

M v S (Unreported) Case no. A343/2018 (14 May 2019) Western Cape Division of High Court (Cape Town)

KEY CONCEPTS	
Rape of 11-year-old female	Rape by father
Multiple postponements	Incomplete evidence by complainant
Complainant not cross-examined	Court upper guardian of children
Treatment of child witnesses in court	Rights of child in court
Trauma counselling for complainant	Child witness

The accused was charged with the rape of his 11 year old daughter. He was convicted of attempted rape and sentenced to a term of 8 years direct imprisonment. The appellant appealed against both the conviction and sentence.

The accused pleaded not guilty but formally admitted that the complainant was his biological daughter and that she was 11 years old at the time. He also made formal admissions concerning the DNA evidence during the trial.

The complainant gave evidence via CCTV at the commencement of the trial, but, after a few minutes of evidence, she became too emotionally upset to continue and the matter was adjourned to give her some time to compose herself. She was still unable to testify later that day and the matter was postponed. The matter was postponed at the next appearance at the request of the appellant because he was ill. Thereafter the case was postponed repeatedly for various reasons. There were more than 20 postponements. The complainant's mother was also unable or unwilling to ensure her daughter's return to court and as a result the complainant never completed her evidence and was not cross-examined. As a consequence, the evidence of the complainant had to be excluded.

The court received evidence from the teacher to whom the child made the first disclosure, the doctor who examined her and the DNA evidence that linked the semen on the child's panties to that of the appellant. Based on this evidence, the trial court found the appellant guilty of attempted rape.

The appeal against conviction and sentence was unsuccessful. However, the largest part of the judgement is devoted to additional matters that require consideration where the judge examines the treatment of child witnesses in the criminal justice system. The court highlighted the following concerns:

- The court is the upper guardian of the children of South Africa and is required to be concerned about the welfare of the complainant as well as other children in her position. This concern should extend to her treatment by the criminal justice system and her participation in the trial.

- There were 21 postponements before the case was resolved. The complainant was present at court on 7 occasions, and every one of those days when she was at court was pointless and served no purpose. Attendance at court might have caused her to relive the experience every time she prepared herself for having to testify. She would have had to endure the hardship of getting to court and then having to wait there in vain. The mother would have had to take leave from her job and the complainant would have missed school.
- There was no indication that a social worker or therapist had been assigned to the child. Either to assist her with the trial or to provide trauma counselling.
- This represents a significant failure by the criminal justice system to provide proper care for the complainant to avoid the possibility of secondary traumatisation taking place.
- Where the legislature has made specific provision for certain minimum standards to be maintained, there can be no excuse for not doing so.

The enabling legislative environment that specifically provides for the care and the nurturing of children, specifically those children who have been harmed:

- Section 28(2) of the Constitution requires that the best interests of the child shall be of paramount importance in every matter concerning the child.
- The preamble to the Children's Act 38 of 2005 requires that children be entitled to special care and assistance.
- Section 6 of the Children's Act provides in general principle 2 that all proceedings, actions or decisions in a matter concerning a child must respect, protect and promote the child's rights set out in the Bill of Rights.
- Section 8 of the Children's Act provides that all organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in the Act.
- Section 9 of the Children's Act provides that the best interests of the child are paramount: in all matters concerning the care, protection and well-being of the child the standard that the child's best interest is of paramount importance must be applied.
- Sections 62 - 65 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 requires the preparation and implementation of a National Policy Framework to ensure a uniform and co-ordinated approach by all Government Departments and institutions in matters dealing with sexual offences and enhance the delivery of service as envisaged in this Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources.
- The National Policy Framework on the Management of Sexual Offences (NPF) was published in 2013 and is based on the principles of ensuring a victim-centred approach to sexual offences, adopting multidisciplinary and inter-sector responses, providing specialised services in these matters, and ensuring equal and equitable access to quality services.

- The NPF provides that psycho-social services and practical assistance must be provided as an integrated part of support services at all stages.
- In the foreword to the NPF, the Minister of Justice and Constitutional Development stated that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was an act that puts emphasis on the progressive development of a criminal justice system that is victim-centred, responsive and caring.
- The NPF acknowledges flaws in the criminal justice system and recognises that the system exacerbates the plight of the victims through secondary victimisation and traumatisation.
- The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 places a significant degree of responsibility and accountability on government departments to deliver appropriate, adequate and efficient services to all victims of sexual violence.
- The NPF also emphasises that special attention must be given to the thorny issue of secondary victimisation and traumatisation, and this may take place through unsympathetic treatment, lack of or insufficiently co-ordinated support services to assist the victim at a personal, institutional and broad social level.
- Principle 1 of the NPF states that an efficient and effective response requires all service delivery points within the value chain of sexual offences to provide victim-friendly services that exhibit speed, sensitivity and responsive attitudes to reduce and ultimately eradicate secondary victimisation.
- Principle 2 of the NPF requires collective participation of service providers such as the police officials, health care professionals, social workers, prosecutors, judicial officers, correctional officials, educators and traditional leaders.
- Principle 3 of the NPF acknowledges that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 may be construed as recognising the peculiar circumstances of victims of sexual violence, which often gives rise to special needs that requires a specialised response.
- One of the specific principles in the NPF is that psycho-social services and practical assistance must be provided as an integral part of support services at all stages of the management of sexual offences.
- The NPF also provides that all implementing government departments with clearly defined responsibilities in terms of the Sexual Offences Act must ensure that their responsibilities are carried out.

There are, therefore, legislatively imposed structures and procedures which are required to be put in place and implemented to ensure that child victims of crime are treated in such a manner so as to reduce, as far as possible, the occurrence of secondary trauma to the victim during the trial. Events, such as the delays and postponements in this case, should not be allowed. Everything that can be done to reduce stress should be done.

Practical Issues that Require Attention

The court found that it was not in the child's best interests – she was only 11 – to attend court so many times. A single appearance causes stress so seven appearances would have

caused immense stress. The judge then highlighted certain problems and suggested practical steps that could have been taken :

- The child was not protected from her father or kept away from him during the course of the trial. This was a failure to impose proper bail conditions.
- The fact that she had to attend court so many times shows that the system is not geared towards reducing secondary trauma.
- It should have been arranged in advance that notice be given to the child that the case was not proceeding. The giving of advance notice could be a condition of bail or be ordered specifically.
- The system should provide for those victims without adequate means or who have to rely on an inadequate transport system to be collected from their homes and transported to court.
- Effective case management would go a long way to reducing the number of postponements.
- There should be early involvement of the Department of Social Services to appoint a social worker to assess the child complainant's circumstances and to provide trauma counselling and assistance.
- The investigating officer or social worker should make prior arrangements to assist the complainant and her custodian to get to the court where there is an unreliable transport system.
- Counselling should be provided to the non-offending parent on methods to assist the child.
- There should be continued trauma counselling after the completion of the trial for a reasonable period.

The court made the following order:

- The Head of the Department of Social Welfare must ensure that a qualified social worker is appointed to provide trauma counselling for the complainant and to monitor the trauma counselling and to report back to the court within 6 weeks that the counselling has commenced and on the progress being made.