

# CHAPTER ELEVEN

## THE SURVIVAL OF THE CAUTIONARY RULE

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### 1. INTRODUCTION

The cautionary rule is a rule of practice that aims to assist judges in assessing evidence. It requires judicial officers to exercise caution before adopting the evidence of certain witnesses on the ground that the evidence of such witnesses is inherently potentially unreliable. The rule thus requires the presiding officer to cautiously regard the evidence of children, complainants in sexual offence cases and accomplices.<sup>1</sup> The cautionary rule and the need for same has its root in ancient legal writings<sup>2</sup> and has been adopted by our judiciary. However, subsequent to the enactment of the Constitution, its validity and the rationale for the rule has been questioned.

More recently, the Supreme Court of Appeal<sup>3</sup> pronounced on the issue and declared the rule to be based on “irrational and outdated perceptions”. What remains is to analyse whether in fact the cautionary rule has been abolished by this judgment and what the effect of the judgment has been to date.

I propose dealing with the judgment and its effect in this chapter before making recommendations for law reform.

### 2. THE SUPREME COURT OF APPEAL LAYS DOWN THE LAW – OR HAS IT?

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<sup>1</sup> Hoffmann & Zeffert “The South African Law of Evidence” 3ed (1988) 572

<sup>2</sup> Lord Hale CJ in the seventeenth century first stated that “it is easy to bring a charge of rape and difficult to refute.” Wigmore followed suite in 1940 in his book “Anglo American Systems of Evidence in trials at common law” where he stated that since women were naturally prone to lie and to fantasise about sexual matters they were equally prone to contrive false charges of sexual offences.

<sup>3</sup> S v J 1998 (2) SA 984 (SCA)

In the case of *S v J* the appellant who had been convicted of attempted rape and sentenced accordingly, appealed against both his conviction and sentence. It was argued before the Court that the trial court had misdirected itself in not truly applying the cautionary rule as the magistrate had simply paid lip service to the rule.<sup>4</sup>

The state argued that the basis, meaning and ambit of the rule should be revisited as it amounted to discrimination against women, was unnecessary and unfairly increased the burden of proof resting on the State in cases involving sexual offences.

Olivier JA analyses the rule and its basis and concludes that it has been recognised in a number of jurisdictions that the very foundation of the rule as it applied to complainants in sexual offence cases was discriminatory.<sup>5</sup>

In this regard he endorses the Court of Appeal's decision in England in the case of *R v Makanjuola, R v Easton*<sup>6</sup> where Lord Taylor CJ had the following to say:

“...[W]e have been invited to give guidance as to the circumstances in which, as a matter of discretion, a Judge ought to in summing up to a jury to urge caution in regard to particular witnesses and the terms in which that should be done...Whether, as matter of discretion, a Judge should give any warning and if so its strength and terms must depend upon the content and manner of the witnesses evidence, the circumstances of the case and the issues raised...”

Lord Taylor CJ goes on to formulate guidelines the third of which Olivier regards as important:

“In some cases, it may be appropriate for the Judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it be necessarily be so because a witness is alleged to be an accomplice. *There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.*”

It is significant that Olivier JA emphasises the latter portion of the quote and it suggests that the cautionary rule may still be applied provided an evidential basis is laid and it is not done as a matter of course. This is in line with and informs his conclusion:

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<sup>4</sup> supra at 1006I-H

<sup>5</sup> The position in Namibia, UK, Canada, New Zealand, California, New York are all considered in the judgment.

<sup>6</sup> [1995] 3 All ER 730 (CA)

“In my view the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. *The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of the general cautionary rule.*<sup>7</sup>”

[My emphasis].

The foregoing seems to indicate that the cautionary rule may still find application in sexual offences and thus the rule has clearly not been abolished. All that has been done is that the obligation previously imposed upon judicial officers has been removed. They need not as a rule apply caution to the evidence of complainants in sexual offence cases, but they may, should the circumstances warrant the application.

Thus in the final analysis the Court finds that the “magistrate was not obliged to apply such rule.”<sup>8</sup> No mention is made anywhere in the judgment that the cautionary rule shall henceforth be abolished. It is not declared to be unconstitutional or contrary to the principles enunciated in the Bill of Rights. This creates some loopholes as illustrated hereunder.

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<sup>7</sup> at 1009 F-G

<sup>8</sup> at 1010E

### 3. THE AFTERMATH OF THE OLIVIER JUDGMENT

Subsequent to the Olivier judgement our courts have had an opportunity to deal with the decision and apply its principles. This has brought about some interesting and conflicting decisions.

In the decision of *Director of Public Prosecutions v S*<sup>9</sup> the Transvaal Provisional division had to deal with the cautionary rule in relation to the evidence of children in sexual offences cases. The court applied the Olivier judgment and concluded that whilst the State has to prove the guilt of an accused beyond all reasonable doubt, in doing so, the evidence in a particular case may call for a cautionary approach and that approach would depend on the facts of the case. The Court found that:<sup>10</sup>

“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 on the evidence of a single witness.”

The same is illustrated by the decision in *S v M*<sup>11</sup> where the Court accepted that even though the cautionary rule is based on out-dated and irrational perceptions, it may still be applicable and evidence in some cases may call for a cautionary approach. The discretion to apply the rule thus remains, hence the survival of the rule.

Had the cautionary rule been declared unconstitutional the discretion to apply same would have fallen away as well. However, since this has not been done it is clear that the Olivier judgment only sought to abolish the obligatory nature of the cautionary rule.

Some jurisdictions have interpreted the decision as an abolition of the cautionary rule notwithstanding that this is not what Olivier intended. In the case of *S v M*<sup>12</sup> Shakenovsky AJ found that the rule had in fact been abolished by the decision in *S v J* and states in this regard that it is “no longer our law and has been relegated to the

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<sup>9</sup> 2000 (2) SA 711 (T)

<sup>10</sup> at 716B-D

<sup>11</sup> 1999 (2) SACR 548 (SCA)

<sup>12</sup> 2000 (1) SACR 484 (W)

limbo of much distinguished principles.” This means that two different divisions have thus far sought to interpret the Olivier judgement in a different light and there is no certainty in our law as to how the decision will be applied henceforth.

Had the Olivier judgment set out the reasons why the cautionary rule infringed upon the fundamental right to equality and furthermore examined whether same could be justified in terms of the limitation clause the position would have been clearer. The Court could then have declared the rule to be unconstitutional, as done by the Namibian High Court in *S v D*<sup>13</sup> (albeit *obiter*) and in the final analysis the rule could have been abolished. Since this has not happened legislative intervention is warranted in order to finally lay to rest the cautionary rule.

#### **4. RECOMMENDATION**

A court has as its primary duty the duty to establish the credibility of witnesses. This means that an abolition of the cautionary rule will in no way leave the Court with no mechanism to deal with the evidence of unreliable witnesses. The basic principles and rules of evidence would still apply.

For the above reasons the writer recommends that the Law Commission’s proposals<sup>14</sup> in relation to abolishing the cautionary rule be adopted. The Chapter<sup>15</sup> dealing with the cautionary rule in the Discussion Document is specifically endorsed by the writer.

However, the provisions in relation to the evidence of single witnesses in subsection (c) of Clause 20 should be deleted. The evidence of single witnesses and the need to regard same with caution is a principle, which has been deemed to be a valid principle especially within the criminal law context.

Furthermore, the constitutional discrimination argument and the allegations that the cautionary rule as applicable to women is discriminatory on the basis of sex and/or gender would not be an argument, which could readily be used in relation to the

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<sup>13</sup> 1992 (1) SA 509 (NmHC)

<sup>14</sup> Clause 20, Draft Bill

<sup>15</sup> Chapter 31, SALC Project 107 at 459-484

cautionary rule in respect of single witnesses. The important factor would be that a witness' evidence should not be treated with caution merely because she is a woman in a sexual offence case. The single witness position is different and would not amount to discrimination and even if so, would probably fall within the limitation clause and amount to a "reasonable and fair" limitation in terms of section 36 of the Constitution.

Therefore, subsection (c) should be removed but the remainder of clause 20 should remain.