

## S v Skepe 2019 (2) SACR 349 (ECP)

KEY CONCEPTS	
Hearsay rule in children	Cautionary rule for children and single witnesses
Rape of 5-year-old	Special skills for prosecutors and magistrates in child sexual offences cases
Police investigation	Competency of child to testify

### Introduction

The accused, a 30-year-old male was charged with contravening s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in that it is alleged that he raped a 5 year old girl. The accused pleaded not guilty and exercised his right to remain silent.

### Facts of the case

The state led the evidence of 2 witnesses, a woman (MD) in the neighbourhood and the complainant's mother. MD testified that the child regularly visited her home to play with her grandchildren. On an unspecified day she noticed that the complainant had been left behind when the other children left so she took the child home. The complainant did not want to enter the shack so MD took her in. The complainant's mother was there and inebriated. Because the complainant was distressed that her mother would leave her alone with the accused, MD took the complainant home with her. The following day the complainant made a report to her that alleged that the accused had raped her when the mother was not there. On another unspecified day, the complainant arrived walking on her toes with her legs wide apart. MD decided to pay for the complainant and her mother to go to Komga as she believed that the alleged rape was continuing. The complainant and her mother left the following day.

The complainant's mother testified that on a Friday in July 2017 she had gone to Duncan Village. When she returned home the following Sunday, she visited her neighbour with the complainant. When the complainant became drowsy in the evening, she took her home but the complainant refused to be left alone. The complainant alleged that the accused would rape her and, when questioned, alleged that the accused had raped her the previous Friday. The mother confronted the accused who denied the allegation and later that night assaulted her with a spade.

### Competency to testify

At the time of the trial, the complainant was 7 years old. The state called her as a witness and the court found that, due to her young age and state of development, she would not understand the nature and import of the oath. The court then proceeded in terms of s164(1) of the Criminal Procedure Act 51 of 1977 and conducted an enquiry to determine whether the child could distinguish between truth and falsity. At the very best her answers were contradictory. She would seem to understand the difference and then immediately create the opposite impression. Counsel for both parties were even given an opportunity to clarify the confusion, but it only deepened. The court then asked a clinical psychologist to assist and she produced a report which concluded that the child did not have the mental capacity to give evidence in court. Consequently the court rules that

the complainant was not a competent witness due to her inability to distinguish between truth and lies.

### **Hearsay evidence of the child**

The state brought an application for the admission of hearsay evidence of the child. The court admitted the hearsay evidence for the following reasons:

- the court took into account the caution in *S v Ramavhale* 1996 (1) SACR 639 (A) at 649c – d that a judge should “hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so;”
- the hearsay evidence could only be relied on if there was corroborating evidence to support it;
- the nature of the hearsay evidence was a report that alleged rape and identified the alleged perpetrator as the accused;
- the evidence was tendered by the state to prove that the rape had indeed occurred and that the accused was the perpetrator;
- the defence did not challenge that the child had made the reports to MD and the mother, but challenged rather the reliability of the child;
- the complainant did not testify as a result of the court’s ruling;
- court also took into account that part of the hearsay was proven to be true by way of the medical report
- it was in the interests of justice to admit the hearsay.

### **Cases of sexual abuse involving children require special skills**

In *S v Vilakazi* 2009 (1) SACR 552 (SCA) the judge observed as follows:

“The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone.”

It appears that the state relied unduly heavily on the hearsay evidence of the child and not much effort was expended to corroborate the hearsay or gather other circumstantial evidence to assist the court to determine what really happened.

### **Cautionary rule for single witnesses and children**

The only issue for determination is the identity of the perpetrator. The fact of rape is not in dispute. The only direct evidence on identity is the mere say-so of the child. Even if she did testify, her evidence would have been treated with caution because she was both a single witness and a child witness. And in such a case the court must have proper regard to the danger of uncritical acceptance of the evidence of both a single witness and a child witness. The cautionary rule works as follows:

- the court must articulate the warning in a judgement and the need for caution in general and with regard to the specific case;
- the court must examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects;
- although corroboration is not a prerequisite for conviction, a court will sometimes seek corroboration which implicates the accused before it will convict beyond reasonable doubt;

- failing corroboration, a court will look for some feature in the evidence which will give the single child witness enough trustworthiness to substantially reduce the risk of a wrong reliance upon her evidence.

It was the court's view that this was the type of a case that was "crying out for corroboration to provide some guarantees that the truth had been told." And from the evidence placed before court, it was of the opinion that this court would not have been able to convict the accused unless he incriminated himself. Accused acquitted.

"I need to make this clear, Mr Skepe, you will be acquitted, not due to your innocence. In fact, I have a strong suspicion that you raped this child. You are simply benefiting from the failure of the state to present evidence to prove your guilt beyond reasonable doubt."

The court also dealt with the issue of the police not arriving after the rape was reported:

"The evidence of LS is that she called the police to report the alleged rape. She was told by the police to wait at the road in her locality, but the police never came. The delay in registering the case may have played role in the acquittal of the accused due to evidence not being gathered on time. An order is issued for the provincial commissioner of the police to investigate the conduct of the police at Bluewater Police Station relating to CAS 03/08/2017 in allegedly failing to promptly respond to LS complaint of rape of the child."