Evidence

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Age

The court noted in *S v Mbelo* 2003 (1) SACR 84 (NCD) that '[w]here the age of either an accused or a complainant is material to either the offence or to sentence, hearsay evidence thereof is admissible' (at para 8). (See also *S v Moeketsi* 1976 (4) SA 838 (O); *S v Magqabudi* 1983 (4) SA 54 (Tk). Majiedt J also held that a baptismal certificate was not sufficient proof of age. However, the court held that formal admissions made by the accused's legal representative in the pleadings were binding and sufficient proof of the ages in question.

Alibi

In *S v Thebus* 2002 (2) SACR 566 (SCA) the court had to consider the veracity of an alibi raised for the first time at the trial which took place some two years after the incident in question. Lewis AJA (Olivier JA concurring) held, that the only inference to be drawn from such late disclosure was that 'the alibi' had no truth in it al all. The Law Commission's proposal in its Report on Simplification of Criminal Procedure *A more inquisitorial approach to criminal procedure — police questioning, defence disclosure, the role of judicial officers and judicial management of trial* (2002), that late disclosure of an alibi should be prohibited save with the leave of the court appears somewhat redundant given the negative inference that is clearly permissible at common law.

Computer Evidence

In *S v Mashiyi* 2002 (2) SACR 387 (TkD), Miller J held that documents containing information that had to be processed and generated by a computer were inadmissible in a criminal trial. (See also *S v Harper* 1981 (1) SA 88 (D). The reasoning of the court is not examined here as hopefully the seemingly insurmountable barrier to the admission of such documents in criminal cases has been cured by the Electronic Communications and Transactions Act 25 of 2002. The Act defines a 'data' message as 'data *generated,* sent, received or stored by electronic means and includes — (*a*) voice, where the voice is used in an automated transaction; and (*b*) a stored record (s 1; emphasis added). 'Data' is defined as the 'electronic representations of information in any form' (s 1). Section 15 of the Act regulates the admission of data messages and reads as follows:

'(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence
  (a) on the mere grounds that it is constituted by a data message; or
  (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
(2) Information in the form of a data message must be given due evidential weight.
(3) In assessing the evidential weight of a data message, regard must be had to–
  (a) the reliability of the manner in which the data message was generated, stored or communicated;
  (b) the reliability of the manner in which the integrity of the data message was maintained;
  (c) the manner in which its originator was identified; and
  (d) any other relevant factor.
(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an

> officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.'

Discharge at the close of the state case

Unfortunately the judgments handed down by the Supreme Court of Appeal in *S v Lubaxa* 2001 (2) SACR 703 (SCA) and *S v Legote* 2001 (2) SACR 179 (SCA) were not available to Maya J at the time of writing the judgment in *S v Tusani* 2002 (2) SACR 468 (TD). Nevertheless, the finding of the court in *Tusani* is consistent with the reasoning of Nugent AJA (as he was then) in *Lubaxa* in so far as he holds that the requirement of a prima facie case need not be met in order to avoid discharge, 'where the prosecution's case against one accused might be supplement by the evidence of a co-accused' (at para 20). This judgment is criticised in (2002) 15 *SACJ* 141.

Evaluation of evidence

The Supreme Court of Appeal in *S v Trainor* 2003 (1) SACR 35 (SCA) endorsed the approach to the evaluation of evidence as set out by Nugent J (as he was then) in *S v Van der Meyden* 1999 (1) SACR 447 (W) 449*b*–450*b*. Navsa JA elaborated (at para 9) as follows:

> 'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.'

Hearsay

The court in *S v Ndlovu* 2002 (2) SACR 325 (SCA) dealt with the admission of hearsay evidence in terms of the Law of Evidence Amendment Act 1988. Cameron JA made the following general observations regarding the appropriate manner in which to safeguard the fair trial rights of an accused when dealing with the admissibility of hearsay evidence. First, presiding officers should actively guard against the inadvertent admission of inadmissible evidence. Second, it is essential that unrepresented accused have the provisions of the Act properly explained to them. (See also *S v*

Congola 2002 (2) SACR 383 (T).'Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility' (at para 18). Fourth, it should be borne in mind that a ruling on the admissibility of evidence is one of law and can be overruled by an appeal court.

The more specific question was formulated by Cameron JA as follows: can 'an accused's out-of-court statement incriminating a co-accused, if disavowed at the trial, ... nevertheless be used in evidence against the latter' (at para 1). The court a quo had answered the question in the affirmative on the basis that the statement was admissible in terms of s 3(1)(*b*) of the Law of Evidence Amendment Act 1988 and did not need to be repeated under oath. (S *v* *Ndlovu* 2001 (1) SACR 85 (W), for a further discussion of this case see 2001 (14) *SACJ* 262). In terms of s 3(1)(*b*) hearsay evidence may be admitted 'if the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings'. This should be read together with s 3(3) which reads; 'Hearsay evidence may be provisionally admitted in terms of ss (1)(*b*) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings. Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out to account unless the hearsay evidence is admitted' by consent or in the interests of justice. The Supreme Court of Appeal found that the central flaw in the court a quo's finding was that the danger inherent in the admission of hearsay evidence 'is that it maybe untrustworthy since it cannot be subject to cross-examination' (at para 30). This danger will occur not only when the hearsay declarant is not called as a witness, but when he or she is called and 'does not confirm the statement, or repudiates it' (at para 30). Consequently, in such circumstances the court may not automatically admit the statement in terms of s 3(1)(*b*) and must proceed to determine whether the interests of justice require the statement's admission. In other words admissibility falls to be determined through the application of s 3(1)(*c*).

With regard to the constitutionality of the hearsay rule as formulated in s 3 of the 1988 Act the court concluded that there was no infringement of the constitutional right to challenge evidence. Cameron JA reasoned as follows (at para 24):

> 'It has correctly been observed that the admission of hearsay evidence "by definition denies an accused the right to cross-examine", since the declarant is not in court and cannot be cross-examined. I cannot accept, however, that "use of hearsay evidence by the state violates the accused's right to challenge evidence by cross-examination", if it is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. The Bill of Rights does

> not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to "challenge evidence". Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to "challenge evidence" does not encompass the right to cross-examine the original declarant.'

It is submitted that the court in reaching this conclusion failed to fully explore the content of the right to challenge evidence and the essential role played by cross-examination. Even the most considered application of s 3 cannot compensate for the inability to use cross-examination — to explore contradictions between witnesses and apparent inconsistencies in a witness's statement; to elicit favourable information and extract information that might have been left out or under-emphasised in evidence-in-chief. There can be little doubt that s 3 would meet the requirements of the limitations clause however, the failure to find an infringement and engage in a limitations analysis has potentially diminished the content of the right to challenge evidence.

Exculpatory statement by the accused

During the course of a trial the prosecution handed in as evidence an exculpatory statement made by a co-accused (the appellant) to the police. The appellant's legal representative consented to the handing in of the statement. The magistrate disregarded the statement on the basis that it did not form part of the evidence. On appeal, Pillay J in *S v Mali* 2002 (2) SACR 597 (E) held that the magistrate had misdirected himself in not taking the statement into account in that it was admissible hearsay evidence in terms of s 3(1)*(a)* of the Law of Evidence Amendment Act 45 of 1988 which permits hearsay evidence to be admitted by consent.

Identification evidence

In *S v Matwa* 2002 (2) SACR 350 (E), Leach J held that ruling *S v Maradu* 1994 (2) SACR 410 (W) that evidence of dock identification should only be admissible in special circumstances went 'too far' (at 355*d*). The court held that the better approach to be adopted is that such evidence is admissible but the circumstances in each case will determine the weight to be attached to the identification. (See also *S v Bailey* unreported case No. 215/2000 (C) which is discussed in (2002) 15 *SACJ* 269.)

Improperly obtained evidence

In *S v M* 2002 (2) SACR 411 (SCA) the court held that in the circumstances evidence improperly obtained from a third party did not affect the fairness of the appellant's trial. Heher AJA confirmed the existence of a common-law discretion to exclude improperly obtained evidence (see *S v Hammer* 1994 (2) SACR 496 (C)) but held that the facts of the case did not justify the exercise of such a discretion. In reaching this conclusion the court noted (at para 31) that:

> 'Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say-so of a witness. . .the reason being that it usually possesses an objective reliability. It does not "conscript the accused against himself". . ..'

The court also noted that despite the improper surrounding circumstances there was no conduct by the policeman in question that 'was consciously directed at finding or obtaining possession of the letter' (at 432*i*) (the letter being the improperly obtained evidence in question). Furthermore admitting the letter would not constitute approval or encouragement of improper police conduct.

Previous convictions

In both *S v Njikaza* 2002 (2) SACR 481 (C) and *S v Smith* 2002 (2) SACR 488 (C) the court held that is was a serious irregularity for a magistrate to question an accused on his previous convictions where the state declines to prove previous convictions. Clearly, previous convictions may be relevant to sentence and perhaps the courts' impartiality would be sufficiently protected if a legislative duty was placed on prosecutors to adduce such evidence or a tender a reasonable explanation as to why they are unable to do so.

Sexual offences

Prior to *S v Van der Ross* 2002 (2) SACR 362 (C) it could be argued that the Supreme Court of Appeal in *S v Jackson* 1998 (1) SACR 470 (SCA) abolished the cautionary rule applicable to complainants in sexual offence cases and simply required that the complainant's evidence be approached in the same way as any other witness; the court only taking a cautionary approach when there was an evidential basis for doing so. However, Thring J in *Van der Ross* in finding an evidentiary basis for exercising caution in the sexual nature of the charge effectively circumvents the Supreme Courts of Appeal's ruling that this cautionary rule is irrational and outdated and has no place in South African law. If *Jackson* is capable of such an interpretation, it can only be

hoped that the recommendations of the South African Law Commission (Project 107, *Sexual Offences* Report (2002) para 5.3.3) will be acted upon and that this iniquitous rule will be legislatively abolished.

In contrast the judgment of the Supreme Court of Appeal in *S v M* 2002 (2) SACR 411 (SCA) is to be welcomed in its support of the South African Law Commission (op cit para 5.6.3) proposals in respect of the approach to be adopted in determining the admissibility of prior sexual history evidence.

Section 227(2) of the Criminal Procedure Act 1977 is directed at protecting a complainant in a sexual offence case from humiliating, hostile and irrelevant questioning. It prohibits the defence from adducing evidence of the complainant's prior sexual history (cross-examination is similarly prohibited) without leave of the court, the court will only grant such leave if it is satisfied that the evidence or questioning is relevant. Unfortunately, whilst this provision has been in force since 1989, there is little evidence of the prosecution invoking it in order to protect complainants and it is not surprising that Heher AJA in *S v M* (at 422*b)* noted: 'The members of this Court are not aware of any instance where s 227(2) has been applied in this country.' Heher AJA noted that the South African Law Commission (Discussion Paper 102, Project 107, *Sexual Offences: Process and Procedures* (2002) 501) had noted that one of the reasons for the failure of s 227(2) in protecting complainants was the wide discretion conferred on magistrates in determining relevance. The Law Commission has accordingly proposed that evidence of prior sexual history only be admitted if it satisfied that such evidence or questioning:

> '(a) relates to a specific instance of sexual activity relevant to a fact in issue;
> (b) is likely to rebut evidence previously adduced by the prosecution;
> (c) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant where it is relevant to a fact in issue; or
> (d) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
> (e) is fundamental to the accused's defence.'

Heher AJA held that although the above proposal had no legislative status, the criteria identified should nevertheless be taken into account in determining admissibility. He also quoted with approval the following extract from Du Toit et al *Commentary on the Criminal Procedure Act* 1977 (24-100B) setting out the approach to be taken in determining the admissibility of prior sexual history evidence:

> '[s]everal ... policy concerns which militate against admissibility ... must be taken to the balance. These include the need to protect witnesses from hurtful, harassing

> and humiliating attacks, the recognition of a person's right to privacy in the highly sensitive areas of sexuality and the realisation that the exposure of their sexual history may deter many victims of sexual offences from testifying.'

The court noting that there had be a complete failure of the court a quo to apply s 227(2) and that the evidence in question 'served no purpose other than the impermissible one of destroying the complainant's credit' (at 426*b*) held that the evidence (in the form of an affidavit) had been improperly admitted and should be struck from the record.

Witnesses

Incriminating evidence by witness for the prosecution

Moseneke J in *S v Mokoena* 2003 (1) SACR 74 (T) stressed the importance of adhering to the prescribed warning set out in s 204(1)(*a*) of the Criminal Procedure Act 1977. (Section 204 comes into play when a state witness waives his or her privilege against self-incrimination in exchange for discharge from prosecution provided that they testify frankly and honestly.) The magistrate in the court a quo appears to have paid little attention to the contents of s 204 and warned two accomplice witnesses 'to give evidence "favourable to the State" and that their failure to do so shall result in charges against them being reinstated' (at 78*a*). Such a warning, the review court held, constituted undue influence on the accomplice witnesses and severely undermined the reliability of their testimony. The court held that the irregular warning in terms of s 204 constituted a gross irregularity which was compounded by another irregularity in that the magistrate appears to have discharged the witnesses before they testified. Moseneke J held that although these irregularities were not fatal to the entire proceedings the evidence of the two accomplice witnesses had to be excluded when evaluating the conviction.

Children — oath

There have been a disquieting number of cases in which convictions of rape, where the complainant has been a child, have been set aside on review because of irregularities in the administration of the oath or admonition. The South African Law Commission (Project 107, *Sexual Offences* Report (2002) para 4.3.4) has proposed that s 164 of the Criminal Procedure Act 1977 be amended so that the inquiry be restricted to an ability to understand and respond to questions put to him or her. However, legislative reform is uncertain and in any event slow. Consequently, the common sense approach adopted by the Supreme Court of Appeal in *S v B* 2003 (1) SACR 52 (SCA) is to be welcomed.

The accused was convicted in the regional court on a charge of rape and referred to the High Court for sentencing. Before proceeding to testify, the 13-year-old complainant was asked whether she understood what it meant to swear to tell the truth and what it meant to tell the truth, thereafter she was warned to tell the truth. When the matter came before the High Court for sentencing the court set the conviction aside and replaced it with a finding of not guilty as the complainant's evidence had to be excluded as there had been no investigation to justify a finding that the witness did not understand the nature and import of the oath or affirmation due to ignorance arising from youth, defective education or other cause. (See ss 162 and 164 of the Criminal Procedure Act 1977). The prosecution applied for the following questions of law to be reserved: (a) whether the absence of such an investigation rendered the evidence inadmissible, and (b) whether such evidence was to be completely disregarded when the matter came before the High Court for sentencing.

The Supreme Court of Appeal held that a formally noted investigation into a witness' ability to understand the oath or affirmation although preferable, was not always necessary. It was possible that in certain circumstances it would be apparent when attempting to administer the oath that there was a lack of the requisite understanding, and in some cases the young age of the witness could on its own justify such a finding. The circumstances merely had to be such that they sustained the opinion of the presiding officer that the witness did not understand the nature and import of the oath and affirmation as a result of ignorance arising from youth, defective education or other cause. The court found that in the circumstances there was non-compliance with the relevant provisions of the Criminal Procedure Act and the complainant's evidence was inadmissible. However, this did not mean that the court had no option but to acquit the accused. Streicher JA held that alternatives were to be found in s 52(3)(*d*) and *(e)* of the Criminal Law Amendment Act 105 of 1997. Section 52(3)(*d)* provides that the High Court to which a matter has been referred to for sentencing may 'hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article'. In terms of s 52(3)(*e*) a court can confirm or alter a conviction and impose a sentence; set aside the conviction, 'remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit'; or 'make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice'.

The Supreme Court of Appeal noted that the complainant's evidence was of material importance and that the objection to its admissibility was purely of a

technical nature — and investigation into the complainant's understanding of the nature and import of the oath or admonition would not have made her evidence any more reliable. Consequently, the High Court should have given consideration to the options available to it in terms of s 52(3)(*d*) and (*e*) and how these could be best applied without infringing the accused's fair trial rights. The court noted that the interests of justice required the courts not only to guard against incorrect convictions but also ensure that those guilty of crimes were properly punished. The variety of options available to the High Court included the following: hearing of further evidence, requiring the complainant to confirm her evidence after complying with ss 162, 163 and 164 of the Criminal Procedure Act, requiring the complainant to repeat her evidence and be subject to cross-examination on the repeated evidence, the matter be referred back to the regional court for the evidence to be heard in the appropriate manner. Streicher JA (Harms JA and Schutz JA concurring) held that the court a quo had erred in disregarding the evidence of the complainant and failing to consider the appropriate exercise of its powers in terms of s 52(3) of Act 105 of 1997. The court ordered that the case be referred back to the court a quo to consider reopening for rehearing either by the court a quo or regional court.