315 N.C.76. For further detail on the circumstances surrounding the false CSA allegations in the Sylvester case, see B Barrett 'Falsely accused man freed' available at http://injusticebusters.org/04/Smith_Sylvester.shtml (accessed 20 April 2014). Judgment unreported. The second case discussed is the South African case of *Sifiso Shezi* which is unreported. However, for details about alleged false accusations, see A Ayanda & S Mlambo 'Dad cleared of rape happy to be free' (2013), available at <http://www.iol.co.za/dailynews/news/dad-cleared-of-rape-happy-to-be-free-1.1534796> (accessed 20 April 2014).

fail to identify the offender correctly. To quote Mlambo J in *S v Ndlovu*:¹²⁰ '[c]ross examination [becomes] an integral part of the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him or her.' Khumalo AJ in the 2012 judgment in *Muntuza v The State* adds that '[t]he rule serves as a protective measure against the danger of an accused being found guilty on the strength of the evidence of a witness who is unreliable or lacks credibility.'¹²¹ Shanks also observes that '[i]t is hard to overemphasise the importance of confrontation and effective cross-examination to the defence of an individual accused of a crime.'¹²² Thus the case for retention of cross-examination is made: it can either make or mar the child complainant's testimony depending on whether it is handled correctly or not.

Despite conclusive evidence to the contrary, cross-examination is misused and not only traumatises children but causes inaccuracy in their evidence. CSA victims undoubtedly find the prospect of cross-examination distressing, and in fact they can look forward to insensitive treatment from some questioners despite their obligation to be circumspect in this regard. Kassin *et al.*¹²³ refer to these techniques as 'dirty tricks' that jeopardise sound credibility judgments and traumatise witnesses instead, which runs counter to the avowed purpose of probing constructively for the truth. It must, however, be acknowledged that some (not many) legal practitioners work appropriately by probing for the truth while taking due cognisance of the sensitivities around sexual abuse. The next section will deal with the testing of evidence in selected inquisitorial systems. It may be to adversarial systems' advantage to draw inspiration from the tight regulation of cross-questioning practised in the systems to be reviewed.

¹²⁰ *S v Ndlovu* 2002 (2) SACR 325 SCA.

¹²¹ *Muntuza v The State* Case No: A868/2011 para 18.

¹²² A Shanks 'Evaluating children's competency to testify: Developing a rational method to assess a young child's capacity to offer reliable testimony in cases alleging child sex abuse' (2010)58 *Cleveland State Law Review* 594.

¹²³ SM Kassin *et al.* 'Dirty tricks of cross-examination: The effect of conjectural evidence on juries' (1990)14 *Law & Human Behaviour* 374.

5 The option of a more inquisitorial approach to testing the evidence of ACSA victims

Scholars have argued for decades¹²⁴ that the adversarial system is not designed to deal with the uniqueness of child sex offences because of the relationship of trust, the grooming process and the power abuse that accompany sex offences. Even when reforms are made, they hardly have substantive impact on the adversarial nature of the trial process. Schwikkard and Van der Merwe,¹²⁵ for instance, make the point that although protective measures have provided some relief for children, the measures do not address all the traumatic effects of adversarial trial processes. Some inappropriate features of the adversarial system continue to rest comfortably alongside well-intentioned protective reforms, limiting the extent to which child abuse complainants can attain the maximum level of protection while at the same time providing the court with accurate testimony.¹²⁶ More specifically, while justice systems are increasingly adopting protective measures to protect CSA victims during the trial process, cross-examination has hardly changed all.

In pondering the possibility of an inquisitorial approach to children's evidence in South Africa, Muller considers the possibility of a change from an adversarial to an inquisitorial system.¹²⁷ Muller argues that 'although a move from an accusatorial to an inquisitorial form of procedure in certain cases would be a dramatic change, this by itself does not mean that such a change should be avoided.'¹²⁸ According to Eastwood and Patton:

¹²⁴ See e.g. A Cossins 'Prosecuting child sexual assault cases: Are vulnerable witness protections enough?' (2007)18 *Current Issue in Criminal Justice* 299-317; K Muller 'The effect of the accusatorial system on the child witness' (2000)1 *CARSA* 13-23; Muller & Hollely *supra* note 40, 69-103.

¹²⁵ Schwikkard & Van der Merwe *supra* note 83,156.

¹²⁶ Protective measures are intended to ensure that the best possible evidence is obtained from the child victim at the lowest trauma cost. Generally, systems struggle on in the attempt to develop practical and useful guidelines with regard to judicial management in order to protect the child during the court process. These include ground rules for attorneys with specific reference to the asking of developmentally-appropriate questions. Taken together, the guidelines are laudable and impressive. However, within an adversarial context, it is doubtful whether reliance on protective measures alone will further aims of these measures, as intended.

¹²⁷ A Muller 'An inquisitorial approach to the evidence of children' (2001) *Crime Research in South Africa* 1-13.

¹²⁸ *Ibid.*

Until legislators in all...jurisdictions are able to embrace comprehensive reform for sexually abused children-there will be no justice for children, and abusers will continue to offend with impunity... In the end, if both children and adults would not report sexual abuse because of the damage done to the child by the justice system, the abusers are allowed to act with impunity.¹²⁹

It suffices to note that whenever the possibility of drawing inspiration from the inquisitorial approach arises, opinion seems to move towards a fundamental shift from an adversarial to an inquisitorial system of justice. Alternatively it is felt that instead of scuppering the adversarial system, it should merely incorporate some features of the inquisitorial system. For instance, as consistently demonstrated, the mechanism of cross-examination, if used appropriately to further the essence of testing the veracity of evidence, plays a very critical role in the prosecution of ACSA cases. Instead of dispensing with very important mechanisms such as these, adversarial justice systems should rather interest themselves with elements in the inquisitorial systems of justice that can help tame the inappropriate techniques of cross-examination as applied by some legal practitioners. Selected inquisitorial systems will now be considered as regards the testing of children's testimony in the relevant systems.

6 The process of testing the evidence of child witnesses in inquisitorial systems in Germany, Austria, Norway and Italy

Justice systems in Western Europe and South America are specifically inquisitorial. According to Langbein¹³⁰ the term 'inquisitorial' is derived from the fact that the court inquires.¹³¹ Over the years, most inquisitorial systems of justice have fine-tuned their systems to incorporate a number of adversarial features including testing the evidence of witnesses through cross-examination. Although there is no homogeneity across inquisitorial systems of justice there are features that cut across these systems. Further, presently, no justice system can purport to describe itself as purely inquisitorial or adversarial. However, the justice systems of Germany, France, Norway and Italy are very much conducted in accordance with the inquisitorial model. The justice systems of

¹²⁹ C Eastwood & W Patton 'The experiences of child complainants of sexual abuse in the criminal justice system' (2002) *Australian Institute of Criminology* 131 & 134.

¹³⁰ JH Langbein *Comparative criminal procedure: Germany* (1977)1.

¹³¹ *Ibid.*

these countries can therefore be regarded as typical examples of inquisitorial systems of justice. Inquisitorial imports into predominantly adversarial systems are particularly desirable for the purposes of ACSA prosecutions.

In Austria, previously, the evidence of child victims was introduced at trial in the form of statements made during police questioning at the pre-trial stage without the parties being present.¹³² Although witnesses are generally required to testify orally at trial, this requirement is not compulsory where the witness is unavailable.¹³³ As such, previously, child witnesses, particularly victims of child sexual offending, were frequently considered unavailable because experts considered the repeated questioning to be traumatic to the CSA victim and to cause the child psychological harm. This position was, however, challenged as a violation of the accused person's right to fair trial; consequently the 'contradictory interrogation procedure' was introduced. Under this procedure, victims under the age of 14 years provide their evidence at a 'contradictory' pre-trial hearing. The procedure is termed 'contradictory' because all the parties including the defence and the prosecutor have the opportunity to exercise their right to test the evidence of the victim by contradicting it where such need arises.¹³⁴ Where the child victim participates in this 'contradictory interrogation procedure', further testimony and examination can be dispensed with.¹³⁵ Instead of appearing at trial again, the proceedings at the pre-trial hearing are recorded and played at trial.¹³⁶

The contradictory interrogation is conducted prior to trial. It is conducted privately by a pre-trial judge who cannot later preside at trial based on arguments of bias.¹³⁷ The defence and the prosecutor have the right to be present.¹³⁸ The questioning of the child victim is conducted by the pre-trial judge on behalf of the prosecutor and the defence. During this process the child victim is entitled to a whole range of protective measures including support persons, examination in a separated child friendly room with no parties present, amongst other measures.¹³⁹ Examination in a separate child-friendly room is mandatory for victims of child sexual offences. The set-

¹³² V Murschetz 'Child witnesses in Austria' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012)138-141.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

up, however, enables the prosecutor and the defence to view and hear the child victim live on TV screens. After the pre-trial judge has put questions to the child victim in the separate room, he or she goes to the other room to engage with the parties on whether they have additional questions to put to the child victims.¹⁴⁰ Where such questions are available, the pre-trial judge proceeds to put these questions to the child victim. Pre-trial judges can refuse to put questions to the child victim if they deem the questions developmentally-inappropriate for the child victim.¹⁴¹ The parties cannot interrupt the questioning by the pre-trial judge. This interruption can only be done after the pre-trial judge returns to the other room where the parties are situated. Alternatively contradictory questioning can be conducted by an expert, with the parties having the opportunity to put questions to the child victim through the expert¹⁴² who can be a psychologist or a social worker with specialised skills in handling children.

Some issues have been raised with regard to the procedure. These pertain to the fact that the parties cannot personally put the questions to the child victim and the option of the pre-trial judge to reject some questions deemed to be inappropriate.¹⁴³ There have also been issues pertaining to the child victim and the parties being in separate rooms and with no two-way communication.¹⁴⁴ This, it is argued, deprives parties of the opportunity to object to the manner in which some questions are posed or seek clarification. This can only be done after the pre-trial judge returns to the room where the parties are situated. Moreover, once the contradictory interrogation procedure has been conducted, the child victim cannot be examined further on issues that arise later¹⁴⁵ because children have the right to refuse further testimony once the contradictory procedure is over. On balance, however, it must be acknowledged that the ultimate goal of testing the child's evidence is achieved albeit with stricter control of parties' roles.

In Germany, although a typical example of the inquisitorial system of justice, the contradictory interrogation procedure is non-existent. However, a peculiar feature of

140 *Ibid.*

141 *Ibid.*

142 *Ibid.*, 140.

143 *Ibid.*, 141.

144 *Ibid.*

145 *Ibid.*

the German system is that children under eighteen can only be questioned by a judge,¹⁴⁶ or in exceptional circumstances by a defence attorney, at the request of the presiding judge.¹⁴⁷ Practically, defence attorneys' participation is required only if they believe that the judge overlooked or misrepresented crucial evidence, but on condition of course that questioning does not traumatise the child.¹⁴⁸ Under section 141(2) of the Germany Criminal Procedure Code, when permission to examine a child is abused in the course of cross-examination such permission is curtailed. Loffelmann¹⁴⁹ explains that although primacy is given to oral evidence in Germany, documentary evidence and written statements are not considered inferior. German criminal courts still make considerable use of documentary evidence and assign the same weight to it as oral evidence.¹⁵⁰ Written statements continue to considerably form the basis of proof and decision making, since direct oral evidence is not regarded as inherently superior to written evidence.¹⁵¹ Loffelmann¹⁵² explains that in terms of CSA cases, the practice is that the judge examines the child, and during the main hearing, the written statement made to the judge is admissible. Under these circumstances, the CSA victim need not orally testify at the hearing since judges can rely on the written statements of witnesses contained in the investigative file.

Norway's system of justice, as with Germany and Austria, has many features of an inquisitorial system. The avenue of questioning a child witness through a judge outside the main hearing is the main rule, at least regarding young children. This is

¹⁴⁶ Section 241a (1) of the German Criminal Procedure Code states that '[t]he examination of witnesses under 18 years of age shall be conducted solely by the presiding judge.'

¹⁴⁷ Section 141a(2) of the Germany Criminal Procedure Code.

¹⁴⁸ *Ibid.*

¹⁴⁹ M Loffelmann 'The victim in criminal proceedings: A systematic portrayal of victim protection under German criminal procedure law' (2006)70 *Resource Material Series* 34.

¹⁵⁰ See e.g. section 249 of the Germany Criminal Procedure Code on reading out of documents. The section provides that '[c]ertificates and other documents serving as evidence shall be read out at the main hearing.'

¹⁵¹ See e.g. section 251 of the Germany Criminal Procedure Code on reading out of records. The section provides as follows: 'Examination of a witness, expert or co-accused may be replaced by reading out a record of another examination or a certificate containing a written statement originating from him 1. if the defendant has defence counsel, and the public prosecutor, defence counsel and defendant agree; 2. if the witness, expert or co-accused has died or cannot be examined by the court for another reason within a foreseeable period of time; 3. To the extent that the written record or certificate concerns the presence or the level of asset loss. Examination of a witness, expert, or co-accused may also be replaced by reading out the written record of his previous examination by a judge.'

¹⁵² Loffelmann *supra* note 149, 34; Ellison *supra* note 107, 39.

provided for under section 239 of the Criminal Procedure Act,¹⁵³ which requires children under the age of 16 years to be examined by a person qualified in handling children. The qualified person is summoned by the court and accordingly examines the child witness subject to the judicial officer's control.

In Norway, the questioning of a child witness by experts under the supervision of a judge has a very long tradition. The procedure was already introduced in 1926, and relates to the evidence of people who are mentally ill and for children under the age of 14 years.¹⁵⁴ This procedure is applied not only in connection with CSA but also in other situations. Nowadays, the interrogation by the expert under the supervision of the judge is recorded on video and then played back during the main hearing. During the questioning of the child, the judge engages a person with special competence, for example a psychologist to assist in the interrogation.¹⁵⁵ The questioning is conducted in a developmentally-appropriate manner. In practice, the interviewer first conducts an interview in accordance with his or her professional skills and when he or she considers it complete, the interviewer takes a break to consult counsel and the judge.¹⁵⁶ The judge gives both parties an opportunity to suggest topics or identify contradictions that they want investigated.¹⁵⁷ The interviewer then returns to the interview room to address these issues and then consults counsel again.¹⁵⁸ The process continues until the judge and counsel are satisfied. After this process, the case is sent to the State Public Prosecutor for indictment or withdrawal of charges. The process of examining the child is considered sufficient and the child does not have to be examined at trial.¹⁵⁹

Traditionally, Italy's system was potentially inquisitorial. Italy radically reformed its criminal procedure in 1988, superimposing an adversarial mode of procedure on an inquisitorial system.¹⁶⁰ Italy moved towards the adversarial system to arguably make their process more efficient. Currently, Italy's system is a hybrid with more adversarial

¹⁵³ Criminal Procedure Act of Norway 1981.

¹⁵⁴ C Diesen *Child abuse and adult justice: A comparative study of different European criminal-justice systems handling of cases concerning child sexual abuse* (2002)19; T Myklebust 'The position in Norway' in JR Spencer & ME Lamb (eds) *Children and cross-examination: Time to change the rules?* (2012)157-158.

¹⁵⁵ See section 239 of the Criminal Procedure Act of Norway.

¹⁵⁶ Diesen *supra* note 154; Myklebust *supra* note 154.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ See generally V Cirese & V Bertucci *The new Italian criminal procedure for foreign jurists* (1993).

features. However, although adversarial examination of witnesses is now the rule under the new Italian Code of Criminal Procedure, witnesses who are minors are still to be examined by the judge.¹⁶¹

In sum, the fact that examination of children is conducted by judges or independent expert under the supervision of the judge has implications for the emotional well-being and accurate testimony of the ACSA victim. The questioning proceeds from a non-biased point of view. For victims of ACSA, questioning will be less traumatising because it does not pursue an agenda (i.e. has no ulterior motive). This creates an environment for more accurate testimony to be obtained from the child victim. Indeed, in some inquisitorial systems like Germany's, the defence is permitted to put questions to the child witness after the judge has examined the child witness. However, because the overall duty to question the child is vested in the judge, the questioning by the parties is extremely curtailed. Where cross-examination is inappropriate, judges are more prepared to intervene in stopping the questioning. This position finds support in some studies. In a study conducted by Laximinarayan *et al.*,¹⁶² it was found that although cross-examination took place in both the adversarial and inquisitorial systems, there were differences between adversarial and inquisitorial courts concerning victims' justice perceptions. The study indicated that there were higher levels of improper questioning by defence attorneys in adversarial courts than in inquisitorial courts.¹⁶³ Thus, while cross-examination may be present in both systems, the differences in style are where the crux lies for the emotional stability of child victims. Regulation of investigative efforts expended on children's testimony is tighter in the four European systems discussed than in most adversarial systems, which notably comes on top of the protective systems (by way of protective measures) already in place.

The above systems can clearly serve as a much needed example for the benefit of South Africa and Uganda, which is not to say that the exemplary systems should be copied and grafted onto the South African and Ugandan system as is. After all the crux of the matter is:

¹⁶¹ Section 498(a) of the Italian Code of Criminal Procedure of 1988.

¹⁶² M Laximinarayan *et al.* 'Procedural and interactional justice: A comparative study of victims in the Netherlands and New South Wales' (2012)9 *European Journal of Criminology* 271.

¹⁶³ *Ibid.*

- Are adversarial systems prepared, and if so to what extent, to impose strict controls on cross-examination?
- More to the point, would it be constitutionally defensible to move away from the conventional system and increasingly embrace a new one?

7 The constitutional foundation of tightly regulating the cross-examination of ACSA victims by lawyers in adversarial systems

Cross-examination is a fundamental procedural right.¹⁶⁴ Proposed changes to testing evidence through cross-examination must be grounded in the values of South Africa's and Uganda's constitutions. For the present purposes the discussion of this issue will be confined to the South African scenario to avoid unnecessary duplication, given the similarities between the two systems as regards the matter under discussion. The accused's right to a fair trial is guaranteed under section 35(3) of the South African Constitution. The section, in part, provides as follows:

- (3) Every accused person has a right to a fair trial, which includes the right-
- (c) to a public trial before an ordinary court;
 - (d) to have their trial begin and conclude without unreasonable delay;
 - (e) to be present when being tried;
 - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - (i) to adduce and challenge evidence;

The right of the accused person to challenge evidence in accordance with section 35(3) (i) can be asserted by cross-examination. The mechanism of cross-examination is expressly recognised for both the defence and the prosecution under section 166(1) of the Criminal Procedure Act 51 of 1977 (CPA). The section reads as follows:

An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the

¹⁶⁴ Schwikkard & Van der Merwe *supra* note 110, 365. See also *S v Mgudu supra* note 112.

prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.

Traditionally and in accordance with section 166(1) above, the process of cross-examination is conducted by the parties, namely, the prosecution and the defence. As Moshidi J notes in the case of *State v Msimango & Another*,¹⁶⁵ a careful reading of section 166(1) of the CPA invests reciprocal rights in both the accused and the prosecution to cross-examine opposing witnesses, and to re-examine their own witnesses. Clearly, the performance of this role is not vested in the presiding judge because such investigation, or investigation by independent experts, would contravene section 166(1), and therefore by extension, section 35(3)(i) of the Constitution as well. However, as consistently alluded to, a fair trial entails a need to be mindful of interests of the victims of crime. It was demonstrated earlier with reference to empirical studies that some lawyers obdurately insist on inappropriate questioning that makes no allowances for children's abilities as children, which cannot be matched with adults' capacities. Further, the point was made in the preceding section that as a result of adversarial judges' umpire-like passivity, judicial intervention may not produce a wide enough umbrella of protection for witnesses in ACSA cases, which means that the stolid indifference of the judge's presence effectively allows the parties to stray into inappropriate territory in their questioning fervour. Intermediaries may likewise fall short in this regard, given the severe trauma of the ACSA victim who is sexually abused by a person in a position of trust such as a parent. As noted, some lawyers do remain within appropriate limits in furtherance of the testing of evidence, but lawyers' partisan role remains a formidable obstacle in that they are not readily steered away from the understandable motive to stray into inappropriate territory in pursuing their legal objective. Henderson notes that

'[a]llowing a partisan advocate to examine adverse witnesses produces, first, a desire to adopt [inappropriate] questioning techniques which enable the advocate to produce evidence favourable to his client, and secondly, a strong desire to utilise the examination as part of his or her case presentation... However, a highly partial examiner does at least bring one benefit. A

¹⁶⁵ *State v Msimango & another* case no: 187/2005 DPP Ref no: JPV 2005/187 para 4.

good system of testing evidence [which] will ensure that the examiner is sufficiently motivated to investigate issues which may seem distasteful, such as the possibility that the child is lying.’¹⁶⁶

Plotnikoff and Woolfson are justifiably sceptical about lawyers who refuse to take due cognisance of the needs of vulnerable child witnesses, as indicated in their observation that ‘[t]here is not much “stick” by way of incentive to abandon bad habits.’¹⁶⁷ A barrister involved in professional training concluded at a seminar on child witnesses in criminal proceedings that ‘[a]dvocates only learn when they’re under threat.’¹⁶⁸ In light of the persistence of the impasse that is troubling the outlook for improvement in the plight of vulnerable ACSA witnesses, the judicial officer would conceivably have to intervene to break the impasse by assuming a more active role in examining ACSA witnesses where the need arises. For instance, where advocates persist in applying inappropriate techniques in conducting cross-examination, it seems reasonable for judicial officers, who are ideally non-partisan, to not only stop the inappropriate mode of examination, but to also take over the role of examination. Or better still, rather than wait for the ACSA victim to be traumatised before stepping into the breach, the German approach could be adopted in that the judicial officer is authorised to take charge of the questioning part while the parties are relegated to the position of merely putting questions to the ACSA victim as a follow-up to clarify issues not addressed by the judge, rather than assuming the entire questioning exercise.

Generally, giving judicial officers a more active role in examining child witnesses may amount to tight control of the process of cross-examination, a measure that is bound to give defence attorneys in adversarial justice systems cause for concern; however, given the persistent tendency to misuse cross-examination and effectively force ACSA victims to relive the trauma of being abused by a person in a position of trust, it may be worth biting the bullet on such qualms by enabling the judicial officer to set a curb to injudicious courtroom practices where cross-examination of ACSA witnesses is concerned. Moreover, ‘the legitimate expectations of an accused under the fair trial principle are to be balanced against the needs of sexual assault complainants...’¹⁶⁹ In essence, ‘the unfettered right to cross-examine prosecution

¹⁶⁶ Henderson *supra* note 51, 73.

¹⁶⁷ Plotnikoff & Woolfson *supra* note 113, 38.

¹⁶⁸ Plotnikoff & Woolfson *supra* note 90, 14.

¹⁶⁹ Cossins *supra* note 10, 102.

witnesses is not necessarily absolute and can be subject to controls where necessary.¹⁷⁰ In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* the court brought the matter of a fair trial into clear perspective as follows:

Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures [notably, special measures]... special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all.¹⁷¹

Consider further that section 35(3)(i) of the Constitution of South Africa does not provide that the right of accused persons to challenge evidence should specifically be asserted by adverse parties. It merely underscores the right to challenge evidence. Emphasis is on the ultimate aim of cross-examination which is to challenge evidence, and not the issue of who should challenge evidence. Henderson rightly observes that '[w]hat is essential to a fair trial is that the evidence of witnesses be fairly and thoroughly tested... Cross-examination by counsel is a methodology adopted to meet a necessity - but it is not in itself fundamental.'¹⁷² This position was underscored in the 2010 case of *Re W*¹⁷³ where Lady Hale of the England and Wales Court of Appeal made a memorable and interesting ruling to the effect that: '[t]he important thing is that the questions which challenge the child's account are fairly put, not that counsel should be able to cross-examine her directly.' Therefore, although the task of cross-examination in adversarial justice systems tends to be vested in the parties, the stricture imposed where the judicial officer assumes the questioning role to protect the vulnerable witness against harsh and insensitive probing may be well worth the effort and justifiable in a free and democratic society. Technically, the judicial officer still furthers the cause of testing the evidence of the child witness.

The animadversions above are not intended to advocate for a wholesale takeover of child questioning by the judicial officer since inappropriateness (by lawyers) in this regard is not universal, and it would therefore be counterproductive to deprive lawyers

¹⁷⁰ *Ibid.*

¹⁷¹ *DPP v Minister of Justice and Constitutional Development supra* note 65, para 116.

¹⁷² Henderson *supra* note 51, 73.

¹⁷³ *Re W (Children)* [2010] UKSC, 28.

who perform their task conscientiously of the opportunity to serve their profession to the best of their ability. However, for many lawyers, the strategy was summed up by one of the lawyers who said that: 'you're looking... to make sure they make mistakes... some counsel... give double negatives to kids. And the kids get it wrong...'¹⁷⁴ It is the mindset reflected by these words that should be curbed by enabling the judicial officer to take charge of proceedings in the role of examiner to further the goal of testing and challenging the evidence of children. In fact, judicial officers should have wide latitude to exercise their discretion as the need arises. Therefore, the option for judicial officers to take on the role of examiner where the cross-examination styles of the parties traumatise children and reduce the accuracy of their evidence, should not necessarily be viewed as a miscarriage of justice or a ground of appeal. The judicial officer's role would not strictly qualify as cross-examination, but it would serve instead as a remedial inquisitorial procedure to step into the breach where the parties cannot perform the intended function by way of cross-examination. As the Constitutional Court rightly stated in *President of the Republic of South Africa and others v South African Rugby Football Union & Others* '[t]he rule [of cross-examination] is of course not an inflexible one.'¹⁷⁵ Thus in principle, the process of testing the evidence of child witnesses should not amount to a dogmatic and inflexible rule to leave judges aloof. Judicial officers need to be increasingly alert to the techniques and styles of cross-examination applied by advocates so as to be able to know at which point they need to take over the process of examining child witnesses.

Ostensibly, broader protection is accorded to ACSA victims where examination of ACSA victims is exclusively vested in the judicial officer with the parties only reserving the right to examine the child as a follow-up after the judge. This approach would still give an opportunity to advocates with good cross-examination techniques to put questions to the child witness after the child has been examined by the judicial officer. Conversely, advocates with inappropriate cross-examination techniques would still fail to benefit from follow-up cross-examination because this option would be restricted where they fail to abide by the rules. However, it is submitted that incorporation of

¹⁷⁴ E Henderson 'Persuading and controlling: The theory of cross-examination in relation to children' in HL Westcott *et al.* (eds) *Children testimony: A handbook of psychological research and forensic practice* (2002)279-283.

¹⁷⁵ *President of the Republic of South Africa and others v South African Rugby Football Union & Other supra note 117*, para 64.

inquisitorial elements; where that is envisaged for the examination of ACSA victims in adversarial systems, should not amount to a radical departure from the adversarial norm. Thus, to avoid putting potentially adversarial justice systems in the precarious position where the entire proposal could be rejected, a viable proposition seems to be the judicial officer's assumption of examination where the lawyer persistently defaults by cross-examining inappropriately. In principle, inquisitorial mechanisms would merely be integrated in the adversarial system. Such an approach would ensure that helpful inquisitorial elements such as the more active role of the judicial officer will occupy a comfortable niche in company with the well-worn practice of cross-examination by the parties.

8 Conclusion

Child sexual abuse is a distressing experience for victims. The distress is made worse where the offending party is an acquaintance. Generally, cross-examination plays a crucial role in testing the evidence of witnesses. Where it is appropriately conducted, it can expose unreliable witnesses. The procedure is therefore indispensable. However, the available research shows that over the years, some legal practitioners have been and continue to apply inappropriate techniques in cross-examining child witnesses. The inappropriate techniques fail to adapt to the vulnerabilities and the developmental abilities of child witnesses. In some instances these techniques subvert the essential purpose of cross-examination, namely to probe for and reveal the truth concerning the matter at issue, so much so, in fact, that in many instances child witnesses have been traumatised and the accuracy of their testimony has been compromised. Protective measures have been playing a significant role in improving the experiences of children in court. However, these measures can only do so much in light of the persistent inappropriate cross-examination methods adopted by some legal practitioners. This chapter has taken a cue from the experiences of selected inquisitorial systems, particularly as regards methods of testing the evidence of child witnesses. The analysis has shown that testing is more tightly regulated in inquisitorial systems. In all these systems, the process of testing the evidence of child witnesses is conducted by either the judicial officer or an independent expert who ideally proceeds from a non-biased

premise. The process is more strictly regulated in cases where the parties are given an opportunity to conduct the examination. An approach where the presiding officer plays a more active role in examining witnesses is admittedly a departure from the adversarial norm in which cross-examination is conducted by the parties, but since cross-examination is indispensable and some legal practitioners persistently fail to adapt their methods to the vulnerabilities of children, a more active role for the judicial officer seems justified. Certainly, adversarial justice systems do not necessarily have to supplant inquisitorial approaches. Rather, the ultimate goal should be to ensure that the judicial officer has a more active role and wide latitude in tightly regulating the process of cross-examination. Depending on the circumstances of each case, the judicial officer should be allowed the latitude to assume control of examination where the legal practitioner persistently fails to accommodate the vulnerabilities of ACSA victims.

A major lesson to learn from the discussed inquisitorial systems is that adversarial systems can retain their inherent adversarial nature while simultaneously fine-tuning the components of the system to address the demands of victims of crime. The inquisitorial systems discussed are typical success stories of the feasibility of making slight changes to popular norms. While these systems are strongly rooted in an inquisitorial tradition, they do possess ingrained adversarial features such as cross-examination, which are appropriately curtailed to address ever shifting priorities and competing societal demands. There is no historical precedent in inquisitorial systems to prioritise cross-examination. However, the slight changes in these systems to provide a platform for the evidence of witnesses to be tested have addressed its gaps. By analogy, adversarial systems do not have to supplant the practices of inquisitorial systems. All they need to do is draw insight from the good practices which can complement the adversarial system in order to address shifting priorities such as the plight of ACSA victims.

CHAPTER SEVEN: ASSESSING THE ROLE OF RESTORATIVE JUSTICE IN HOLISTICALLY RESPONDING TO ACSA

1 Introduction

With the majority of child sexual offences being committed by acquaintances, criminal-justice systems are confronted by the on-going pressure of striking a delicate balance between holding suspects to account while at the same time guaranteeing the best interest of the ACSA victim. The issue is multifaceted and is complicated by the fact that suspects are often caregivers in relation to victims. The problem that criminal-justice systems have to confront in these circumstances subsists in developing mechanisms that holistically protect the best interest of ACSA victims while treating ACSA seriously as an offence. Discussions have been repetitive and deadlocked. This is partly attributable to the limitation in possible alternatives. In the second chapter, it was illustrated that one of the distinctive dynamics of ACSA is the relationship between the ACSA victim, the suspect and the non-offending adults. It was illustrated further that with this nature of relationship, ACSA inevitably causes harm to the individual ACSA victim and surrounding relationships. Where this harm is disregarded in the criminal prosecution process, the best interest of the ACSA victim is nearly always compromised.

Accordingly, as one of the prerequisites for effective ACSA prosecution, the recommendation was made that criminal-justice systems should ensure that sentencing approaches take cognisance of the realities that ACSA victims face, particularly the potential harm to the ACSA victim. Criminal-justice systems have often concerned themselves, too exhaustively, with securing convictions. The consequences of criminal prosecution, such as the loss of the caregiver and the psychological harm caused to ACSA victims are sometimes left languishing. The emergence of restorative justice, however, may open new possibilities in regard to settling debates between taking ACSA cases seriously as criminal offences while attending adequately to the best interest of ACSA victims. Against this backdrop, this chapter explores the use of restorative justice as a response to the dynamics pertaining to ACSA. It is demonstrated that although child sexual offences are serious crimes, restorative justice can still have a place in their effective prosecution. The chapter therefore gears the discussion towards a conclusion that increased focus on criminalisation and penalisation alone is not likely to yield

constructive outcomes. Restorative justice proceeds from a range of innovative models that, if applied correctly, can provide a holistic response to the needs of ACSA victims. Moreover, it is demonstrated that restorative-justice processes can be duly integrated with the broader sentencing principles and guidelines that have been developed over the years. Restorative justice can therefore thrive within a potentially retributive system of justice. Criminal-justice professionals merely need to get to grips with the ideal role and place of restorative justice, on a case-by-case basis, without assuming that application of the restorative principle will ‘dilute’ the retributive agenda. The discussion is initiated by discussing the meaning of restorative justice and its potential in ACSA cases. Since Uganda’s criminal-justice system has hardly applied restorative justice, selected cases from South Africa are briefly discussed to demonstrate the accommodation of restorative justice in criminal prosecutions. The decision in the case of *S v Thabethe* is discussed in detail to underscore the exact place, limits and safeguards against misuse of restorative justice when sentencing ACSA offenders within the restorative-justice framework.

2 Meaning of restorative justice and its potential to respond to cases of serious offending

Throughout African history, traditional African conflict mechanisms have embedded values of harmony and restoration. Skelton, for instance, has argued that restorative justice is not a new concept in South Africa,¹ and that even before apartheid and colonisation, restorative justice was known and understood by people living in South Africa. She asserts that ‘[r]econciliation, restoration and harmony lie at the heart of African adjudication.’² Thus, although restorative-justice processes are generally viewed as unconventional, these processes do not seem alien to African traditional adjudication.³

Currently, it is internationally recognised that restorative justice can effectively be applied in state justice systems to respond to crime.⁴ In 2000 the United Nations

¹ A Skelton ‘Juvenile justice reform: Children’s rights and responsibilities versus crime control’ in CJ Davel (ed) *Children’s rights in a transitional society* (1999)93-94.

² *Ibid.*

³ See e.g. *Paul Francois Van Vuuren v Minister of Correctional Service* [2010] ZACC 17 para 51 and *Dikoko v Mokhatla* 2007 (1) BCLR 1 paras 68, 86 & 114, in which the Constitutional Court located restorative justice within African norms and values such as ‘Ubuntu.’

⁴ See generally United Nations Economic and Social Council *United Nations Economic and Social*

Congress on Crime Prevention developed a draft proposal for the *United Nations Basic Principles on the use of Restorative-Justice Programmes in Criminal Matters* (The Basic Principles). The proposal adopted by the United Nations in 2002 encourages the use of restorative justice at all stages of the criminal-justice process; underscores the voluntary nature of participation in restorative-justice processes; and recommends the establishment of standards and safeguards for the use of restorative-justice processes.⁵ The Basic Principles were preceded by the United Nations Standard Minimum Rules for Non-custodial Measures of 1990.⁶ Although these rules do not explicitly entrench and further the role of restorative justice in criminal matters, they underscore the need to involve all parties affected by the crime in addressing the harm caused by crime.⁷ The United Nations notes that these rules represent an important step in increasing the effectiveness of society's response to crime.⁸ On balance, the current international framework generally makes room for criminal-justice systems to incorporate restorative-justice processes at all levels of the criminal-justice process.

There is no universally accepted definition of restorative justice. Zehr defines it as 'a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.'⁹ Marshall defines it as 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'¹⁰ According to the UN Basic Principles,

[a] restorative process means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate

Council Resolution 2002/12: Basic Principles on the Use of Restorative-Justice Programmes in Criminal Matters, 24 July 2002, E/RES/2002/12. Available at: <http://www.refworld.org/docid/46c455820.html> (accessed 1 April 2015).

⁵ *Ibid.*

⁶ United Nations General Assembly *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): resolution / adopted by the General Assembly*, 2 April 1991, A/RES/45/110. Available at: <http://www.refworld.org/docid/3b00f22117.html> (accessed 1 April 2015).

⁷ *Ibid.*

⁸ United Nations *Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures* (1993)2.

⁹ H Zehr *Changing lenses-A new focus for crime and justice* (2005)271; H Zehr *The little book of restorative justice* (2002)37.

¹⁰ T Marshall 'The evolution of restorative justice in Britain' (1996) 4 *European Journal of Criminal Policy & Research* 37.

together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.¹¹

Scholars in South Africa have also given meaningful content to the concept. For example, Batley describes it as:

processes [which] focus on relationships and create opportunities for individual, family and community restoration and reconciliation. In doing so they open up new social spaces for offenders and nurture social inclusion. They also help offenders accept responsibility and help all parties manage the process of release from prison.¹²

Batley makes use of the *Sotho* words *Ngwana phosa dira ga a bolawe* (meaning, '[i]f a person has erred he does not deserve to be punished too harshly') to locate restorative justice within the broader framework of African traditional justice.¹³ To Batley, the typical outcomes of restorative justice are an apology, restitution, performance of some services for the victim, performing community service, and referral of the offender to some form of assistance programme.¹⁴ According to Mousourakis 'restorative justice refers to a range of informal justice practices drawing on a common set of values and a philosophy that calls into question many of the objectives and methods of traditional criminal-justice systems.'¹⁵ Tshehla uses the words 'restore', 'make right' and 'mend'¹⁶ to describe restorative justice while Bezuidenhout views it as 'a philosophical paradigm for responding to crime and an effort to repair the damage caused by a wrongdoing.'¹⁷

There have been defensible arguments that the existing conventional responses to crime provide incomplete redress to victims.¹⁸ Hoyano and Keenan, for instance, have argued that often 'the criminal law is retrospective and punitive, [only focussing] on whether the alleged abuser deserves punishment. The criminal law [often] does not

¹¹ UN Basic Principles *supra* note 4, para 2.

¹² M Batley 'Ngwana phosa dira ga a bolawe: The value of restorative justice to the reintegration of offenders' (2008)26 *SA Crime Quarterly* 27.

¹³ Batley *supra* note 12, 34.

¹⁴ Batley *supra* note 12, 28.

¹⁵ G Mousourakis 'Restorative justice: Some reflections on contemporary theory and practice' (2004)29 *Journal for Juridical Science* 2.

¹⁶ B Tshehla 'The restorative justice bug bites the South African criminal-justice system' (2004)17 *SACJ* 6.

¹⁷ C Bezuidenhout 'Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?' (2007)20 *Acta Criminologica* 44.

¹⁸ K Daly 'Conventional and innovative justice responses to sexual violence: Australian centre for the study of sexual assault' (2011)12 *ACSSA* 11.

consider how the victim's best interests may be served in the future.'¹⁹ McLachlin sums up this dilemma by stating that '[t]he criminal law is the most powerful tool at parliament's disposal. Yet it is a blunt instrument whose power can also be destructive of family and ... relationships.'²⁰ Hargovan adds that the conventional retributive and punitive approach fails to address the needs of crime victims, communities and offenders.²¹ Notably, reforms have mainly focused on law violation, the need to hold suspects accountable and to punish them and other state interests. The victims of crime take on the role of mere witnesses with the state being the complainant. The voices of victims are hardly heard except in their capacity as witnesses. When prosecution does take place and offenders are convicted, the punishment of the offender often does not holistically devolve to the complainant's benefit.²² In offences committed by acquaintances, the emotional, psychological and welfare dimensions of the offence are routinely ignored by the justice system. These, however, are critical dimensions that need due consideration if the best interest of ACSA victims is to be guaranteed.

It is also notable that despite the limitations of criminal prosecution in dealing with offending by acquaintances, 'it remains the strongest formal condemnation that society can inflict.'²³ Hoyano and Kennan add that child sexual abuse (CSA) is taken very seriously in society and it would be unthinkable for the criminal law not to be part of the response.²⁴ The same authors warn, however, that 'it is easy to overstate the power of the criminal law as a force for constructive help in cases of child abuse.'²⁵ By the same token, Wattam asks: '[s]hould we prosecute and be damned, or leave the legal system as it stands and ask a different question, [namely], what sort of help do children and families need?'²⁶ Harshbarger (in reply) submits that the criminal-justice system is authorised to decide what sentencing disposition is appropriate for an offender given

¹⁹ L Hoyano & C Keenan *Child abuse: Law and policy across boundaries* (2007)122.

²⁰ *Canadian foundation for children and the law v Canada (Attorney General)* 2004 SCC 4 (SCC).

²¹ H Hargovan, book review on 'Restorative justice and victimology: Euro-Africa perspectives' (2013)43 *SA Crime Quarterly* 39.

²² With respect to child sexual offences, see CR Massat & M Lundy 'Reporting costs to non-offending parents in cases of intrafamilial child sexual abuse' (1998)77 *Child Welfare* 371; JEB Myers 'The legal response to child abuse: In the best interest of children?' (1985-1986)24 *J FAM L* 179-81; RJR Levesque 'Prosecuting crimes against children: Time for outrageous proposals' (1995)19 *Law and Psychology Review* 59.

²³ A Ashworth *Principles of criminal law* (2006)1.

²⁴ Hoyano & Keenan *supra* note 19, 122.

²⁵ *Ibid.*

²⁶ C Wattam *Kids on film: Community care* (1993)21.

the totality of circumstances, hence that criminal prosecution does not necessarily stand aloof from the interests of victims,²⁷ on the contrary that criminal prosecution can take due cognisance of ACSA victims' interests, thereby minimising the negative effects of criminal prosecution and affirming the notion that the offender's behaviour is unacceptable and is not to be tolerated. It then becomes incumbent upon criminal-justice systems to devise mechanisms that can holistically safeguard the interests of victims of crime. It is precisely the gaps apparent in conventional criminal justice that restorative justice can fill.

Outside Africa the role of restorative justice has been visible in a number of criminal-justice systems (e.g. New Zealand, Canada, Australia),²⁸ and in South Africa the principle has become evident in criminal prosecution. Hargovan's²⁹ study on knowledge, training and actual adoption of restorative approaches to justice by prosecutors in KwaZulu-Natal Province (in South Africa) documented the added value where offences such as assault, theft, malicious damage to property, shoplifting, *crimen injuria* and vandalism are concerned, demonstrating that restorative justice added a useful dimension to the conventional justice system by helping to lower the case backlog, allowing the court to utilise existing capacity for serious offences, and thereby improving the efficiency of the courts. According to Hargovan's study restorative justice processes also provided victims and suspects with an opportunity to participate in a

²⁷ S Harshbarger 'Prosecution is an appropriate response in child sexual abuse cases' (1987)2 *Journal of Interpersonal Violence* 108-112.

²⁸ Ministry of Justice of New Zealand *Restorative-justice standards for sexual offending cases* (2013) 28. The Ministry of Justice of New Zealand, for instance, emphasises that, given the uniqueness of sexual offences, the need to transform the abusive relationship is critical. The ministry adds that often, the longstanding harms need repair. In this regard, the ministry underscores the critical role of restorative justice; K Daly *et al.* 'Youth sex offending, recidivism and restorative justice: Comparing court and conference cases' (2013)46 *Australian and New Zealand Journal of Criminology* 245. Daly *et al.* evaluated the youth restorative-justice conferencing scheme of South Australia over a period of almost seven years. The scheme is used as a diversionary tool in some youth sexual offence matters in South Australia. The young person concerned must accept responsibility in order to access a conference, but no formal finding of guilt is recorded. Either the court or the police can make a referral, and specialist youth justice coordinators facilitate and organise the conferences. Most conferenced sexual assault matters are intrafamilial. Matters that have been conferenced include rape and indecent assault. Daly *et al.* found that the scheme had the potential to offer victims a greater degree of justice than conventional court processes. Also, the conference penalties did more for victims than court-ordered penalties; S Julich *et al.* 'Yes, there is another way!' (2011)17 *Canterbury Law Review* 223. Julich *et al.* observe that Project Restore, a restorative-justice initiative in New Zealand, has great potential in addressing cases of serious offending especially those committed by acquaintances.

²⁹ H Hargovan 'A balancing act for the prosecutor: Restorative justice, criminal justice and access to justice' (2012)42 *SA Crime Quarterly* 19.

process that attempted to redress the harm caused by the offence or wrongdoing in a more holistic way. As noted, ACSA causes substantial harm to both the victim and the surrounding community. Because of the harm caused, the need for a collective and humane approach that hinges on responsibility being taken by the offender and attempting to repair the harm is critical. Restorative justice is a useful aid to this project. Skelton and Batley may therefore be right to argue that cases of serious offending should not be placed out of the reach of restorative justice because the harm caused by serious offending warrants an approach that addresses the harm.³⁰

The potential of restorative justice to address the limits of the retributive approach to ACSA lies in a number of notable factors. Firstly, restorative justice furthers victim participation and gives voice to the victim. This is in view of the fact that within the restorative-justice framework, crime is viewed not merely as an offence against the state, but also, a direct violation of a particular person's rights and relationships.³¹ The primary stakeholders are understood to be individual victims, offenders and the immediate community affected by the crime.³² Secondly, because crime often leads to a breakdown in relationships, restorative justice has the potential to repair this harm. This is in view of the fact that within the restorative-justice paradigm, crime is viewed as infliction of harm on individual victims and breakdown of relationships.³³ In fact, a primary aim of restorative justice is to rebuild broken relationships.³⁴ Thirdly, restorative justice opens the door to consideration of the interests of all those affected by the crime, particularly the immediate community, the object being to ensure that the interests of persons most affected by the crime (primary and secondary) are addressed comprehensively.³⁵ Wherever possible, a platform is created for the interests of all those affected.³⁶

³⁰ A Skelton & M Batley 'Restorative justice: A contemporary South Africa' (2008)21 *Acta Criminologica* 39 & 43.

³¹ Zehr *supra* note 9; Marshall *supra* note 10; UN Basic Principles *supra* note 4.

³² H Zehr & H Mika 'Fundamental concepts of restorative justice' in E McLaughlin *et al.* (eds) *Restorative justice: Critical issues* (2004)41.

³³ Zehr *supra* note 9, 271; Marshall *supra* note 10, 37; UN Basic Principles *supra* note 4; Zehr & Mika *supra* note 32, 41; United Nations Office on Drugs and Crime *Handbook on Restorative Justice-Programmes* (2006) 8 (UN Handbook).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ J Paulin *et al.* *The Wanganui Community-Managed Restorative Justice Programme: An Evaluation* (2005)38. The authors evaluated one of the restorative-justice programmes in New Zealand. Community members actively participate in this programme. The members, who are either

3 Accommodation of restorative justice as evident in selected South African case law

Restorative justice has grown in stature and impact in recent years to the extent that it has won approval from South Africa's judiciary. In the judgment of *S v Shilubane*,³⁷ Bosielo J, amongst others, took cognisance of the limits of retributive justice in addressing crime, consequently urging presiding officers to be more 'innovative and proactive' in handing down sentences. A similar message was echoed by the court in *S v Maluleke*, with Bertelsmann J categorically pointing out that courts should not be deterred from exploring the feasibility of

exciting and vibrant potential alternative sentences [in the criminal-justice system] ... restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society thereby. In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender, and the community and the offender.³⁸

In the case of *Dikoko v Mokhatlo*, a case pertaining to civil damages, the Constitutional Court made interesting and memorable observations on the need for restorative paradigms within the current justice systems. Makgoro J ruled categorically that

the law as presently understood and applied does little to encourage repair and reconciliation between parties...courts should attempt, wherever feasible, to re-establish dignified and respectful relationships between parties...the goal should be to knit together shattered relationships in the community and to encourage across-the-board respect for the basic norms of human and social interdependence.³⁹

Similarly in *S v M*,⁴⁰ the Constitutional Court affirmed the role of restorative justice, with Sachs J ruling that restorative justice recognises the community rather than criminal-justice agencies as the prime site of crime control. The Constitutional Court's decision in

affected by the crime or can meaningfully inform the outcome contribute to the restorative-justice meetings by suggesting options.

³⁷ *S v Shilubane* 2008 (1) SACR 295 (T) 297.

³⁸ *S v Maluleke* 2008 (1) SACR 49 (T).

³⁹ *Dikoko supra* note 3, paras 33 & 34.

⁴⁰ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 62.

*Le Roux v Dey*⁴¹ similarly underscored the role of restorative justice in cases involving ruptured personal relationships. In *The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)*, the Constitutional Court located restorative justice within the wider framework of African values such as ‘Ubuntu’, with Mogoeng J ruling that ‘[a] forgiving and generous spirit, the readiness to embrace and apply restorative justice, as well as a courteous interaction with others, were instilled even in the young ones in the ordinary course of daily discourse.’⁴² A case that has recently dealt with the role of restorative justice in criminal proceedings is *S v Tabethe (Thabethe case)*.⁴³ This case forms the crux of the discussion on the feasibility of a restorative approach in sentencing child sexual offenders.

It is also notable that despite the growing popularity of restorative justice, its integration in national criminal-justice systems is fraught with difficulties. Tshehla has observed that in South Africa’s potentially retributive system of justice, restorative justice still struggles to sit comfortably alongside the retributive system.⁴⁴ Hargovan is equally critical of the practical application of restorative justice, observing that its development, application and implementation continues to be haphazard and inconsistent.⁴⁵ These observations seem justified in light of the inconsistent reception of restorative justice by the courts. Presently, despite its acceptance by the Constitutional Court, the divergent decisions of the High Court and the Supreme Court of Appeal in cases such as *Thabethe* suggest that restorative-justice initiatives are persistently mired in incomprehension and deficient application.

Given this background the following discussion seeks to provide an assessment of the exact role and place of restorative justice in sentencing practice observed in ACSA cases as seen in context with international standards and scholarly writing on the subject. Since the *Thabethe* case is placed at the heart of the discussion, the facts of the case and the decision of the High Court and the Supreme Court of Appeal are briefly discussed.

⁴¹ *Le Roux v Dey* 2011 (3) SA 274 (CC) para 202.

⁴² *The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)* 2011 (4) SA 191 (CC) para 217.

⁴³ *S v Tabethe* 2009 (2) SACR 62 (T) (*Thabethe case*).

⁴⁴ Tshehla *supra* note 16, 2.

⁴⁵ H Hargovan ‘Evaluating restorative justice: Working out what works’ (2011)24 *Acta Criminologica* 69. See also Hargovan *supra* note 29, 14.

4 The *Thabethe* case

4.1 Background

The accused was found guilty of the rape of a daughter of his life companion. The rape occurred when the complainant was 15 years of age. A day after the sexual intercourse with the complainant, the accused reported the sexual intercourse to the police and voluntarily handed himself over. At the time of the offence, the accused had for some years been staying with the victim's mother. For some time before the rape in question, the accused had been providing for the family consisting of himself, the victim's mother, the victim, the victim's younger sister and a boy who was born of the union between the accused and the victim's mother prior to the offence. Another son was born to the victim's mother before the trial was concluded. The accused was also the father to the latter son. He pleaded guilty to the rape charge and was convicted.

4.2 Judgment on sentence by the High Court

The complainant, a CSA victim, stated at the sentencing stage in High Court that she was still deeply hurt by the fact that she had been subjected to a violent offence by a man she had trusted. On the other hand, she pleaded that the accused should not be sent to jail because the entire family, including herself, depended on his income. One of her siblings was chronically ill and the accused provided for her medical treatment. She herself was still attending school and needed his support to continue her education. The court made known to the victim that she had an inalienable right to convey her own emotions, feelings and convictions, her own view of a suitable sentence for the accused, and that the court was obliged to take due cognisance of her wishes and sentiments. The complainant reiterated that she regarded it as being in the best interests of her family, herself and her further schooling that the accused should not be sent to a correctional institution. The court found that the facts of the case presented an opportunity in which 'restorative justice could be applied in full measure.'⁴⁶ The court accordingly made use of a victim/offender programme that was aimed at creating a platform for the complainant to express her views concerning the offence, and for the benefit of all who were affected by the crime. The program involved the accused and the victim, under the guidance of the local probation officer and supervised by the Restorative Justice Centre

⁴⁶ *Thabethe* case *supra* note 43, para 36.

in Pretoria. The court was of the view that the programme was essential in determining whether the wishes expressed by the complainant regarding the sentence of the accused were indeed genuine and had a realistic prospect of being realised for the benefit of all concerned.

During the program, a meeting was arranged between the offender and the victim, during which the accused formally apologised for his misdeed, which apology she accepted. All the discussions were recorded by the probation officer. When an appropriate sentence for the accused was discussed, the record indicated that the victim was satisfied that the offender had used the programme effectively to apologise for what he had done to her. She further indicated that she would be satisfied with any sentence that the court imposed, although her wish was not to see the offender being sentenced to imprisonment. After assessing the outcome of the restorative-justice programme the court found that there were a number of substantial and compelling circumstances that individually and collectively justified the imposition of a lesser sentence than the minimum sentence of life imprisonment prescribed by Act 105 of 1997 in Part 1 of Schedule 2 thereto, read with section 51 of the Act. The substantial and compelling circumstances were as follows:

- The accused pleaded guilty and was genuinely remorseful;
- The accused remained involved as caregiver in the family he had been supporting;
- The accused had supported the family, including the victim, throughout the period from commission of the offence to the end of the trial;
- The accused maintained his employment and fulfilled his obligations towards the family throughout the period of the trial;
- If the accused were to be sentenced to imprisonment he would lose his employment and income, and the family would lose its only source of support. This would most likely lead to the loss of the family home;
- The accused did not present a threat to the community and was highly unlikely to reoffend;
- The family was entirely dependent on the accused;

- In token of this fact the victim had concluded that incarceration of the offender would not be in the family's interest.⁴⁷

In light of the above circumstances, Bertelsmann J, having found the case appropriate for the application of restorative justice, sentenced the accused to ten years imprisonment, suspended for five years, subject to certain conditions.⁴⁸

4.3 A reversal in the Supreme Court of Appeal (*Director of Public Prosecution, North Gauteng v Thabethe*)⁴⁹

The Director of Public Prosecutions opposed the decision of the High Court on sentence and therefore appealed in the Supreme Court of Appeal, submitting that given the nature and gravity of the offence, and the fact that the legislature prescribed life imprisonment as the minimum sentence for this offence, the restorative-justice sentence imposed by the High Court was inappropriate. The father-daughter relationship between accused and complainant implying trust was an aggravating element. Imposing a restorative sentence, the state argued, had the effect of trivialising the offence. Additionally, it was the state's contention that the High Court placed inordinate emphasis on the personal circumstances of the respondent at the expense of the seriousness of the offence and the interests of society. The appellant argued further that section 51(5) (a) of the minimum sentences legislation prohibited the suspension of the operation of the minimum sentence provisions in respect of this type of offence.

In the Supreme Court of Appeal's judgment, Bosielo J cautioned 'against the use of restorative justice as a sentence for serious offences.'⁵⁰ Bosielo J was persuaded that although the facts of the case presented compelling circumstances, a sentence 'based on restorative justice' was inappropriate.⁵¹ The court ruled further that in terms of sections 51(5) (a) and section 294(4) of the Criminal Procedure Act the sentence could not be suspended, therefore the High Court sentence had to be set aside. In the result, the Supreme Court of Appeal upheld the appeal, consequently replacing the High Court sentence with 10 years' imprisonment.⁵²

⁴⁷ *Thabethe case supra* note 43, para 35.

⁴⁸ *Thabethe case supra* note 43, para 41.

⁴⁹ *Director of Public Prosecution, North Gauteng v Thabethe* 2011(2) SACR 567 (SCA).

⁵⁰ *DPP v Thabethe supra* note 49, para 20.

⁵¹ *DPP v Thabethe supra* note 49, para 22.

⁵² *DPP v Thabethe supra* note 49, para 31.

In light of the divergent decisions handed down by the High Court and the Supreme Court of Appeal, a conclusion cannot be easily reached as to which court was correct and which one was wrong. It appears that at the sentencing stage the High Court decision failed to strike a proper balance between retribution, deterrence and restorative justice. Conversely, while the Supreme Court of Appeal took cognisance of the need for serious offending to be taken seriously, it appears that the court failed to appreciate the fact that restorative justice can co-exist alongside retributive justice. This divergence suggests the need for directions on how to arrive at an appropriate sentence when sentencing within the restorative-justice framework.

5 Divergence in the decisions of the High Court and the Supreme Court of Appeal respectively, and the future of restorative justice

According to the Supreme Court of Appeal's dictum in *Director of Public Prosecution, North Gauteng v Thabethe (DPP v Thabethe)* it would appear that cases of serious offending such as ACSA are currently placed beyond the reach of restorative justice. The pronouncements of the Supreme Court of Appeal are bold and instructive, having major implications for the future administration of justice. Particularly, the divergent decisions of the two courts could close the doors of restorative justice in all cases of serious offending or leave its application in the balance. It is interesting that there is a growing body of literature and strong evidence suggesting that restorative-justice initiatives can in fact have a critical role in cases of serious offending, particularly at the sentencing stage.⁵³ This is an important finding for the debate about the future of restorative justice, not only in South Africa, but also in other criminal-justice systems. It puts to question the strong pronouncements against the role of restorative justice in cases of serious offending such as ACSA. The divergence in the decisions of the High Court and Supreme Court of Appeal leaves a series of unanswered questions. The issue

⁵³ MP Koss *et al.* 'Restorative justice for sexual violence: Repairing victims, building community, and holding offenders accountable' (2003) *Annals New York Academy of Science* 384-396; MP Koss 'Restoring rape survivors: Justice, advocacy, and a call to action' (2006) *Annals New York Academy of Sciences* 206-234; K Daly 'Sexual assault and restorative justice' In H Strang & J Braithwaite (eds) *Restorative justice and family violence* (2002)62-88; K Daly 'Setting the record straight and a call for radical change: A reply to Annie Cossins on restorative justice and child sex offences' (2008)48 *British Journal of Criminology* 359-378; A Massey & S Julich 'Views of justice among survivors of historical child sexual abuse: Implications for restorative justice in New Zealand' (2006)10 *Theoretical Criminology* 125-138.

addressed in this part of the chapter is whether restorative justice can be relevant in serious matters such as ACSA, and if so, to what extent. The role and weight of victim impact statements in furthering restorative outcomes is assessed and the question of ensuring consistency between restorative and prescribed sentences is addressed.

5.1 The place of restorative justice in cases of serious offending

There has been a noticeable trend in the manner in which the courts are approaching restorative justice in cases of serious offending. In *Mtshabe v The State* (*Mtshabe case*), Jansen J ruled as follows: ‘This is not an appropriate case for restorative justice to be applied [because] the seriousness of the conduct involved in this matter is such that the principles of restorative justice, useful and important as they may be in the abstract, have no application to the facts before us.’⁵⁴ A similar tone was evident in the pronouncements of Bosielo J in *DPP v Thabethe*, ruling as follows: ‘I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences... in the result, the sentence imposed by the court below is set aside and replaced with 10 years’ imprisonment.’⁵⁵ What is striking about the decision of the Supreme Court of Appeal in *DPP v Thabethe* is not the fact that the court substituted a suspended sentence for a custodial sentence of 10 years, but some of the reasons that the court gave for its revised decision. The court reasoned, for example, that restorative justice, as an alternative form of sentencing, was not appropriate because the offence was serious, hence the revision.⁵⁶ The available body of literature demonstrates that this position has many adherents who consider that juvenile and minor offending constitute the proper and only domain for restorative justice.⁵⁷

For many opponents of restorative justice, cases of serious offending are an inappropriate and unsuitable area for the application of restorative justice. Bezuidenhout, for instance, is particularly critical of the role of restorative justice in cases of serious offending such as terrorist acts, murder and rape.⁵⁸ To Bezuidenhout, recourse to restorative justice in cases such as these is ‘unrealistic.’ To her credit, however, Bezuidenhout correctly acknowledges and underscores the need for balance

⁵⁴ *Mtshabe v The State* Case No.: CA & R 122/07 (unreported).

⁵⁵ *DPP v Thabethe supra* note 49, paras 20 & 22.

⁵⁶ *DPP v Thabethe supra* note 49, para 31.

⁵⁷ See e.g. A Cossins *Alternative models for prosecuting child sex offences in Australia: Report of the National Child Sexual Assault Reform Committee* (2010)365.

⁵⁸ Bezuidenhout *supra* note 17, 56.

between retributive justice, restorative justice and rehabilitation.⁵⁹ The underlying reason for opposition to the idea of restorative justice is that it is considered a 'too lenient' response to serious offending, as a 'soft option',⁶⁰ a form of 'cheap justice',⁶¹ 'an easy way out'⁶² for offenders, and a 'concoction.'⁶³ The argument advanced by opponents therefore is that restorative-justice initiatives diminish the goal of full accountability, reinforce and justify the belief that crime is after all not wrong and in fact excusable. It has also been argued that initiatives geared towards dialogue, damage repair and future or immediate reintegration of the offender cannot benefit the offender because serious offenders, it is argued, can best respond to punishment and deterrence.⁶⁴

A conclusion on whether or not restorative justice should be applied in ACSA cases cannot be drawn without getting to grips with the controversial issues pertaining to the scope of restorative justice. As Curtis-Fawley and Daly put it, 'people get stuck in having a too literal interpretation of the words 'restorative' and 'restoration.'⁶⁵ For instance, restorative justice continues to be generally limited to diversion of suspects from the retributive system of justice. Gxubane has pointed out that the tendency for criminal-justice systems to place cases of serious offending out of the reach of restorative justice partly stems from the misguided view that restorative justice only entails diversion of suspects.⁶⁶ Gxubane adds that the important restorative element in

⁵⁹ *Ibid.*

⁶⁰ M Batley 'Restorative justice in the South African context' in T Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005)29. Batley observes that a major challenge for reception of restorative justice is the tendency to view it as a soft option that ignores the need for punishment.

⁶¹ D Coker 'Enhancing autonomy for battered women: Lessons from Navajo peacemaking' (1999)47 *UCLA Law Review* 15.

⁶² See National Prosecuting Authority of South Africa 'Guidelines for restorative justice for prosecutors' (2010)5. Available at [www.npa.gov.za/UploadedFiles/RJ%20Guidelines%20\(4\).pdf](http://www.npa.gov.za/UploadedFiles/RJ%20Guidelines%20(4).pdf) (accessed 2 November 2014). The National Prosecuting Authority sets the record straight, observing that contrary to popular belief, restorative justice 'is not the easy way out.' Rather, it is a valuable paradigm that connects the offender with the victim in order to enable them to restore broken relationships (if that is the goal).

⁶³ See *Gwebu v Minister of Correctional Services* 2014 (1) SACR 191 (GNP) para 5, in which the court declared as follows: 'This so-called "restorative justice" concept is a fabrication of a process... The whole process is an illegal concoction...'

⁶⁴ AE Acorn *Compulsory compassion: A critique of restorative justice* (2004)47.

⁶⁵ S Curtis-Fawley & K Daly 'Gendered violence and restorative justice: The views of victim advocates' in K Heimer & C Kruttschnitt (eds) *Gender and crime: Patterns of victimisation and offending* (2006)235.

⁶⁶ T Gxubane 'Restorative justice with youth sex offenders: Issues for practice' (2014) 26 *The Social Work Practitioner-Researcher* 242.

contexts such as sentencing is largely overlooked by some opponents of restorative justice.⁶⁷ There is also a tendency to confuse and lump restorative justice together with the whole spectrum of rehabilitative and traditional justice processes. Moreover, the term 'restorative', is interpreted as a simplistic matter of quantifiable 'payback'.⁶⁸ For some, restorative justice is tantamount to non-custodial sentences or total absence of punishment,⁶⁹ an idea that may be attributable to the misconception that restorative-justice processes cannot be equated with the status of formal criminal-justice processes.

However, detailed scrutiny of research and scholarly writings on restorative justice over the years reveals precise clarity on a number of issues that tend to blur the precise meaning of restorative justice. For instance, although restoration may be a desired aim of the process, the fact that reconciliation is not secured does not render the process less of a restorative-justice process. Daly⁷⁰ submits that immediate reconciliation should not be automatically expected and ought not to be a test for the feasibility of restorative justice because recovery may take a long while. Further, while restorative justice may entail diversion of suspects, restorative-justice processes are not exclusively limited to diversion. '[D]iversion is just one of several legal contexts (not goals) of restorative justice.'⁷¹ Batley also offers persuasive guidance that can help criminal-justice professionals to understand what restorative justice is, and what it is not, in cases of serious offending:

Applying restorative-justice principles and processes in rape and murder cases does not imply minimising the seriousness and tragedy of such incidents, nor does it suggest that perpetrators should be left off the hook simply because they have apologised. Serious cases present excellent opportunities for victims to feel that they are heard, and for perpetrators to be confronted with the real consequences of their actions. Specific steps can also be taken to ensure that victims are

⁶⁷ Gxubane *supra* note 66. See also B Naude & D Nation 'An analysis of cases referred to restorative justice in the Tshwane Metropolitan Area' (2007)20 *Acta Criminologica* 138-153. Naude and Nation have observed that most cases are referred at the pre-trial phase for diversion purposes and restorative justice is rarely adopted at the sentencing and post-sentencing phase.

⁶⁸ *Ibid.*

⁶⁹ For instance, in the *Mtshabe* case *supra* note 54, para 13, the court declared as follows: 'On our understanding of the concept [of restorative justice], it involves a shift in emphasis in appropriate cases from retribution...' Such a declaration suggests that many criminal-justice professionals assume that restorative justice means the total absence of punishment. See also P Garvey 'Restorative justice, punishment, and atonement' (2003) *Utah Law Review* 303 & 317. Garvey convincingly demonstrates that contrary to popular assumption, restorative justice does not *per se* eliminate the idea of punishment.

⁷⁰ Daly *supra* note 53, 562.

⁷¹ *Ibid.*

not dealt with insensitively, as restorative justice seeks to promote the respect and dignity of all concerned, especially those who have been hurt.⁷²

From an international standpoint, the UN Basic Principles and the UN Handbook on restorative-justice programmes recommend that member states define the appropriate use of restorative justice to the effect that the focus is on relevant issues rather than the nature of the offence.⁷³ The United Nations makes it clear that restorative justice has ‘a range of measures that are flexible in their adaptation to established criminal-justice systems and that complement those systems.’⁷⁴ Impressively therefore, the UN Basic Principles do not concentrate on the nature of the offence but on the legal safeguards against abuse of restorative processes.⁷⁵ The import of this is that, what matters are sufficient safeguards, and when and how the initiatives should be applied after careful consideration. Restorative justice can be invoked at multiple stages including pre-charging, pre-sentencing in the form of sentencing advice to the presiding judge, post-sentencing, post-conviction, in prison, prior to prison release and as total diversion, or even after prison.⁷⁶ At this stage, restorative justice serves as a vehicle to increase the participation of the victim, offender and the community. What this means is that it is quite possible for the seriousness of the offence to be endorsed through a custodial sentence, while at the same time furthering restorative-justice outcomes. It is therefore important to get to grips with the fact that sentencing within the restorative-justice framework does not necessarily mean getting rid of criminal penalties such as custodial sentences.⁷⁷ Barton⁷⁸ submits that ‘some appropriate level and form of punitiveness will enhance the effectiveness of the restorative-justice response.’ The import of this is that restorative-justice processes can

⁷² Batley *supra* note 60, 31.

⁷³ See generally the UN Basic Principles *supra* note 4. It is apparent that as opposed to being concerned with the kind of restorative justice that should be applied, the Principles are more concerned with safeguards such as sufficient evidence to warrant a charge, safety of the victim, and consent of parties to participation in restorative-justice processes.

⁷⁴ UN Basic Principles *supra* note 4, the preamble.

⁷⁵ Such safeguards include victims’ and suspects’ rights to consult legal counsel, as well as translation and interpretation services where necessary; minors’ right to the assistance of parents or guardians; parties’ right to be fully informed of their rights, judicial supervision of agreements and when appropriate, etc..

⁷⁶ UN Handbook *supra* note 33, 14-15.

⁷⁷ Garvey *supra* note 69, 303. Garvey, has argued that despite what some proponents of restorative justice assert, restorative justice does not insist on total exclusion of punishment.

⁷⁸ C Barton ‘Empowerment and criminal justice’ in H Strang & J Braithwaite (eds) *Restorative justice: Philosophy to practice* (2000)62.

still influence the sentencing decision of court within prescribed sentencing guidelines, including guidelines that prescribe custodial sentences. With specific regard to the *Thabethe* case, Mujuzi has correctly observed that even if a custodial sentence was handed down by the High Court, it would not necessarily have closed the door to furtherance of the goals of restorative justice such as reconciliation, participation and forgiveness.⁷⁹

Thus, a blanket exclusion of restorative-justice initiatives in cases of serious offending such as ACSA is problematic in the sense that it conveniently ignores the diversity and flexibility of restorative-justice processes and the multiple stages at which the processes can be introduced. Indeed, petty offences may be diverted without a trial but serious offences can still benefit from restorative-justice initiatives before sentencing, after sentencing or prior to prison release. Skelton and Batley⁸⁰ submit that the cases that are referred for a restorative-justice process at the pre-sentencing and sentencing stages would typically be more serious than those referred at a pre-trial stage. It is accordingly submitted that on a case-by-case basis, restorative-justice initiatives should have a place in cases of serious offending; certainly with sufficient safeguards such as ensuring that such initiatives are sanctioned and supervised by court, and as was the approach in the *Thabethe* case, having restorative-justice initiatives sanctioned by the court so that the court retains oversight over the proceedings.⁸¹

Another safeguard in the above regard pertains to having an integrated approach involving linkage of restorative justice to and constrained by conventional criminal-justice processes. With an integrated approach, restorative justice does not displace the adjudicating role of the current formal criminal-justice system neither does it bar ACSA charges from being preferred. Indeed, invoking restorative-justice initiatives should not necessarily be tantamount to a displacement of criminal penalties. Rather, the conventional criminal-justice system should incorporate restorative-justice initiatives in the justice process, with a restorative platform being an additional tool that ensures

⁷⁹ JD Mujuzi 'Sentencing' (2011)3 *SACJ* 405-407.

⁸⁰ Skelton & Batley *supra* note 30, 44.

⁸¹ *Thabethe* case *supra* note 43, para 26. As per this case, the restorative-justice program was sanctioned by the court. The program involved the accused and the victim. As an appropriate safeguard, the program was guided by the local probation officer and supervised by the Restorative-Justice Centre in Pretoria.

that the criminal prosecution process accommodates the needs and interests of the ACSA victim and all the children affected by the crime. Consequently, instead of considering which system is the most effective at punishing the offender, the more pressing matter should be how the retributive and restorative processes can complement and check each other to afford ACSA victims the broader protection envisaged.

5.2 The role and place of victim impact statements in the furtherance of restorative-justice outcomes in ACSA cases

In the *Thabethe* case the complainant was given an opportunity to explain to the court how the crime had affected her. According to the complainant, she was still deeply hurt by the fact that she had been subjected to a violent offence by a man she had trusted. On the other hand she pleaded that the accused should not be sent to jail because the entire family, including herself, depended on his income. One of her siblings was chronically ill and the accused provided for her medical treatment. She herself was still attending school and needed his support to continue her education. She regarded it as being in the best interests of her family, herself and her further schooling that the accused should not be sent to a correctional institution. Bertelsmann J, as per the High Court decision on sentence, ruled that ‘the court was obliged to pay attention to [the complainant’s] wishes and that she was free to tell the court whatever troubled her.’⁸² In light of the pronouncements made by Bertelsmann J it would appear that the court took cognisance of the complainant’s views.

As consistently pointed out, restorative justice underscores the need to hear the victim’s voice. Restorative justice is also premised on the need to address the present and future effects of crime. From an international perspective the need for the views of the victim to be accorded due weight in criminal proceedings has been emphasised in a number of international instruments.⁸³ In South Africa the Service Charter for Victims of Crime in South Africa emphasises the need for the criminal-justice process to

⁸² *Thabethe case supra* note 43, para 22.

⁸³ See e.g. UN Basic Principles *supra* note 4; United Nations Economic and Social Council (ECOSOC) *UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, 22 July 2005, E/RES/2005/20. Available at <http://www.refworld.org/docid/468922c92.html> (accessed 1 April 2015); United Nations General Assembly *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution / adopted by the General Assembly*, 29 November 1985, A/RES/40/34. Available at <http://www.refworld.org/docid/3b00f2275b.html> (accessed 1 April 2015).

accommodate victims more effectively.⁸⁴ This need has been underscored in a number of cases, including *S v Matyityi*,⁸⁵ where Ponnann JA emphasised the need to operationalise the international standards on the need to give voice to victims of crime, for example through restorative justice.

The need to accord due weight to the voice of ACSA victims brings to the fore the role of victim impact statements. In the *Thabethe* case the High Court had the benefit of a psycho-social report on the impact of the offence on the complainant. It was clear from the report that the offending had serious adverse effects on the psycho-emotional well-being of the complainant. Her academic performance at school deteriorated to such an extent that she did not even write her final examination for Grade 8.⁸⁶ The report indicated that the complainant was hurt by the respondent's betrayal of her trust in him as a father figure.⁸⁷ Meintjies has observed that victim impact statements are examples of measures that aim at giving victims an opportunity to voice their opinion.⁸⁸ According to Erez a victim impact statement is intended to 'address the effects of the crime on the victim, in terms of the victim's perceptions and expressions of the emotional, physical or economic harm he or she sustained as a result of the crime.'⁸⁹ Roberts offers useful insight on the number of roles that victim impact statements can play which include providing presiding officers with information about the seriousness of the crime, providing the court with a direct source of information about the victim's needs which may assist in determining more appropriate and reparative sanctions, providing the court with information about the appropriate conditions that might be imposed on the offender, providing the victim with a public forum in which to make a statement reflecting his or her suffering, providing the court with an opportunity to recognise the wrong committed against an individual victim, and allowing victims to participate in sentencing.⁹⁰ Van der Merwe has also pointed out that these statements

⁸⁴ See Service Charter for Victims of Crime in South Africa (2004). Available at www.justice.gov.za/VC/docs/vc/vc-eng.pdf (accessed 1 April 2015).

⁸⁵ *S v Matyityi* 2011 (1) SACR 40 (SCA) paras 16 & 17.

⁸⁶ *DPP v Thabethe supra* note 49, para 9.

⁸⁷ *Ibid.*

⁸⁸ L Meintjies-Van der Walt 'Towards victims' empowerment strategies in the criminal-justice process' (1998) 11 *SACJ* 166.

⁸⁹ E Erez 'Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice' (1999) *Criminal LR* 545.

⁹⁰ JV Roberts 'Victim impact statements and the sentencing process: Recent developments and research findings' (2003) 47 *Crim. L. Q.* 371-372.

increase awareness among justice professionals of the effects of crime.⁹¹ The roles of victim impact statements are clearly consonant with the cause of furthering restorative outcomes.

Thus in light of the issue of furthering restorative outcomes in ACSA cases, victim impact statements can be seen as a vehicle through which the goal of victim participation is achieved. Muller and Van der Merwe note that '[a] sentencing discretion can only be exercised properly if all the facts relevant to a matter are presented to the court.'⁹² This suggests the need for criminal-justice professionals to prioritise victim impact statements in furthering the larger issue of restorative justice. Undoubtedly this need should encompass cases of both minor and serious offending. Arguably, these statements are indispensable in ACSA cases in light of the greater harm caused to victims of this crime. The courts have occasionally demonstrated their increased awareness of the need to accord due regard to the impact of the offence on the victims. For instance in *S v Gerber*⁹³ it was pointed out that '[a] court does not have the necessary expertise to generalise about the consequences, if any, for the victim in a case...' Similarly, in *S v EN*,⁹⁴ Shongwe JA noted as follows:

Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate.

In relying on victim impact statements to further victim participation, the victim's participation should be emphasised in a non-determinative way. Statements to the effect, for example, that the accused should be spared a custodial sentence may be misleading.⁹⁵ Muller and Van der Merwe submit that victim impact statements should

⁹¹ A Van der Merwe 'Addressing victims' harm: The role of impact reports' (2008)30 *Thomas Jefferson Review* 395.

⁹² K Muller & A Van der Merwe 'Recognising the victim in the sentencing phase: The use of victim impact statements in court' (2006)22 *SAJHR* 653.

⁹³ *S v Gerber* 2001(1) SACR 621 (WLD) 624.

⁹⁴ *S v EN* 2014 (1) SACR 198 (SCA) para 14.

⁹⁵ See *DDP v Thabethe supra* note 49, para 8. The social worker recommended that the respondent be sentenced to correctional supervision in terms of s 276(1) (i) of the Criminal Procedure Act.

preferably not include a reference to the victim's sentence recommendation.⁹⁶ They argue that this may tend to diminish the value of the victim impact statement, particularly where the recommendation is overly-emotional.⁹⁷ However, ACSA victims may find it hard to resist the temptation of recommending less severe sentences as was the circumstance in the *Thabethe* case.⁹⁸ This could be attributable to the mixed emotions between the need to confront crime and the need to protect an offender who is known to them. In these circumstances it is incumbent on the court to be mindful of the fact that it is under no obligation to follow ACSA victims' recommendations. Commenting on the *Thabethe* case, Mujuzi has observed that 'much as the victim has a say in as far as the issue of imposing an appropriate sentence is concerned, the victim cannot dictate to the court which sentence should be imposed.'⁹⁹ Within the broader framework of restorative justice, such caution on the part of the court is critical because of the possible power imbalances between offenders and ACSA victims, especially the younger ones. Weaker victims may be re-victimised and forced to recommend less severe sentences to satisfy the needs of the offender and the community. These, however, are implementation risks that can be surmounted with appropriate safeguards in place.¹⁰⁰

5.3 Restorative justice and sentencing discretion

Section 51(2) read with Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (of South Africa) provides for a prescribed minimum sentence of life imprisonment for the nature of offence in the *Thabethe* case. This is subject to the convict being a first offender and a finding of substantial and compelling circumstances to justify a lesser sentence. In terms of section 51(5) (a) of this Act, such a sentence

⁹⁶ K Muller & A Van de Merwe *supra* note 92, 653.

⁹⁷ *Ibid.*

⁹⁸ In this case the victim impact statement, in accordance with the views of the complainant recommended that the accused should preferably not be sentenced to a custodial sentence.

⁹⁹ Mujuzi *supra* note 79.

¹⁰⁰ UN Basic Principles *supra* note 4, paras 9 & 10. The UN Basic Principles indicate that '[d]isparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case, and in conducting a restorative process.' These principles further recommend that '[t]he safety of the parties shall be considered in referring any case to, and in conducting a restorative process.' Thus, issues pertaining to power imbalances and safety of the victim should not necessarily be an obstacle to restorative processes. The obligation is on the justice system to take these risks into account.

cannot be suspended as contemplated in section 297(4) of the Criminal Procedure Act of 1977. In the *Thabethe* case Bertelsmann J wholly suspended the 10- year sentence handed to the accused.¹⁰¹ As demonstrated in the preceding sections, the decision of the High Court was overturned by the Supreme Court of Appeal on grounds that '[i]t is true that section 51(5)(a) precludes a sentencing court from suspending a sentence imposed in terms of this Act' ¹⁰² and therefore held that the High Court had erred in having the sentence wholly suspended.¹⁰³ The decisions of the High Court and the Supreme Court of Appeal raise several issues that are relevant to sentencing ACSA offenders, and more specifically, sentencing them within the restorative-justice paradigm. It is settled that sentencing prescriptions are not intended to strip courts of their sentencing prerogatives.¹⁰⁴ The state of affairs in these two decisions, however, raises the question whether the need to further restorative outcomes should justify a flexible application of sentencing prescriptions. The decisions open to question the exact application of prescribed sentences and suspended sentences when courts decide to sentence within the restorative-justice paradigm. There are numbers of precedents in this regard, as well as scholarly material that has helped to add meaningful content in the context at issue. On balance, the precedents, coupled with the commentaries on these subjects by scholars, provide a useful point of reference for criminal-justice professionals when dealing with restorative justice in cases of ACSA and other serious offences.

A notable consideration that is likely to come into view where sentencing ACSA offenders in the context of restorative justice is one of 'substantial and compelling circumstances' warranting a departure from prescribed sentences. It is notable that although restorative justice is not equivalent to a non-custodial sentence, custodial sentences are seen from a restorative-justice viewpoint as a measure of last resort, in which case it follows that where a custodial sentence is prescribed; in furthering a restorative-justice outcome, a judicial officer will inevitably assess whether or not there are substantial and compelling circumstances to warrant departure from the prescribed custodial sentence. If such be the case the issue would be whether judicial officers can legitimately depart from prescribed sentences for the purpose of furthering restorative

¹⁰¹ *Thabethe case supra* note 43, para 41.

¹⁰² *DPP v Thabethe supra* note 49, para 23.

¹⁰³ *Ibid.*

¹⁰⁴ See generally *S v Malgas* 2001 (1) SACR 469 (SCA).

outcomes. The general approach with respect to departure from prescribed sentences was properly laid down in *S v Malgas (Malgas case)*¹⁰⁵ in which the Supreme Court of Appeal ruled that the sentences prescribed by the legislature did not intend ‘a court to exclude from consideration ... any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.’ The court emphasised that ‘[t]he use of the qualifiers “substantial” and “compelling” cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that.’ The court therefore underscored that the ultimate cumulative impact of all the traditional factors must be taken into account to justify a departure from the prescribed sentences. This position has been affirmed independently by the Supreme Court of Appeal and adopted by other courts.¹⁰⁶ According to Terblanche and Roberts the judgment in the *Malgas* case explicitly laid to rest the confusion and inconsistencies that had earlier plagued the justice system as regards interpretation of ‘substantial and compelling circumstances.’¹⁰⁷ Terblanche is justly critical, however, of some recent judgments that could set a problematic pace that furthers a strict application of prescribed sentences.¹⁰⁸ He submits that a strict approach that does not allow departure from the prescribed sentence for ‘flimsy reasons’ is not particularly helpful in the sentencing discourse. A strict approach could also impact negatively on the exploitation of restorative justice in ACSA cases as it would strip judicial officers of sentencing discretion in terms of the extent to which restorative-justice initiatives can be invoked. It would seem, therefore, that an approach that underscores the need to give due regard to all of the many factors traditionally taken into account by courts when sentencing offenders, would promote greater accommodation of restorative justice in cases of serious offending.

¹⁰⁵ *S v Malgas supra* note 104, para 9.

¹⁰⁶ See e.g. the approach and pronouncements of the courts in *S v Dodo* 2001 (1) SACR 594 (CC); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Nkwanyana* 2003 (1) SACR 67 (W); *S v Tshisa* 2003 (1) SACR 171 (O); *Michaels v S* [2003] 1 All SA 312 (E); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahlangu* 2012 (2) SACR 373 (GSJ); *S v SMM* 2013 (2) SACR 292 (SCA).

¹⁰⁷ SS Terblanche & JV Roberts ‘Sentencing in South Africa: Lacking in principle but delivering justice?’ (2005)2 *SACJ* 192.

¹⁰⁸ SS Terblanche ‘Sentencing’ (2011)2 *SACJ* 228. Specifically see Terblanche’s commentary on the approach of the Supreme Court of Appeal in *S v Matyityi* 2011 (1) SACR 40 (SCA) and *S v PB* 2011 (1) SACR 448 (SCA). In these two cases the justices focused on the principle stated in *S v Malgas* that sentences should not deviate from the prescribed sentences for ‘flimsy reasons.’

Further, courts may consider handing down suspended sentences for purposes of advancing restorative-justice outcomes in ACSA cases because suspended sentences provide opportunities for the furtherance of restorative tenets such as reconciliation, healing, deterrence, reintegration of the offender and forgiveness. Here it should be noted that although the application of restorative justice has been welcomed, some scholars have been critical of its integration in potentially retributive systems of justice and indeed postulated that mistakes may most likely not be ruled out in the course of integration.¹⁰⁹ The application of suspended sentences is one particular issue that has thus far fallen prey to the said misconceptions about restorative justice. As noted, in the *Thabethe* case the High Court wholly suspended the ten-year sentence handed down. Again, the dicta of the courts thus far, coupled with the relevant scholarly arguments, are useful in taking care of the contextual placement of restorative justice within the broader framework of suspended sentencing in ACSA cases. The general principle pertaining to suspended sentences is as follows:

... the total sentence has to be appropriate in all the circumstances of the case, regardless of the fact that it or part thereof may be suspended. Although, owing to the softening effect of the suspension, it is not unacceptable for a sentence slightly on the heavy side of the spectrum of appropriate sentences to be imposed, it is not acceptable for a sentence additional to what is appropriate to be imposed simply for the sake of deterrence.¹¹⁰

The above principle suggests that a suspended sentence is 'an integral part of the sentence and not something that can be added on once an appropriate sentence has already been imposed.'¹¹¹ Suspended sentences can either be non-conditional or subject to certain conditions. Generally, the conditions attached to suspended sentences serve a variety of purposes, including deterrence, rehabilitation, counselling and reintegration. It is trite for the conditions to be appropriately couched with a view to achieving their purpose.¹¹² Moreover, the conditions have to be clear enough so that the accused can be aware of the circumstances under which the custodial sentence will come into

¹⁰⁹ SS Terblanche 'Sentencing' (2010)1 *SACJ* 161-162.

¹¹⁰ SS Terblanche *A guide to sentencing in South Africa* (2007)350; SS Terblanche 'Sentencing' (2013)1 *SACJ* 113-114.

¹¹¹ On this issue see *S v Sokweliti* 2002 (1) SACR 632 (TkD) 634; SS Terblanche 'Sentencing' (2003)16 *SACJ* 106.

¹¹² See SS Terblanche 'Sentencing' (2004)17 *SACJ* 275. Specifically the author's commentary on *S v O* 2003 (2) SACR 147 (C).

operation.¹¹³ The judgment of the High Court in the *Thabethe* case on sentence suggests that the application of suspended sentences is still fraught with difficulties. The suspended sentence and the conditions of the sentence handed down in this case have been criticised from many angles. It was evident that some of the conditions imposed in the *Thabethe* case were beyond the control of the accused. For instance, the accused was required to report to a probation officer one day each weekend and to take part in programmes prescribed by the probation officer.¹¹⁴ This condition, as rightly pointed out by some scholars who are critical of this judgment, failed to take cognisance of the possibility that the probation officer might not be on duty on the prescribed days (weekends).¹¹⁵ Perhaps more problematic was the fact that most of the conditions were dependent on the accused remaining in employment. Taken together, most of the conditions in the *Thabethe* case were problematic because there was a high likelihood of some of them remaining unfulfilled for reasons beyond the control of the accused. The import of this was that the custodial sentence would possibly come into operation for reasons beyond the control of the accused. Thus, although the conditions attached to the suspended sentence in the *Thabethe* case would presumably have favoured a restorative outcome, their implementation was bound to be difficult.

Another cause for criticism of the approach adopted by the High Court (in the *Tabethe* case) in wholly suspending a ten-year sentence was that the seriousness of ACSA was not reflected in the sentence that was later suspended, whereas the obligation to fit the punishment to the crime is quite unambiguous. The judgment of *S v RO*¹¹⁶ gives useful insight into the balancing role of the sentencing court. Here the Supreme Court of Appeal ruled that

[s]entencing is about achieving the right balance (or, in more high-flown terms, proportionality). The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence.

¹¹³ *Ibid.*

¹¹⁴ See *Thabethe* case *supra* note 43, para 41. On the conditions of the suspended sentence, see also the decision of the court in *S v Dniwayo* 2005 (2) SACR 235 (T) in which it was confirmed that a sentence cannot be suspended based on a condition which the accused has no control over.

¹¹⁵ SS Terblanche 'Sentencing' (2010)1 *SACJ* 167.

¹¹⁶ *S v RO* 2010 (2) SACR 248 (SCA) para 30.

A similar tone was evident in the *Thabethe* case where the Supreme Court of Appeal pointed out that although the patent facts provided a wealth of reasons that were sufficiently substantial and compelling to justify a departure from the prescribed minimum sentence, a wholly suspended sentence was not justified because the seriousness of the offence needed to be reflected in the sentence.¹¹⁷ Commenting on the *Thabethe* case, Mujuzi has pointed out that in applying restorative justice the court must not lose sight of the need for punishment to fit both the criminal and the crime.¹¹⁸ To caution, however, courts will need to resist the temptation of unreflectively dispensing with restorative justice in ACSA cases when they take cognisance of the seriousness of ACSA offences.

5.4 The place of restorative justice in sentencing primary caregivers who abuse children in their charge

The well-being of children is inevitably imperilled where offenders are primary caregivers. Sentencing the offender is a particularly difficult decision in this instance.¹¹⁹ According to the decision in *S v M* 'a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.'¹²⁰ The offender in the *Thabethe* case,¹²¹ as consistently alluded to was a primary caregiver.

The international and regional legal instruments are in nearly unanimous accord that minor children under the care of adult abusers merit special treatment.¹²² In South Africa this obligation has been specifically endorsed by the judiciary to the effect that all sentencing courts are now obliged to take account of the best interest of minor children when sentencing primary caregivers. In the celebrated decision of *S v M*¹²³ the Constitutional Court underscored the obligation of the sentencing court to give due weight to the best interest of children when sentencing primary caregivers because

¹¹⁷ *DPP v Thabethe supra* note 49, para 22.

¹¹⁸ Mujuzi *supra* note 79.

¹¹⁹ The difficulty here is that the child has to be protected against sexual abuse and taken care of at the same time. This is particularly difficult where the suspect is the caregiver, because protection of the child against abuse may clash with material support for the child.

¹²⁰ *S v M supra* note 40, para 28.

¹²¹ See *Thabethe* case *supra* note 43, paras 6, 7 & 20.

¹²² See e.g. article 30(1) of the African Charter on the Rights and Welfare of the Child 1999, expressly dealing with treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing penal laws.

¹²³ *S v M supra* note 40.

'children are innocent of the crime.'¹²⁴ The Constitutional Court having established that the best interest of children under her care would be jeopardised if the primary caregiver received a custodial sentence, handed down a non-custodial sentence. Sachs J observed categorically that

[e]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them...[t]he purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.¹²⁵

The Constitutional Court in *S v M* expressly set the record straight on the duty of the sentencing court when the person sentenced is the primary caregiver to minor children generally. The *Tabethe* case presents a situation as regards sentencing where the offender is a primary caregiver to minor children that he has abused. A debate is introduced on whether primary caregivers who offend against children under their care should also receive exceptional consideration at sentencing. In the *Thabethe case* the judgment at sentence in the High Court per Bertelsmann J took cognisance of the primary caregiving position of the offender, consequently handing down a non-custodial sentence to ensure that the accused, who was a primary caregiver, continued to support the minor children.¹²⁶ On appeal in the Supreme Court of Appeal, Bosielo J replaced the non-custodial sentence with a custodial sentence, notwithstanding the fact that the convict was a primary caregiver.¹²⁷ The debate here is not so much about whether the non-custodial sentence was the right sentence. Rather, it is whether in cases of serious offending such as ACSA, the sentencing court is still obliged to allow the caregiving role of the offender to influence the sentence handed down. Besides, in formulating the appropriate sentence, sentencing courts look to restorative-justice

¹²⁴ *S v M supra* note 40, para 42.

¹²⁵ *S v M supra* note 40, paras 18 & 34.

¹²⁶ *S v M supra* note 40, para 35.

¹²⁷ *DPP v Thabethe supra* note 49, para 31.

initiatives.¹²⁸ A further issue is whether restorative justice should still have a place and role.

Sachs J in *S v M* noted that the sentencing court is obliged to ‘pay appropriate attention to [affected children] and take reasonable steps to minimise damage.’¹²⁹ Paying proper attention to affected children is, however, by no means a detraction from the gravity of ACSA offending. Rather, it confirms the need to countenance other considerations in the child’s best interest.¹³⁰ Effectively, invoking restorative justice with a view to minimising damage does not equate to diminishing the gravity of ACSA. The general tendency has been for suspects to assume that giving due consideration to the child’s best interest at sentencing should automatically lead to a non-custodial sentence,¹³¹ but this view can be dismissed as invalid. ‘Minimise damage’ as used by the Constitutional Court seems quite instructive in the sense that all that the sentencing court is required to do is minimise damage. The fact that a custodial sentence is handed down does not necessarily mean that damage was not minimised.

What is required of sentencing courts is to strike a proper balance when confronted with competing children’s rights. These courts should keep an open mind to the multiple justice approaches available in perfectly striking this balance as opposed to being preoccupied with contrasting systems of justice. On a case-by-case basis, the competing rights of children such as family care and protection from CSA should be appropriately weighed. The fact that a sexual offender is a primary caregiver ought not to automatically ‘win’ an offender a non-custodial sentence. Sachs J, in *S v M*, warns against this practice, noting that automatically transposing approaches is problematic, and instead recommends ‘a parallel change in mindset’ when sentencing primary caregivers.¹³² In this regard, Sachs J observes the following:

[a] truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for

¹²⁸ See e.g. *S v M supra* note 40, paras 55-72, *S v Maluleke supra* note 38, paras 25-37.

¹²⁹ *S v M supra* note 40, para 45.

¹³⁰ *S v M supra* note 40, para 42.

¹³¹ See e.g. *S v The State (CCT/63/10)* [2011] ZACC 7 paras 2 & 30. In this case the appellant argued that since the court in *S v M* handed down non-custodial sentence, she also ought to have received a non-custodial sentence. This position was, however, challenged by the court.

¹³² *S v M supra* note 40, para 16.

the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.¹³³

Cameron J in *S v The State* was similarly cautious of this tendency when in dissenting he underscored the need for courts not to exclusively base on the dictum in *S v M* to automatically ‘spare’ primary caregivers of custodial sentences.¹³⁴ Sachs J in *S v M* recommends that ‘[i]t should become a matter of context and proportionality.’¹³⁵

6 Conclusion

Presently, the potential of restorative justice to add value to retributive justice has generally received the approval of the courts in South Africa. It is, however, not favourably received in cases of serious offending, with the result that serious offences such as ACSA are placed out of the realm of restorative justice. In disregarding restorative justice in cases of serious offending, the sentencing discourse is deprived of the benefits of restorative justice that are in accord with the retributive agenda. It may be argued that restorative justice trivialises serious offending but on the contrary, making use of restorative justice in cases of serious offending does not detract from the established sentencing principles and guidelines. In fact, restorative-justice initiatives can appropriately fit within the broader sentencing principles and guidelines that have been developed over the years. Restorative justice can therefore thrive within a potentially retributive system of justice. Criminal-justice professionals merely need to get to grips with the ideal role and place of restorative justice on a case-by-case basis without assuming that restorative justice will ‘dilute’ the retributive agenda.

However, while criminal-justice professionals set about making use of restorative justice in sentencing serious offenders, the sentences will need to reflect the seriousness of the offence so that the system is not placed in a position where it must choose between restorative justice and retributive justice. For a country like South Africa, where restorative justice has generally been embraced, restorative-justice initiatives merely need to be appropriately applied as broadly as possible. As Bertelsmann J puts it, restorative justice will more likely address current criminal-justice gaps ‘[if it finds] application not only in respect of minor offences, but also, in

¹³³ *S v M supra* note 40, para 24.

¹³⁴ *S v The State supra* note 136, para 61.

¹³⁵ *S v M supra* note 40, para 37.

appropriate circumstances, in suitable matters of a grave nature.¹³⁶ For countries like Uganda, where restorative justice has hardly penetrated the criminal-justice process, inspiration can be drawn from the practice in South Africa.

¹³⁶ *Thabethe* case *supra* note 32, para 39.

CHAPTER EIGHT: CONCLUSION AND RECOMMENDATIONS

1 CONCLUSION AND FINDINGS OF THE STUDY

The study undertaken addresses the problem of child sexual offending by acquaintances. It is premised on the challenges of prosecuting acquaintance child sexual abuse (ACSA). A synopsis of the findings and conclusions drawn with respect to the study undertaken is now discussed.

1.1 Chapter one: Findings and conclusions

Chapter one highlighted the problem statement, how the research was to be undertaken and the method of research. More specifically, the problem of ACSA in South Africa and Uganda was taken up. The gap between the incidence of ACSA and the rate at which convictions are sustained was demonstrated. The potential of behavioural science evidence (BSE), protective measures and restorative justice in bridging this gap was underscored as a means to confronting the distinctive dynamics of ACSA. A major problem identified, however, was that despite the potential of these mechanisms and their familiar usage in Uganda and more specifically South Africa, their application in ACSA prosecutions is still problematic. The chapter then underscored the need for the contextual placement of these mechanisms in the realm of ACSA prosecutions. It is this gap that the research intended to fill.

1.2 Chapter two: Findings and conclusions

Chapter two sought to resolve the issue of whether ACSA has some distinctive features to warrant assigning greater weight and broader accommodation to BSE, protective measures and restorative justice in the systems of criminal justice in Uganda and South Africa. This issue was resolved constructively. The chapter found that in most ACSA cases the suspect is in an authoritative position, making it hard to detect and hold wrongdoers to account. On the other hand, the ACSA victim is in a powerless position *vis-a-vis* the suspect. This not only makes him/her a vulnerable target for sexual abuse, but also impacts on the disclosure and the prosecution of the offence. Often, the adults close to the ACSA victim are not supportive because of the conflict of interest between protecting the ACSA victim and the suspect. Aside from this relational web, the chapter found that ACSA victims often do not disclose the abuse immediately, consequently

accounting for the paucity of medical evidence in these cases. Based on these findings, it was concluded that indeed, ACSA is distinctive in comparison to child sexual offending by strangers. Consequently, the chapter underscored three prerequisites for the successful prosecution of ACSA cases. These are evidence in proof of ACSA beyond reasonable doubt, measures cognisant of both the need for quality child victim testimony and the traumatic nature of ACSA, and sentencing mechanisms cognisant of the 'costs' of criminal prosecution. These prerequisites implicitly highlighted the need for BSE, protective measures and restorative justice in the effective prosecution of ACSA. Before discussing the unique dynamics of ACSA, the constitutional foundation of the obligation to narrow the gap between the incidence of ACSA and the rate at which convictions are secured was demonstrated. It was established that this obligation finds force and backing from the values and norms of the constitutions of both South Africa and Uganda.

1.3 Chapter three: Findings and conclusions

Chapter three narrowed down the discussion to the role and exact place of BSE in ACSA prosecutions in South Africa and Uganda. Two broad roles of BSE in the prosecution of ACSA cases were highlighted. These are BSE as substantive evidence in determining whether child sexual abuse (CSA) has occurred and BSE as background evidence in providing a context within which to evaluate the evidence of ACSA victims. In assessing the exact place and role of BSE in South Africa and Uganda, recourse was made to more recent jurisprudence on the subject. In regard to South Africa, the study found that over the years BSE has been routinely admitted in ACSA and CSA cases. South Africa's system was therefore credited for this stance since in cases where BSE is admitted, it has played a pivotal role in improving the prosecution of ACSA cases. Indeed, in this regard, the study found significant similarity in doctrine and principle between the jurisprudence of a system such as that of the USA where BSE has had liberal admittance in CSA cases over the years, and the system prevailing in South Africa as regards the role of BSE.

However, the study also found a slight difference in terms of the weight attached to the admitted BSE. While both criminal-justice systems are admitting BSE in ACSA prosecutions, on the whole the courts in the USA seem more accommodative of BSE than those in South Africa. For instance, as opposed to generally limiting BSE to the role of providing a context within which to evaluate the evidence of the ACSA victim, the

often ignored role of informing the decision of the court on whether CSA occurred, or not, is accommodated in the USA in cases where the evidence is properly adduced by qualified experts. This is a departure in non-essential particularity from the position in South Africa where some scholars have gone a step further to recommend that BSE should not be accommodated unless substantive evidence is adduced that CSA occurred.¹ They argue that admitting BSE without substantive proof of the occurrence of CSA would amount to proffering an opinion on the ultimate issue. This position was, however, challenged in chapter five with the study concluding that the courts that still apply the rule should desist from doing so and that the overriding criterion should be the relevance of the opinion, or, whether the court can obtain appreciable help from the opinion of the expert. It was therefore concluded that if courts in South Africa and Uganda are afforded guidelines by way of codified rules of evidence, this could potentially improve the interpretive methods of the courts and consequently impact on the weight accorded to BSE.

In the case of Uganda, the chapter found that despite the established potential of BSE in ACSA prosecution, there is no indication whatsoever that such evidence has been put to the test in the prosecution of ACSA cases or CSA cases generally. Instead it was found that the legislative framework on opinion evidence in Uganda, if broadly interpreted, is favourably disposed towards admitting BSE provided by behavioural science experts; moreover that the courts are also favourably disposed in this regard. This conclusion was drawn on grounds that over the years some courts in Uganda have routinely made reference to CSA victims' behavioural and emotional reactions to inform their decisions. In the current context, however, no case law has been found in which BSE expertise has been enlisted in prosecuting ACSA cases in particular or CSA cases in general. The need for Uganda's justice system to start advancing BSE in CSA cases was emphasised. It was, however, underscored that this recommendation in itself is not enough. Accordingly, three considerations that could undermine Uganda's reliance on

¹ See e.g. R Songca 'Aspects of sexual abuse of children: A comparative study' (2003) *Unpublished Doctoral Thesis: University of Pretoria* 460-461; A Allan & DA Louw 'The ultimate opinion rule and psychologists: A comparison of the expectations and experiences of South African Lawyers' (1997) 15 *Behavioural Sciences and the Law* 310 & 318; D Nelson 'Non-Pathological criminal incapacity in South Africa- A disjunction between legal and psychological discourse? A case study' (2012) *Unpublished Research Project: University of Cape Town* 27.

BSE were identified, and procedures that could be applied to circumvent or overcome these obstacles were discussed.

In assessing the role of BSE in ACSA prosecutions, the discussion in chapter three found that this category of evidence can equally be of relevance in substantiating false CSA allegations. This analysis was particularly critical because the study similarly found that cases of false CSA allegations and wrongful conviction were prevalent. The role of BSE can therefore be critical in substantiating CSA allegations. The study found that there is an absence of jurisprudence on the use of BSE by the defence. This could, perhaps, be on account of the general tendency to assume that such evidence is only relevant to the prosecution's case.

1.4 Chapter four: Findings and conclusions

Chapter four assessed the role and place of diagnostic standards, syndromes and interview protocols in advancing BSE in ACSA prosecutions. Early in the chapter, an issue whether or not standardised frameworks should be a prerequisite when advancing BSE in ACSA prosecutions was raised, given the possibility of errors in findings. The standards identified in this regard included diagnostic standards, syndromes and interview protocols. This issue was resolved by concluding that standards are important in diagnosis and description of behaviour; moreover that without them the same condition may be given different labels, consequently misleading the court.

With regard to diagnostic standards, reference was made to the Diagnostic and Statistical Manual of Mental Disorders (DSM). The most recent 2013 version of the DSM, namely, DSM-V was analysed.² The study established that a number of mental disorders that are recognised by the DSM-V could be of legal significance in answering the question whether CSA occurred. It was concluded that DSM diagnoses can provide court with adequate understanding of CSA victims' behavioural and psychological reactions, with courts left to decide whether CSA actually did occur. In terms of application in the forensic context, it was concluded that the legal question is not whether the child was diagnosed with a mental disorder but how the difference in behaviour and psychological reactions as described by the DSM diagnosis can be attributable to CSA.

² American Psychiatric Association *Diagnostic and statistical Manual of mental Disorders*, fifth edition (2013).

Concerning the specific mental disorders under the DSM-V, post-traumatic disorder (PTSD) in very young children was discussed because this mental disorder is most likely to be cited by the prosecution in dealing with ACSA offences. The discussion in the chapter established that the DSM-V of 2013 made a novel and commendable development pertaining to diagnosis of PTSD among children under the age of six years. It was found that prior to the DSM-V there was no specific diagnostic criterion for much younger children. The discussion in chapter four however found that the DSM-V criteria for very young children was more developmentally-sensitive and could consequently further more accurate diagnosis and legal findings. The chapter, however, cautioned that while the new development changes the rhetoric on diagnosis of much younger children, it requires justice and behavioural science professionals to make the best of the innovation in addressing the challenges of ACSA prosecution.

The Child Sexual Abuse Accommodation Syndrome (CSAAS) was specifically analysed with reference to syndrome standards. It was found that although this syndrome has been in existence for decades it is still imperfectly understood and applied. Some justice systems rely on the CSAAS standard to advance the opinion that CSA occurred. Others rely on it to merely advance opinion relevant in providing context within which to evaluate the evidence of the ACSA victim, while yet others totally reject reliance on the CSAAS standard. Currently, there is still scholarly and judicial dissent on the exact place and role of the CSAAS standard and whether it is still relevant as a standard in advancing BSE. It was argued in this chapter that the solution to this dilemma lies in getting to grips with the meaning of the term 'syndrome.' It was established that there are two types of syndromes for purposes of BSE, namely, diagnostic and non-diagnostic syndromes. Whereas diagnostic syndromes relate directly to the pathological condition, the symptoms of a non-diagnostic syndrome do not directly relate to a pathological condition.³ The CSAAS is a non-diagnostic syndrome and it cannot be relied on to advance an opinion that the child in question was sexually abused. It has a limited role, however, of explaining unusual behavioural reactions of child complainants to court. The study therefore concluded that the CSAAS standard is

³ JEB Myers 'Expert testimony describing psychological syndromes' (1993)24 *Pacific Law Journal* 1453 & 1462.

still relevant in the ACSA discourse and where appropriately applied, it should be preferred as opposed to experts arriving at informal judgment.

Pertaining to protocols in interviewing children, the National Institute of Child Health and Development Protocol Interview guide (NICHD Protocol) was placed at the heart of the discussion. It was found that inappropriate interview techniques are substantially effective in inducing preschool children to make false allegations. The *McMartin* case was found to be a striking example.⁴ The study found that the NICHD Protocol, if appropriately implemented by behavioural science professionals, could further more objective and accurate interview findings and conclusions. This finding is supported by studies demonstrating that the quality of interviewing reliably and dramatically improves when interviewers employ the NICHD Protocol to elicit information from alleged CSA victims.⁵ Thus, though behavioural science professionals could in some cases arrive at objective and accurate findings without relying on standardised interview protocols, it was concluded that reliance on the NICHD Protocol should increase to reduce error.

1.5 Chapter five: Findings and conclusions

Chapter five assessed the exact place of selected rules of evidence in advancing BSE in ACSA prosecutions. The study found that presently, the problem lies not with the rules of evidence, but rather with their interpretation and application by some courts. Rules requiring an expert not to express a view on the ultimate issue or not to found their evidence on hearsay, for example, contrast starkly with their ideal interpretation. Unfortunately, it was found that these rules continue to be invoked in some courts during the advancement of BSE in CSA prosecutions. The chapter concluded that the principle of relevance is the only criterion that can displace the misguided rules that negatively impact on the accommodation of BSE in ACSA prosecution; consequently the principle of relevance has to be applied on a case-by-case basis, to broadly accommodate and keep up with the pace of new developments in behavioural sciences.

⁴ The *McMartin* preschool abuse trial has often been cited to serve as a cautionary tale for experts in interviewing and assessing alleged CSA victims. Critiques argue that the interview techniques applied in the *McMartin* case were highly leading and had the counterproductive effect of reducing the perceived credibility of the children who reported sexual abuse. See detailed discussion in chapter four.

⁵ See chapter four on these studies.

In the case of Uganda it was found that one notable rule of evidence that might undermine the advancement of BSE is the cautionary rule applied to the evidence of children. The study found that in Uganda, the manner in which the cautionary rule is applied detracts from its ideal mode of application. The evidence of a child witness, although satisfactory in all material respects, cannot found a conviction unless it is corroborated. This requirement is embedded in Uganda's statutory laws.⁶ This position puts into question the continued relevance of the cautionary rule applicable to the evidence of children. The study found that despite the challenges arising from the implementation of this cautionary rule in Uganda, the solution lies not in the 'caution' itself but rather its dogmatic application. It was concluded that a common sense approach should be preferred and to this end judicial officers should not be prevented from treating a child's evidence with caution where such caution is merited in the circumstances. Rather, the assumption unjustly applied to all evidence proceeding from children's testimony, to the effect that such evidence is inherently unreliable, should be discarded.

Although the discussion came to a conclusion that the solution to the dilemma of improper application of some rules of evidence lies in appropriately interpreting them to broadly accommodate relevant BSE in ACSA cases, the need for codification of the ideal interpretation and application of these rules was found to be merited. It was acknowledged that while common law ought to be given the benefit of developing piecemeal, codification becomes a needed step where the misguided application of these rules persists. It was submitted that the codified rules on admissibility of expert evidence could exert pressure on judicial officers to discard unsound and inflexible rules since codification would bar them from continuing to hide behind the cloak of ambiguities in the law.

1.6 Chapter six: Findings and conclusions

Chapter six underscored the need to strike a balance between calling ACSA suspects to account and minimising the traumatic experience undergone by their victims in the justice process. Based on the findings in chapter two, the chapter proceeded on the premise that ACSA victims are often profoundly traumatised by both the act of sexual

⁶ See sections 40 (3) & 101(3) of the Trial on Indictments Act chapter 23 and the Magistrates Court Act Chapter 16 of the Laws of Uganda respectively.

offending and the ensuing judicial process. The study identified the procedure of cross-examination in adversarial systems as one of the most traumatising experiences of ACSA victims. It was found that while the ideal essence of cross-examination is to test the accuracy of the evidence of witnesses, often the techniques of some legal practitioners end up inordinately traumatising ACSA victims and preventing the court from eliciting the best evidence from them. It was concluded, therefore, that rather than cross-examination itself, the problem has lain with how it was implemented. Thus since the ideal essence of cross-examination is to test the evidence of witnesses, the chapter concluded that cross-examination is still crucial in ACSA prosecutions in light of the rising cases of false CSA allegations and wrongful convictions.

The chapter found that in addressing the challenges arising from inappropriate cross-examination techniques applied by some legal practitioners, most adversarial justice systems, including those in South Africa and Uganda, are increasingly resorting to protective measures to ameliorate these challenges. Some of the measures that the chapter identified were the use of intermediary mechanisms and judicial intervention in cases of inappropriate questioning during cross-examination. The study found that these measures are positively impacting on the experience of child witnesses and victims in the course of cross-examination. The study found, however, that where the techniques of cross-examination by legal practitioners are fundamentally flawed, the protection accorded to the ACSA victim may be limited. Based on this premise, the study concluded that broader protection to ACSA victims could be attained if cross-examination were regulated more strictly.

Inspiration was drawn from the mode of testing evidence in selected inquisitorial justice systems. On balance, the analysis of the mode of testing evidence of child witnesses and victims in systems such as Germany, Italy, Norway and Austria, revealed that the process of testing the evidence of children more broadly reduces the trauma of their court experience. The chapter, however, recommended that the adversarial justice systems should desist from 'dogmatically' transplanting the approach of inquisitorial systems. Rather, selected elements of inquisitorial systems should be adopted in a manner that is contextually appropriate to the adversarial justice systems of South Africa and Uganda. To advance this cause, the study found that the current constitutional norms and values of the constitutions of both South Africa

and Uganda would accommodate developments that draw insight from the practice in inquisitorial justice systems.

1.7 Chapter seven: Findings and conclusions

This chapter sought to assess the ideal role and place of restorative justice in ACSA prosecutions. Based on the discussion in chapter two on the distinctive dynamics of ACSA, the discussion in this chapter proceeded on the premise that if the justice gap in ACSA prosecutions is to be effectively bridged, then justice systems will need to strike a balance between holding the suspect to account and taking into account the best interests of the ACSA victim. However, because ACSA is admittedly a form of serious offending, the critical issue that formed the crux of this chapter was whether or not restorative justice can comfortably operate in tandem with the retributive system of justice in cases of serious offending. The literature reviewed established that in most justice systems emphasis is placed on criminalisation. This stance, however, often offers inadequate redress to victims of acquaintance offending. The emotional, psychological and welfare dimensions of the offence are sometimes not given due attention in the trial and sentencing process. A conclusion was reached that restorative-justice approaches are typified by several features that could ameliorate these challenges. Some of these features include viewing crime as infliction of harm to individual victims and breakdown of relationships, emphasis on victim participation, restoration of the relationship between the offender and the victim where that is the goal and if it is possible, and emphasising the need to take account of the interests of all those affected by the crime.

Narrowing down the discussion to South Africa and Uganda, it was found that despite South Africa's predominantly retributive system, the system has over the years broadly accommodated restorative justice in criminal prosecutions. However, although this has been an established practice, an observable trend in South Africa's jurisprudence was identified which showed that restorative justice has generally not been accommodated in cases of serious offending such as ACSA. In Uganda, hardly any jurisprudence was found on the explicit application of restorative justice in criminal prosecutions, let alone cases of serious offending. Thus because of the paucity of jurisprudence on the subject of restorative justice in Uganda, the assessment of the ideal role of restorative justice in ACSA prosecution was made with reference to the

jurisprudence in South Africa. The findings were, however, found to be instructive to all adversarial justice systems including Uganda's.

The decisions in the cases of *S v Thabethe*⁷ and *DPP v Thabethe*⁸ were placed at the heart of the discussion. The divergence between the findings of the High Court and those of the Supreme Court of Appeal showed that restorative justice is still problematic in that it is misunderstood and misapplied. In reconciling the findings of the two courts for future reference and consistent practice, the study concluded that contrary to popular assumption, restorative justice can have a place and role in the prosecution of cases of serious offending such as ACSA, provided it is properly applied. It was further concluded that if restorative justice is to be applied appropriately, sentencing courts and more broadly, criminal-justice systems need to get back to basics pertaining to the meaning of restorative justice. Criminal-justice systems need to desist from using the term 'too loosely.' Specifically, restorative justice should not be regarded as effectively equivalent to a non-custodial sentence. Restorative justice is broad and flexible, and all criminal-justice systems need to do is appreciate the scope within and stages at which it can be applied. Restorative justice does not necessarily exclude punishment such as custodial sentences, but merely views it as a last resort.⁹ Thus custodial sentences do not necessarily close the door on the benefits of restorative justice for offenders and victims.¹⁰

It was concluded that if restorative justice is to be broadly embraced by the conventional criminal-justice system in cases of serious offending, it needs to strike a proper balance between restorative outcomes, retribution and deterrence. Such an approach will more likely ensure that restorative justice comfortably rests alongside potentially retributive systems of justice.

2 RECOMMENDATIONS

The recommendations made herein are on a subject by subject basis. These subjects pertain to the various substantive issues dealt with throughout the study. It is equally notable that some of the recommendations draw insight from foreign justice systems.

⁷ *S v Thabethe* 2009 (2) SACR 62 (T).

⁸ *Director of Public Prosecution, North Gauteng v Thabethe* 2011(2) SACR 567 (SCA).

⁹ AN Skelton 'The influence of the theory and practice of restorative justice in South Africa with special reference to child justice' (2005) *Unpublished LLD Thesis: University of Pretoria* 476.

¹⁰ *Ibid.*

But in drawing insight from foreign justice system, it is not concluded, not even remotely, that the approaches of other jurisdictions are a 'perfect fit' with the justice systems of South Africa and Uganda. Jackson has correctly observed that

Although much has been written about the dangers of transplanting foreign procedures into local soil, this is not an argument for refusing to look at other procedures with a view of understanding how things are done differently elsewhere. Rather it is an argument for looking at other procedures provided this is done by giving detailed attention to the institutional context in which the processes are administered... More positively, however, a study of comparative proof processes may help to throw up imaginative solutions that have not been encountered within indigenous processes.¹¹

Based on Jackson's persuasive argument, the emphasis on the approach of other justice systems throughout this section should at the end of the day be guided by the context of the justice systems of South Africa and Uganda. Where the approach of other systems cannot be wholly transplanted, only insight should be drawn.

2.1 Behavioural science evidence

2.1.1 The justice systems of South Africa and Uganda should consider making the role and exact place of behavioural science evidence in sexual abuse prosecutions more apparent

It could be argued persuasively that the codification of the role of BSE may cause new and unnecessary rigidities in assessments by the courts. Similarly, trial judges may argue that their discretion to ameliorate the effect of the rigidities of a codified rule in special circumstances of an individual case may be reduced. However, codification, though never exhaustive, plays a critical role in affording insight to legal professionals. Even in justice systems like South Africa's where this category of evidence is generally admitted, in some cases prosecutors have not been keen to make use of it.¹² Uganda's case is much worse because the option of BSE has never been considered. It is against this backdrop that codification may indeed be necessary. It is therefore recommended that the justice systems of Uganda and South Africa consider making the role and exact place of BSE more apparent through statutory codification so as to offer guidance to the

¹¹ J Jackson 'Taking comparative evidence seriously' in P Roberts & M Redmayne (eds) *Innovations in evidence and proof* (2007) 298-299.

¹² See e.g. the South African case of *Evans Michael v The State*, case No 2011/A46, in which the prosecutor sought to advance BSE without calling upon experts in the field. This position was frowned upon by the court.

various criminal-justice professionals and behavioural science experts on the role of BSE. Inspiration in this regard can be drawn from the phraseology adopted by the Namibian Combating of Rape Act which reads as follows:

Evidence of psychological effects of rape

8. (1) Evidence of the psychological effects of rape shall be admissible in criminal proceedings at which an accused is charged with rape (whether under the common law or under this Act) in order -

(a) to show that the sexual act to which the charge relates is likely -

(i) to have been committed towards or in connection with the complainant concerned;

(ii) to have been committed under coercive circumstances;

(b) to prove, for the purpose of imposing an appropriate sentence, the extent of the mental harm suffered by that complainant.

(2) In estimating the weight to be attached to evidence admitted in terms of subsection (1), the court shall have due regard to -

(a) the qualifications and experience of the person who has given such evidence; and

(b) all the other evidence given at the trial.¹³

A provision similar to Namibia's could indeed be instructive to the justice systems of both South Africa and Uganda. Such a provision is more warranted in the case of Uganda in light of the fact that BSE has hardly been admitted in ACSA prosecution with the result that justice professionals and experts have very few guidelines on the scope and role of this nature of evidence. In South Africa, the need for codification of the role of BSE was recommended by the South African Law Reform Commission (SALRC).¹⁴ This recommendation was, however, not implemented. In light of the critical role of BSE as consistently discussed, it is recommended that this recommendation is considered.

2.1.2 Professionals at all stages of the criminal-justice process should give adequate weight to the role of behavioural science evidence in ACSA prosecutions

Making the best of BSE in the prosecution of ACSA cases requires an integrated effort by several professionals in the justice system.

Police department and law enforcement bodies are the gateway through which victims of crime must pass to enter the criminal-justice system. The objects of the police

¹³ Combating of Rape Act, No. 8 of Namibia, 2000.

¹⁴ South African Law Reform Commission Discussion Paper 102 *Sexual offences: Process and procedure* (2002)517.

are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of a country and their property, and to uphold and enforce the law.¹⁵ Generally, criminal proceedings flow from the laying of a complaint, a police arrest of a suspect and a police investigation. The police collect the evidence, arrest the suspect, record the statements of the victim, the accused and other witnesses, investigate the case and later forward it to the public prosecutor. Aspects of the investigation in sexual offences have traditionally included the medical examination and the taking of the preliminary statement. Issues pertaining to BSE have generally not been accorded adequate weight at the investigation level.¹⁶ Amidst the paucity of medical evidence in ACSA cases, the police should increasingly take into account aspects of BSE. Indeed the only discretion that the police have in relation to the continuing investigation of the sexual offence is the arrest of the suspect.¹⁷ However, in practice police professionals do exercise substantial discretion on whether to prefer a charge of a sexual offence, whether to proceed with an investigation and whether to refer the case to the prosecuting authorities for a decision on whether to prosecute or not. They exercise this discretion almost invisibly.¹⁸ Thus, the police should desist from making charging decisions merely based on the absence or presence of medical evidence.

Where the justice system accommodates BSE, ACSA victims will most likely undergo an assessment after the alleged sexual offending report. This assessment will be carried out by qualified behavioural science professionals. As consistently demonstrated in the study, BSE is regarded as crucial for the successful prosecution of ACSA as it can constitute substantive evidence or contextual evidence. BSE, however, is only of value if the assessment of the ACSA victim is properly conducted. Frequently, the assessment is inappropriately conducted. It is therefore recommended that behavioural science professionals make use of established standards in their field to ameliorate the possibility of arriving at inaccurate findings that could potentially be misleading to court. Some of these standards were elaborately dealt with in chapter four. These include the DSM-V, the CSAAS and the NICHD Protocol. Where experts fail to make use

¹⁵ Section 205(3) of the constitution of the Republic of South Africa of 1996.

¹⁶ See e.g. sections 37(2) (a) and 225 of the Criminal Procedure Act 51 of 1977 of South Africa which seemingly predominantly further medical evidence at the investigative stage. The Act is silent on the exact role of the investigation officer with regard to BSE.

¹⁷ See section 40 of the Criminal Procedure Act 51 of 1977.

¹⁸ South African Law Reform Commission Discussion Paper 102 *supra* note 14, 38.

of standards and instead rely on informal judgment, the opposite party should increasingly challenge the opinion of the expert unless of course the informal assessment can be justified and is reliable enough to further accurate findings. Further, as discussed in detail in chapter three, the explanatory power of the expert can profoundly impact on the weight accorded to their opinion. It is therefore recommended that experts perform a thorough task of educating the court in such a logical and coherent manner so that the court receives the appreciable help sought after in admitting the opinion of the expert. This will impact on the weight accorded to their opinion.

Prosecuting authorities have the power to institute criminal proceedings on behalf of the state, and to carry out necessary functions incidental to instituting criminal proceedings, including discontinuing criminal proceedings.¹⁹ The decision to prosecute a suspect is not made lightly as many factors are taken into consideration. The initial consideration is the adequacy of the evidence. Generally, a prosecution is not to be instituted or continued unless there is reliable evidence to provide reasonable prospects of a conviction. Prosecutors have wide discretion as they generally decide whether the evidence against the defendant merits a prosecution. Frohmann²⁰ argues that often, the decision to prosecute is based on whether the prosecutor believes that a case has a realistic prospect of conviction. Pertaining to the factor of adequacy of evidence, it is recommended that in resolving the issue whether or not to prosecute, prosecutors should be open to the option of BSE. Since prosecutors are mandated to call witnesses to prove child sexual offending, behavioural science experts should increasingly be called upon to adduce this nature of evidence as opposed to exclusively relying on inferences from lay witnesses.

Behavioural science evidence as advanced by qualified experts in the field is of little or no value if judicial officers are not ready to accommodate it or equipped to appropriately assess it. Judicial officers should be more accommodative of new developments in the behavioural science field. Indeed some of these developments may be a departure from the role of science in its traditional sense. However, the basic

¹⁹ See e.g. section 179(2) of the constitution of South Africa, 1996. See also section 20 of the National Prosecuting Authority Act 32 of 1998.

²⁰ L Frohmann 'Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections' (1991)38 *Social Problems* 213-226.

criterion should be the relevance of the opinion of the behavioural science expert and whether or not the judicial officer can receive appreciable help from the expert. More specifically, when it comes to the rules on admissibility of evidence, judicial officers should discard some out-dated traditional rules of expert evidence such as the ultimate issue rule. Under no circumstance should archaic rules such as this account for the non-accommodation or less weight being accorded to BSE in ACSA prosecutions. Often, the parties may not be keen to call upon behavioural science experts. In cases where the court deems the opinion of expert relevant in substantiating on the behavioural and emotional reactions of the ACSA victims, the phenomenon of court-appointed experts should more readily be accommodated. In this regard, judicial officers on their own should increasingly exercise their discretion to appoint a neutral expert or to order the parties to show cause why a behavioural science expert witness should not be appointed.

2.1.3 Professional boards for mental health professionals, in collaboration with justice systems should develop a framework to guide professionals in advancing BSE

The failure of justice professionals and experts to make the best of responsive alternatives may not necessarily be an issue of 'ignorance' but also one of lack of guidelines and a framework upon which the interaction between justice professionals and experts can be based. It is against this backdrop that the need for a framework to guide behavioural science experts in their interaction with the justice system in CSA cases is underscored. The guidelines should be designed in such a way as to provide a practical guide to preparing expert evidence and the obligations for expert witnesses who are instructed by both the prosecution and defence. When properly applied, these instructions should be able to assist expert witnesses, investigators and prosecutors to perform their duties effectively, fairly and justly, which is vitally important to the integrity of the criminal-justice system. In terms of scope, the guidelines should at the very least encompass the following aspects

- The exact place and role of diagnostic and non-diagnostic standards;
- Ethical rules of conduct;
- Therapeutic and forensic roles and the need to avoid dual roles;
- Nature and scope of opinion in CSA cases;

- Objectivity, methodologies and appropriate techniques of assessment;
- Confidentiality and informed consent in terms of the relationship between the CSA victim and the expert, amongst others.

2.1.4 Uganda's legislature should consider making reforms to the current mental health and penal laws

A mental health law that takes cognisance of the evolving roles of mental health professionals should be enacted. Currently, there is a Mental Health Bill in place. This Bill has taken decades without being passed into law. It is particularly recommended that this Bill is passed into law. The legislature should also consider expanding the catalogue of child sexual offences recognised under its penal laws. The Sexual Offences Bill is another Bill that has not been passed into law for decades. This Bill creates an opportunity for the proposal on a broader catalogue of child sexual offences to be recognised. As discussed in chapter three, the only child sexual offence recognised by the Penal Code Act is defilement. Thus, because the major ingredient of this offence is sexual intercourse, the practice of the police and justice professionals has been to make recourse to medical evidence. A broader catalogue of child sexual offences similar to that under South Africa's Sexual Offences and Related Matters Amendment Act 32 of 2007 will arguably make room for alternative approaches including reliance on BSE. Other aspects discussed in this entire thesis such as the express codification of the role of BSE in CSA prosecutions, a broader catalogue of protective measures, amongst other recommendations, could also be encompassed in the forthcoming sexual offences law of Uganda.

2.1.5 Continuous legal education of law enforcement authorities and legal practitioners on the potential of BSE should be made a priority

It is not enough for Uganda's justice system to transplant the practice of justice systems like South Africa's and USA's. Kanda and Milhaupt have correctly observed that a 'fit between the imported rule and the host environment is crucial to the success of a transplant.'²¹ Uganda's justice system has a number of barriers to surmount in drawing insight from South Africa and USA. One of these barriers pertains to the practice of generally relying on medical evidence. It is particularly important for efforts to be

²¹ H Kanda & CJ Milhaupt 'Re-examining legal transplants: The director's fiduciary duty in Japanese corporate law' (2003)51 *The American Journal of Comparative Law* 891.

directed towards legal education to further attitudinal change among justice professionals. Police training schools and law schools are arguably some of the ideal arenas through which this goal can be furthered. Moss has pointed out that 'law schools have an intensified ethical responsibility to examine their curriculum in deep and meaningful ways in order to best ensure their graduates are prepared to enter the legal profession as it exists today.'²² It is not suggested that law schools should have the luxury of considering new courses or modules for every development that impacts on law. This may indeed be unrealistic as the developments in law may be inexhaustible for each development to constitute a new module. Similarly, it is not suggested that law schools should give up training students in 'traditional' modules or courses. But arguably these 'traditional' courses should be taught with a view towards incorporating the latest theories. Ribstein has correctly argued that 'law schools [should abandon] the uniformity that has gripped legal education.'²³ Mollema and Naidoo also persuasively argue that incorporating novel approaches 'into current legal curricula causes discomfort for many legal academics and lawyers.'²⁴ They, however, correctly submit that 'the current globalisation of crime and culture inevitably necessitates a changing climate of legal education which reconciles legal traditions and respects diversity in law.'²⁵ The point being stressed here can best be driven home in the words of Strossen who asserts as follows:

No matter what the area of law, there are constantly new issues emerging, which depend on careful and creative new scholarship for resolution. For this reason, every semester when I put together materials for my advanced constitutional law course, I never have any shortage of 'hot' new cases to include that are either currently pending before the Supreme Court or wending their way there, presenting path breaking issues of constitutional law.²⁶

²² DM Moss 'Hidden curriculum of legal education: Toward a holistic model for reform' (2013) *Journal of Dispute Resolution* 18.

²³ LE Ribstein 'Practicing theory: Legal education for the twenty-first century' (2011)96 *Iowa Law Review* 1674.

²⁴ N Mollema & N Naidoo 'Incorporating Africanness into the legal curricula: The case for criminal and procedural law' (2011)36 *Journal of Juridical Science* 63.

²⁵ *Ibid.*

²⁶ N Strossen 'Reflections on the essential role of legal scholarship in advancing causes of citizen groups' (2004)49 *New York Law School Law Review* 514.

The impact of this suggestion may not be instant, but with time, it will progressively impact positively, inform and open the minds of prosecutors and police on alternative mechanisms that can be explored to effectively prosecute CSA cases.

2.2 Rules of evidence

2.2.1 The justice systems of South Africa and Uganda should consider developing a statutory framework on admissibility of expert evidence

Although the common-law position on some rules of evidence has evolved over the years, the legislature in South Africa and Uganda should consider codifying the position on the assessment of such evidence so as to make this ideal mode of assessment more apparent. This could equally afford courts with interpretative guidance when dealing with BSE and consequently impact on the weight accorded to this nature of evidence. Some of the issues that should be encompassed include qualification of experts, basis of expert evidence, court-appointed experts, the exact place of the ultimate issue rule, amongst others. In this regard, inspiration can be drawn from the Federal Rules of Evidence of the USA.²⁷

It is, however, to be emphasised that a recommendation on drawing insight from USA should not be understood to mean a transplant of USA's rules to South Africa and Uganda. The codified rules of evidence in USA were partly developed in the context of jury trials whereas South Africa's and Uganda's trials do not have juries. Thus, dogmatically transplanting legal rules of the USA could cause potential problems in terms of implementation. Effectively, the point that the author underscores pertains to the need for South Africa's and Uganda's systems to develop a statutory framework on admissibility of expert evidence that addresses the contextual gaps in the current discourse of expert evidence and the needs of a non-jury system. Statutory guidelines should be introduced to strengthen the advancement of BSE and expert evidence generally. The statutory rules should be drafted in such a manner as to assist judicial officers to evaluate expert evidence, including controversial fields such as BSE.

²⁷ See generally rules 702-710 of the Federal Rules of Evidence of America, 1975.

2.2.2 The justice systems of South Africa and Uganda should consider expressly codifying the ideal application of the approach of caution with regard to the admissibility of the evidence of children

As was consistently demonstrated in chapter five, the need to treat the evidence of children with caution is not the problem *per se*. The real problem is the dogmatic manner in which the evidence of children is considered suspect *ab initio* in some cases. With such a position, even when BSE is admitted to bolster the credibility of ACSA victims and to make the testimony of children satisfactory, convictions would still not be able to be sustained. Thus, in the case of Uganda, the statutory provision requiring the evidence of children of tender years to be corroborated should be abolished because its continued application will undermine the benefits of BSE in ACSA prosecutions. The statutory provisions as discussed in chapter five close the door to the option of judicial officers to apply the common sense approach when dealing with the evidence of children.

In South Africa, although the justice system does not have an express provision that furthers the dogmatic application of the cautionary rule, the jurisprudence in which this rule was clarified should be underscored. In any case, justice systems like England, which had no such express provision considered an express provision because to do so would make the demise of the dogmatic application more apparent. Therefore, the justice systems of both South Africa and Uganda could draw inspiration from the phraseology of England and Ireland which respectively provide as follows:

Section 34(2)

Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated.²⁸

Section 28

The requirement in section 30 of the Children Act, 1908, of corroboration of unsworn evidence of a child given under that section is hereby abolished.²⁹

²⁸ Criminal Justice Act of England 1988.

²⁹ Criminal Evidence Act of Ireland 1992.

2.3 Protective measures

2.3.1 Uganda should adopt a wider variety of protective measures to afford protection to ACSA victims and child witnesses generally

It has consistently been demonstrated that protective measures bear great potential in protecting ACSA victims from the traumatic experiences of the justice process and ensuring that the best evidence is obtained from them. Since Uganda's system hardly has any protective measures for child witnesses to speak of, reforms to the criminal procedures of the system should be made a priority. Some of these reforms may merely require administrative reforms while others may require amendments to the statutory laws to particularly make provision for children to adduce evidence without being directly confronted by the accused. Uganda can draw inspiration from the broad catalogue of protective measures at the disposal of the child witnesses in South Africa which include the use of intermediaries, one-way mirrors, CCTV cameras, support persons, child-friendly waiting rooms, amongst others.

2.3.2 South Africa's justice system should strengthen the implementation of the already available protective measures in place

Undoubtedly, one of the advantages that South Africa's system has over Uganda's system is the express recognition and current implementation of a reasonably wide variety of protective measures. For South Africa therefore, the task is not to recognise these mechanisms because there has been an established practice for these measures to be applied in cases of child sexual offending. The current position of South Africa is therefore commendable and praiseworthy. South Africa does not need to adopt new protective mechanisms but to strengthen the implementation of the available ones. As was demonstrated in chapter six, there is a shortage of protective measures in some jurisdictions. This is definitely impacting on the protection of some ACSA victims. Further, in some cases, the courts are failing to appropriately exercise their discretion particularly when it comes to ACSA cases, the appointment of intermediaries should be made a prerequisite. In ACSA cases, judicial officers should more broadly accommodate intermediary mechanisms and other protective measures. This is because this nature of offending often, if not always, traumatises ACSA victims. Further, in jurisdictions where there is a shortage, the concerned departments should make concerted efforts to progressively avail these jurisdictions with these measures.

2.3.3 Judicial officers in the justice systems of South Africa and Uganda should more keenly regulate the process of cross-examination

The justice systems of Uganda and South Africa should strictly regulate the process of cross-examination to ensure that the essence of cross-examination which is to test the evidence of children is attained. It is submitted that the norm should be that the parties are allowed to cross-examine the parties. However, where the parties fail to appropriately conduct the cross-examination and in the process, traumatise the ACSA victim, the judicial officer should, from time to time, intervene by taking on the role of examining the ACSA victim for purposes of testing their evidence.

2.4 Restorative justice

2.4.1 Restorative-justice approaches should be prioritised in ACSA cases

Restorative-justice approaches should be prioritised in ACSA prosecutions unless the safety of the victim and the community requires otherwise. These approaches should not be restricted to the sentencing stage but all stages of ACSA proceedings. The use of restorative approaches should be justified on a case-by-case basis as the need and stage at which restorative-justice approaches should be applied may vary depending on the facts and circumstances of each case. In all ACSA cases, justice systems and all concerned professionals should endeavour to promote the restoration of the victim, the family of the victim and the community.

2.4.2 Restorative justice-approaches should be implemented in a manner that strikes the balance between restorative outcomes, retribution and deterrence, and subject to sufficient safeguards

The fact that an offence is generally thought to be a form of serious offending should not deter courts from applying restorative justice. What matters should be the stage at which it is applied and the extent to which restorative-justice initiatives take into account other tenets of punishment such as retribution and deterrence.

The interests of the ACSA victim must be considered in any decision regarding sentencing. Furthermore, in ACSA cases, the definition of the term 'victim' for purposes of informing the appropriate sentence should be redefined so as to encompass direct victims, namely the ACSA victim and indirect victims such other children who may be under the primary care of the offender.

Restorative-justice approaches should not be used to undermine certain tenets of punishment. Rather, a balance needs to be struck between furtherance of restorative outcomes, deterrence and retribution. This recommendation partly draws inspiration from *R v Karg* in which Schreiner JA ruled that

While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.³⁰

To safeguard against the abuse of restorative-justice processes, restorative-justice initiatives should be sanctioned and supervised by court. The court in the *Thabethe* case rightly preferred this approach in that, having sanctioned the restorative-justice program, the court still retained the overseeing role over the proceedings.³¹

Judicial officers, prosecutors and defence attorneys should receive training on restorative justice and innovative sentencing and prosecution options aimed at furthering restorative-justice outcomes. Furthermore, in all ACSA cases, prosecutors and defence attorneys should avail court with information that justifies the need to more broadly accommodate restorative-justice approaches. This information may pertain to the relationship of trust between the ACSA victim and the suspect, information pertaining to the impact of the offence on the ACSA victim, family and the community, the caregiving role of the suspect, amongst others. It may occur that the information is not made available to the court by the prosecution or defence, for example, where the court rules that it is not admissible for purposes of determining whether child sexual offending occurred. In these circumstances, a platform must be

³⁰ *R v Karg* 1961 (1) SA 231 (A) 236A-CX.

³¹ *Thabethe* case *supra* note 7, para 26. In this case, the restorative-justice program was sanctioned by the court. The program involved the accused and the victim. As an appropriate safeguard, the program was guided by the local probation officer and supervised by the Restorative-Justice Centre in Pretoria.

created for this nature of information to still be brought to the attention of the court in all ACSA cases.

Although the role of assessors was beyond the scope of this thesis, it is worth mentioning in as far as the greater accommodation of BSE, restorative justice and protective measures in ACSA prosecutions is concerned. Assessors may assist and influence judicial decision-making based on their knowledge of the ACSA and the usefulness of the aforesaid three mechanisms. They usually have a legal background given that they come from a similar culture as the accused and the complainant. As such, they can be at the useful disposal of judicial officers by providing judges with information in areas in which they (judges) are not very familiar with. It is therefore recommended that the training and education on the aforesaid three mechanisms should apply to them if the justice gap in the prosecution of ACSA cases is to be effectively bridged.

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