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**CHILDREN AND OTHER VULNERABLE WITNESSES**

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This presentation will focus on the treatment of children and other vulnerable witnesses in criminal proceedings. Vulnerable witnesses include a wide range of persons including women, persons with disabilities, the elderly and commercial sex workers (CSWs), whether male or female. Traditionally, the criminal justice system has operated without much consideration for the particular sensitivities of these witnesses and their varying capabilities to give evidence or the trauma that they may have endured and continue to endure as well as the stigma and discrimination they may have faced or are facing. The issues to be addressed in relation to children and vulnerable witnesses must be considered in light of the fact that the circumstances which result in these witnesses having to testify occur mainly in circumstances of violence and abuse in the private sphere, though of course there is violence and abuse perpetrated on these persons in the public sphere. Therefore knowledge of rape and domestic violence myths and the effects and reactions of victims or survivors would be an asset to judicial officers in adjudicating on these types of matters.

Some of these myths are that these are private, domestic matters, that victims ask for or look for the abuse or that they attract attacks by their mode of dress or way of life. The judiciary has a duty to understand the nature, extent and impact of violence on children and vulnerable witnesses in the conduct of proceedings in their courts and in their judgments.<sup>1</sup>

The competency of young children and mentally challenged witnesses to testify is always a source of concern with a ruling that a witness is competent being reviewable as the trial

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<sup>1</sup> See The Challenge of Bangalore: Making Human Rights a Practice Reality - Commonwealth Judicial Colloquium, Bangalore, India Dec., 1998, 25 Commonwealth Law Bulletin, 47, at 58.

progresses. It is not necessary that the person subscribe to any religious faith or believe in any religious sanction, though some judicial officers still erroneously subscribe to this view, oftentimes, in my experience, applying a Christian perspective, despite our multicultural societies.

All witnesses should be considered to be potentially competent regardless of their age. As such, the evidence of children should not be viewed with suspicion from the outset. Each child should be evaluated to ascertain if s/he should give sworn or unsworn evidence. The court is to ask relevant questions to determine whether the witness can understand the questions put and give intelligible answers and whether the witness appreciates that s/he ought to speak the truth. In jury trials this should be done in the absence of the jury. It is not necessary that the witness be aware of the status of being a witness, but they should appreciate the solemnity of the occasion. While a young child should not be considered incompetent based on age alone,<sup>2</sup> the younger the child, the more the court should scrutinize the child's answers and exercise caution regarding the issue of competence. Similar considerations would apply to persons who are mentally challenged.

One has to distinguish between competence and memory so that while a person's competence may or may not improve with the passage of time, memory of the incident may diminish. Therefore, it is also important that the administration of justice system be responsive so that trials are conducted in the shortest possible time after the alleged commission of the offence, utilizing intermediaries and newer methods of procedure such as video interviews and recordings and video links, prior to and during trials.

In Guyana, there are at present no provisions for the intervention or involvement of third party intermediaries such as social workers, psychologists or counselors to assist the court in the criminal trial process. Despite this, in the absence of detailed intermediary procedures and guidelines, judicial officers can be proactive in permitting the intervention of such intermediaries, even if in a limited way, so as to foster fairness while not being biased in

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<sup>2</sup> *McPherson* [2006] 1 Cr App R 459; See also *Powell* [2006] 1 Cr App R 31

favour of children or other vulnerable witnesses. As a prosecutor I did encounter some resistance to permitting a child witness to be counseled when, on seeing the accused, she was so terrified that she would scream and cry uncontrollably. Eventually she was counseled with the result that ultimately she testified. Though limited, this was a case where an intermediary was used to assist the court and the witness so that she could have testified. The counseling of many child and other vulnerable witnesses by governmental and NGO counselors does occur more often now and in a few instances courts would refer these witnesses for counseling. The court can also allow counselors to be present during a trial in order to give moral support to the witness.

While the prosecution has conduct of the case and in some instances can decide whether a particular case is to be fixed for trial, it is the court as the ultimate guardian of justice which must decide whether it is appropriate for the trial or hearing to proceed. For instance, the period chosen for these witnesses to testify may be of importance, e.g. as far as possible a child's schooling should not be disrupted. I have known judicial officers to be insensitive to having a trial proceed during a more appropriate time bearing in mind the child's age and school commitments. So where possible, trials involving children should be done during school holidays. The time of day maybe important, e.g. a child or an elderly witness may be more alert in the morning than in the afternoon. In being more responsive to vulnerable witnesses, the judicial officer should make allowances for them to have breaks. These persons may have short attention spans, being unaccustomed to lengthy periods of concentration and questioning. Thus it may be necessary to conduct the trial in stages, with the judicial officer being alert to the witness's demeanour while testifying. Where the witness is in distress, the judicial officer should try to reassure the witness. There may be need to have a parent/guardian, who is to testify, do so first, so that they can be in court when the child testifies. Long and complicated or repetitive questioning should not be permitted. It is not improper for the court to ask the witness some questions while not taking over the questioning. And at the end, the witness should be thanked for testifying. It has been found that this gesture of appreciation makes these witnesses, especially children under ten years of age, feel better. Flexibility and empathy are necessary in the conduct of these trials and proceedings especially when these witnesses are testifying.

A judicial officer should control the manner in which proceedings are to be conducted, facilitating pre-trial proceedings which would make a vulnerable witness more comfortable with testifying. Where there are to be legal arguments, the witnesses should not be called and made to wait or to stand down while these issues are determined. Even in the absence of provisions for pre-trial conferences in Guyana, I have conducted what is essentially a pre-trial conference in order to determine legal issues up front so that the trial could have proceeded as smoothly as possible.

In a case of statutory rape I conducted a pre-trial meeting, indicating to counsel that I would not give a corroboration warning<sup>3</sup> in the strict sense since I am of the view that the statutory and common law provisions in this regard are unconstitutional in light of the amendments made to the Constitution of Guyana. I also did not permit cross-examination on general sexual history<sup>4</sup> on two bases – (1) that the provisions in this regard are unconstitutional and (2) that the victim was a child and any sexual activity which she might have engaged in would not and could not have been consensual and would have amounted to sexual abuse. Of course, each case would still have to be dealt with on its merits so e.g. if the allegation by the defence is that the witness previously made false allegations regarding sexual offences allegedly committed, cross-examination on this issue could be permissible as it goes to the witness's credibility and not to their sexual behaviour.

Ultimately, the aim must be to ensure that these witnesses give coherent evidence which can be properly assessed or adjudicated upon without compromising a fair trial. In this context, the overarching goal in ensuring that justice is done is to focus not only on the human rights of the accused, but also on the human rights of the witness, whether child or vulnerable person. Therefore, courts must no longer subscribe to the view that children and vulnerable witnesses are inherently unreliable with children and victims of sexual assault in particular being prone to telling false stories with some possible ulterior motive either of their own or

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<sup>3</sup> See also Evidence Act, Chapter 5:03, ss 61 (3) (4) and 71 in relation to the mandatory application of corroboration rules regarding children which I submit are inherently discriminatory and unfair.

<sup>4</sup> See Evidence Act, Cap 5:03, s 82.

induced by another person.<sup>5</sup> Children and vulnerable witnesses should not be treated as suspect witnesses for this would amount to discrimination.

The Constitution of Guyana has widened the grounds of non-discrimination to include sex, gender, age and disability<sup>6</sup> and also provides for equality<sup>7</sup> as a fundamental right. Further, article 39(2) of the Constitution specifically mandates that the courts “shall pay due regard to international law, international conventions, covenants and charters bearing on human rights.”<sup>8</sup> Article 154 enjoins the courts to take cognizance of the seven international human rights conventions named in the Fourth Schedule to the Constitution.<sup>9</sup> A reading of these constitutional provisions means that the courts can strive to achieve a level playing field in the adjudication process as between witnesses and accused or defendants by taking into consideration e.g. the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as well as other conventions such as the Convention on the Rights of People with Disabilities.

“The Constitution should dictate the norms embodied in legal practices and procedures and the court should not always have to await legislative intervention to make necessary changes and to correct imbalances ... .”<sup>10</sup> Even without relying on constitutional provisions, courts have held that common law evidential rules that are discriminatory of children and vulnerable witnesses should be modified to suit more modern mores and they have also invoked international human rights conventions in adjudicating on cases. In *R v Gilbert*<sup>11</sup> the Privy Council held that the traditional corroboration warning was no longer absolutely necessary especially as it did not add to the fairness of the trial nor did it aid in achieving a

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<sup>5</sup> See e.g. dicta in *R v Henry & Manning* (1968) 53 Cr App R 150; *Pivotte v R* (1995) 50 WIR 114; *William & Khublall v The State* (1997) 57 WIR 164.

<sup>6</sup> Art 149 as amended by Constitution (Amendment) Act No. 10 of 2003.

<sup>7</sup> Art 149D, Constitution (Amendment) Act No. 10 of 2003.

<sup>8</sup> Constitution (Amendment) Act No. 10 of 2003

<sup>9</sup> The conventions are the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belem do Para).

<sup>10</sup> R. George, ‘Balancing Justice in Rape Trials: Judicial Activism for Gender Equality’ MSt Dissertation, 2005, Oxford, 3.

<sup>11</sup> (2002) 61 WIR 174

safe verdict. Similar views were expressed in *R v Makanjuola*<sup>12</sup> and *The State v Jackson*<sup>13</sup> where the House of Lords and Supreme Court of South Africa respectively expressed the view that the corroboration rule is anachronistic as it unjustly stereotypes complainants in sexual assault cases as being particularly unreliable. These Courts gave guidance on the discretion courts should exercise in deciding whether and what directions on the evidence should be given in cases where children and vulnerable witnesses have testified. In *State v K*<sup>14</sup>, the Namibian Supreme Court held that the cautionary or corroboration rule “might adversely infringe the fundamental rights of the victims, which included a fair trial also in regard to such victims’ rights and interests.” In *Gladstone v R*<sup>15</sup> Chief Justice Byron referred to the Convention on the Elimination of All Forms of Discrimination Against Women in a case where an accused who was indicted for raping a girl raised the issue that the delay in his trial infringed his rights. The Chief Justice stated that “the complainant was a girl child ... St. Vincent and the Grenadines is a member of the CEDAW. The international norms therefore that are applicable in this society include the duty of the State to protect the interests of the girl child against domestic violence and sexual abuse. The society and the complainant had an important interest in the prosecution of this case.” He went on to state that “in determining the scope of the constitutionally protected rights of the individual, the court is obliged to balance the rights and interests of the girl child against domestic violence and abuse.”

Judicial officers can and should reconsider common law and statutory provisions in order to determine whether they violate fundamental rights and international human rights which provide for the protection of children and vulnerable witnesses. We have to work to remove systemic obstacles and discrimination in the form of unreasonable procedural and evidentiary requirements. There have been and will continue to be challenges to provisions that are aimed at ensuring a level playing field but we will have to be vigilant in ensuring that a balance is maintained.<sup>16</sup> The principles of law must support children and vulnerable witnesses, and judicial officers and other actors in the administration of justice must respond

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<sup>12</sup> [1995] 2 Cr App R 469; [1995] 3 All ER 730

<sup>13</sup> 1998 1 SACR 470 (SCA)

<sup>14</sup> [2000] 4 LRC 129

<sup>15</sup> Crim App No. 13 of 1997, 12 Jan 1998 CA, St Vincent and the Grenadines.

<sup>16</sup> See e.g. *R v Seaboyer, R v Gayme* 83 DLR (4<sup>th</sup>) 193

to the needs of these witnesses.<sup>17</sup> While radical reform will ultimately reside with the executive and the legislature, we “can encourage reform from the bench and extra-judicially.”<sup>18</sup> Equality and non-discrimination provisions and human rights principles dictate that these witnesses have a right to equal protection of the law, access to justice and a fair trial. As representatives of the third arm of the State, we have an obligation to protect and ensure the protection of the rights of children and other vulnerable witnesses.

Justice Roxane George

June 26, 2009

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<sup>17</sup> *State v K* supra n 13 at p 131: “If it appears to a superior court as a reasonable possibility that the application of an existing rule of procedure or evidence, even one of long standing, might adversely affect the fairness of a trial or the outcome of an appeal, whether it is fairness in regard to the rights and interests of the accused or fairness in regard to the rights and interests of the victim, or both, the court would be duty-bound to raise the issue *mero muto* and, if necessary, to decide the issue of the continuity of the rule measured against the fundamental rights to a fair trial guaranteed by the Constitution.”

<sup>18</sup> Tracy Robinson, ‘An Analysis of legal change: law and gender-based violence in the Caribbean’ Judicial Colloquium on the Application of International Human Rights Law at the Domestic Level, Nassau, May 2004.