

## CHAPTER NINE

### THE RIGHT TO CONFRONTATION

#### 9.1 INTRODUCTION

The right of an accused to face one's accusers is regarded as an old and venerable tradition. The history of the right to confrontation can be traced back to Roman law. The Roman Governor Festus is reported to have made the following comments regarding a prisoner:

"It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers **face to face**, and has been given a **chance to defend himself** against the charges."<sup>1</sup>

Thus, early Roman law recognised that the law does not convict a man before he is given an opportunity to defend himself face-to-face with his accusers.<sup>2</sup> For centuries, the English also practised a form of confrontation that required an open and face-to-face system, described as "altercation".<sup>3</sup> Indeed, the justice of bringing accusing witnesses before the accused has been acknowledged for at least 1,500 years.<sup>4</sup> Therefore, the right to confrontation has a lineage that can be traced back to the beginnings of Western legal culture.

Section 35(3)(e) of the Constitution provides that an accused has the right "to be present when being tried". The right to confrontation has traditionally been regarded as entitling an accused to be present at trial.<sup>5</sup> Accordingly, it is said to be closely

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<sup>1302</sup> Jones *op cit* 960. Also see *Coy v Iowa* 487 US 1012 (1988) at 1016.

<sup>2</sup> See Creta *op cit* 397. However, according to Natalie Kijurna, the Hebrews also endorsed the right to confrontation by requiring that the accused have the right to hear testimony from the witnesses in the offender's presence. This is reflected in the writings of the Hebrews in the King James Bible. See Kijurna "Lilly v Virginia: the confrontation clause and hearsay – 'oh what a tangled web we weave'" 50 (2001) *DePaul Law Review* 1133 at 1138.

<sup>3</sup> The battle for confrontation rights was also fought in England during the treason trials of Sir Walter Raleigh and John Lilburne. Both men fought for civil liberties in England during the 17<sup>th</sup> century. See Kijurna *op cit* 1139-1141.

<sup>4</sup> See Herrmann *et al* "Facing the accuser: ancient and medieval precursors of the confrontation clause" 34 (1994) *Virginia Journal of International Law* 481 at 483.

<sup>5</sup> See s 158 of the Act, which encapsulates the right to confrontation by providing that all criminal proceedings in any court must take place in the presence of the accused, except where this has been expressly excluded by any other law. Indeed, it is a basic principle of criminal procedure that the accused is entitled to be present during the trial and to hear all the evidence against him, and consequently, to demand that the accusation be made face-to-face. Also see s 166 of the

related to the right to be present and the right to present one's case.<sup>6</sup> However, more is required than that an accused's trial must proceed in his presence, and that conviction and sentence must be handed down in his presence. A confrontation must take place in that an accused must be able to observe witnesses at close hand.<sup>7</sup> In this way, he can assess not only the content of their evidence, but also their demeanour, facial expressions, body language and inflections of the voice.<sup>8</sup> However, the democratic concept that every man is entitled to confront and cross-examine his accusers is not designed to "coddle" criminals. Rather, it is designed to ensure that those who must decide disputed factual issues will arrive at a correct decision.<sup>9</sup>

This chapter will first examine the interpretation of the confrontation principle. Thereafter, exceptions to the confrontation principle will be examined. The first exception relates to section 170A of the Act, which deals with evidence given by child witnesses. The second exception relates to section 171 of the Act, which provides for evidence on commission. Hearsay evidence is the other major exception to the confrontation principle. The effect of the amendment to section 158 on section 170A of the Act, will also be examined. Principles extracted from comparative law will also be applied where it is relevant. Finally, the conclusion will consider the impact and influence of comparative law on our law, and present proposals and recommendations.

## 9.2 THE INTERPRETATION OF THE RIGHT TO CONFRONTATION

Colman J made the following pertinent remarks regarding the rights of the accused

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Act.

<sup>6</sup> Section 35(3)(i) of the 1996 Constitution provides that the accused has the right "to adduce and challenge evidence". The right to challenge evidence includes the right to cross-examine evidence. Cross-examination is regarded as an example of confronting one's adversary. Thus, the right to challenge evidence may well include the right to confrontation.

<sup>7</sup> See Joubert (2001) *et al op cit* 79. It is the accepted opinion that a witness is less likely to lie in the accused's presence; hence the need for witness confrontation. See *Coy v Iowa supra* at 1019-1020. Also see Conklin "People v Fitzpatrick: the path to amending the Illinois Constitution to protect child witnesses in criminal sexual abuse cases" (1995) *Loyola University Chicago Law Journal* 321 at 325.

<sup>8</sup> The same principles apply to the accused's adversaries, the prosecutor and the judge. The "impulses" coming from these parties, may influence the way in which the accused conducts his defence.

<sup>9</sup> See Pollitt *op cit* 381.

in *S v Motlatla*.<sup>10</sup>

“The right to confrontation means more than that an accused person must know what the state witnesses are saying or have said about him, or that he shall be able to hear them saying it. There must be a confrontation in that he must see them as they depose against him so that he can observe their demeanour, and they for their part must give their evidence in the face of a present accused.”

The importance of confrontation is that the witness is under oath and the court also has an opportunity to observe the witness and determine if he is a credible witness.<sup>11</sup> Therefore, both the accused and the court must be given the opportunity to observe the witness. Any violation of the right to confrontation will result *per se* in a failure of justice. The denial of confrontation amounts to an irregularity which will lead to the conviction being overturned.<sup>12</sup> Sometimes, it may happen that a trial will proceed in the accused’s absence in terms of section 159 of the Act.<sup>13</sup> However, he is later given the opportunity to question or to confront witnesses who testified in his absence.<sup>14</sup>

The Sixth Amendment of the US Constitution provides, *inter alia*, that “in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him”.<sup>15</sup> According to Drew Kirshen, the Sixth Amendment was drafted to

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<sup>10</sup> 1975 (1) SA 814 (T) at 815. The accused was only added as an accused after the complainant had already given evidence. The court held that a denial of confrontation amounted to a failure of justice. The court relied on s 156(1) of the Criminal Procedure and Evidence Act 56 of 1955, which provided that every criminal trial, except in special circumstances, shall take place and the witness shall give their evidence in open court and in the accused’s presence.

<sup>11</sup> See *Lee v Illinois* 476 US 530, 540 (1986).

<sup>12</sup> See *S v Motlatla supra*, where an irregularity had occurred in that a witness had not given evidence in the presence of the accused. Such irregularity was found to amount to a failure of justice. The court found that a denial of the right to confrontation is of so fundamental a nature that it amounts *per se* to a failure of justice.

<sup>13</sup> Section 159(1) of the Act provides that if an accused conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence. Please refer to subsection 8.3.1.

<sup>14</sup> Also see s 160 of the Act, which provides that if an accused referred to in s 159(1) or (2), again attends the proceedings in question, he may, unless he was legally represented during his absence, examine any witness who testified during his absence, and inspect the record of the proceedings or require the court to have such record read over to him.

<sup>15</sup> This is known as the Confrontation Clause of the Sixth Amendment. The origins of the clause have been traced to the trial of Sir Walter Raleigh in 1603. Raleigh was convicted of treason on the basis of a coerced confession by an alleged co-conspirator. Raleigh requested the right to face the witness in court, saying: “The proof of the common law is by witness and jury; let (the

provide that the jury be "impartial" and that witnesses be confronted.<sup>16</sup> The Sixth Amendment right to confrontation has been interpreted in such a way that it is not a personal right of the accused. The Confrontation Clause is said to grant the accused the right to the most accurate truth-determining process. However, the Confrontation Clause no longer expressly safeguards the accused. In asserting his confrontation rights, the accused is no longer claiming a protection from the prosecution, but is seeking precisely what the prosecution can also claim. Instead, the Confrontation Clause is a protection which everyone in society, as represented by the prosecutor can demand.<sup>17</sup> The right to confront an accuser under the Sixth Amendment of the United States Constitution, is said to be firmly rooted in federal jurisprudence. To illustrate this, in *Mattox v United States*<sup>18</sup> the first case to interpret the Confrontation Clause, the court remarked that the Sixth Amendment grants accused individuals the right to be confronted by their accusers and to cross-examine the witnesses. Indeed, the court made the following comments regarding the Confrontation Clause:

"The function of the Confrontation Clause is to provide the accused with an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief."<sup>19</sup>

The Supreme Court has also concluded that the primary purpose of the Federal Confrontation Clause is to provide the opportunity for cross-examination, together

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accuser) be here, let him speak it. Call my accuser before my face." However, the court denied his request, and he was convicted and executed. Thus, Raleigh was never able to confront his accusers nor summon witnesses on his own behalf. See Murphy "Justice Scalia and the confrontation clause: a case study in originalist adjudication of individual rights" (1997) *American Criminal Law Review* 1243 at 1244, and Pollit *op cit* 388-389.

<sup>16</sup> Kirshen "Vicinage" 30 (1977) *Oklahoma Law Review* 1, 79 at 77. According to Kirshen, the draftsmen of the Sixth Amendment were concerned about the possible abuse of personal knowledge of the case by the jurors. The demand is that jurors be impartial and decide the case on the evidence presented during the trial.

<sup>17</sup> See Jonakait "Restoring the confrontation clause to the Sixth Amendment" 35 (1988) *UCLA Law Review* 557, 580-581. Also see Jonakait "Foreword: notes for a consistent and meaningful Sixth Amendment" (1992) *The Journal of Criminal Law and Criminology* 713-746 at 746, where the author argues that to ensure a consistent and meaningful Sixth Amendment, courts must view the Sixth Amendment as holding a central place in the Bill of Rights. He maintains that the Sixth Amendment guarantees neither a fair trial nor a reliable outcome, but grants the accused a particular trial process, which is also intended to check governmental overreaching.

<sup>18</sup> 156 US 237, 242-43 (1895).

<sup>19</sup> According to the *Mattox* court, this constitutional provision stemmed from a concern that "depositions or *ex parte* affidavits, such as were admitted in civil cases would be used against the prisoner in lieu of a personal examination". *Id.*

with a preference for physical confrontation.<sup>20</sup> The accused's right to confront witnesses against him was held to be a fundamental right, and therefore applicable to the states through the Fourteenth Amendment in *Pointer v Texas*.<sup>21</sup> The court also remarked that the rights "to confront and cross-examine witnesses and to call witnesses in one's own behalf, have long been recognised as essential to due process".<sup>22</sup> These rights are fundamental to a fair trial, and therefore cannot be dispensed easily. There are now statutes in all the states which define and guarantee the accused's right to confront witnesses.<sup>23</sup> However, it may occur sometimes that accused may have forfeited their constitutional and evidence-law rights to confront and cross-examine a prosecution witness. To illustrate this, a witness may be unavailable for trial due to threats or misconduct of others to which the defendant (accused) acquiesced.<sup>24</sup> Accused who are physically disruptive in the courtroom may also forfeit their right to be present.<sup>25</sup>

The European Court of Human Rights made the following pertinent remarks

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<sup>20</sup> See *Ohio v Roberts* 448 US 56, 63 (1980). It should be noted that this case addresses the hearsay rule regarding the right to confrontation. The admission of hearsay testimony is regarded as the other major exception to the right to confrontation.

<sup>21</sup> 380 US 400, 403 (1965). The court held that the Sixth Amendment guarantee of confrontation and cross-examination was denied to the accused. Here, the prosecution had offered as evidence the transcript of a witness's testimony from a preliminary hearing, which the accused had attended. This transcript of the witness's statement prevented the accused from cross-examining the principal witness. The court held that the accused had a fundamental right under the Sixth Amendment to confront the witnesses against him, and that use of the transcripts was a constitutional error.

<sup>22</sup> See *Chambers v Mississippi* 410 US 284, 294 (1973). Also see *Barber v Page* 390 US 719 (1965), where the court had to decide whether the accused's right to confrontation was violated by the use of the preliminary hearing script, even though the accused was represented by a lawyer, and had the opportunity to cross-examine the witnesses had he so chosen. The court remarked that a witness is not "unavailable" for purposes of the exception to the confrontation requirement, unless the prosecutorial authorities have made a good-faith effort to obtain his presence at the trial. The state had made no such effort to secure the presence of the witness. It has also been held in *Barber* that the right to confrontation includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanour of the witness. The court also remarked that the right to confrontation may not be dispensed so lightly.

<sup>23</sup> Brannon "The trauma of testifying in court for child victims of sexual assault v the accused's right to confrontation" (1994) *Law and Psychology Review* 439 at 447.

<sup>24</sup> See *People v Geraci* 649 NE 2d 817 (NY Ct App 1995).

<sup>25</sup> This is similar to s 159 of the Act, which provides that a trial will proceed in the accused's absence if he is disruptive in the courtroom.

regarding the right to confrontation, in *Kostovski v The Netherlands*.<sup>26</sup>

"If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility."

The European Court has given a number of decisions supporting the conclusion that the right to confront adverse witnesses in front of the trier of fact, is an important component of a fair trial.<sup>27</sup> In the case of *Barberà, Messegue and Jabardo v Spain*<sup>28</sup>

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<sup>26</sup> App No 11454/85, 12 EHHR 434 (1989). In *Kostovski*, witnesses were allowed to give declarations against the defendant anonymously. The defendant did not have an opportunity to confront or question the witnesses themselves, and could only question at the trial those who took the witnesses' declarations. The defendant was convicted on the basis of this anonymous testimony. The European Court held that this procedure was a violation of the Convention's fair trial right. The court also observed in *Kostovski* that because the trial judges are precluded from studying the behaviour of anonymous witnesses, they are unable to form an opinion regarding the witnesses' credibility.

<sup>27</sup> The European Court found violations of the art 6.3 right to examine witnesses in *Windisch v Austria* App No 12489/86, 13 EHRR 281 (1990) and *Delta v France* App No 11444/85, 16 EHRR 574 (1990). This deprived the defendants of art 6.1 fair trial right. However, in other cases, the European Court majority have held that a court's reliance on evidence other than the statement of the absent witness to convict, cured any deprivation of the defendant's right to confront the absent witness. See for example, *Artnier v Austria* 13 HRLJ 461 (1992) and *Asch v Austria* 12 HRLJ 203, 205 (1991). Also see *Isgro v Italy* 21 HRLJ 100 (1991), where the European Court again considered the issue of the admissibility of unavailable witness testimony. Here, the European Court found that the defendant had been able to confront the witnesses against him. Also see *Saidi v France* (1994) 17 EHRR 251, where it was held that the testimony of witnesses whom the applicant had been prevented from confronting deprived him in certain respects of a fair trial.

<sup>28</sup> App Nos 10588/83-10590/83, 11 EHRR 360 (1988). The defendants had appealed to the European Court on the following grounds: a violation of their rights under the European Convention because they had not been given a fair trial before an impartial tribunal; their convictions rested on coerced confessions; the principles of adversarial proceedings and of "equality of arms" had not been observed, and they had not being able to have the witness Mr Martinez Vendrell examined. Their appeals were based on arts 6.1 and 6.2 of the Convention. Although, the defendants did not expressly base their submission on art 6.3 of the Convention, nevertheless, the European Court included the art 6.3 issue, along with those under arts 6.1 and 6.2. It should be noted that Spain is by tradition a civil law nation, while the right at the core of the *Barberà* case which was the right to confront adverse witnesses, is historically associated with the adversarial process of the common law tradition. According to Dennis Riordan, the above case addresses the extent to which the European Convention will move the criminal justice systems of member nations, many of which have traditionally followed the inquisitorial model of criminal procedure, closer to the adversarial practices of common law countries. See Riordan "The rights to a fair trial and to examine witnesses under the Spanish Constitution and the European Convention on Human Rights" 26 (1999) *Hastings Constitutional Law Quarterly* 373.

the rights violated were those of a fair and public trial in general, and the right to confront adverse witnesses. The European Court noted the following regarding article 6(3): that the Convention requires the contracting states to take positive steps, *inter alia*, to enable him (the accused) to examine or have examined witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The latter right not only entails equal treatment of the prosecution and defence in this matter, but also means that the hearing of witnesses must in general be adversarial.<sup>29</sup> The European Court also objected to the Spanish Supreme Court's judicial reliance on the witness Vendrell's second statement, which constituted a form of unreliable hearsay, although it was taken before a magistrate.<sup>30</sup> The majority opinion recognised that the core problem was that the defendants were convicted on the basis of evidence, the credibility of which was untested by an adversarial examination. According to Riordan, the European Court majority could have done better by holding that reliance on Vendrell's second statement was a clear breach of article 6.3 right to confront witnesses, and they should further have held that this violation deprived the defendants of their fair trial right under article 6.1.<sup>31</sup> The European Court's decision recognised that Spanish criminal procedure also allows an investigating judge to convene a confrontation between an accused and the witnesses against him, and suggested that had such a procedure being used in this case, the resulting evidence would have been admissible.<sup>32</sup>

Therefore, the right to confrontation has been recognised as being a fundamental requirement of a fair trial. The right of an accused to be confronted with the witnesses against him is deemed to be one of the most valuable safeguards of the accused. Such a right protects the accused against the dangers of conviction on the basis of *ex parte* testimony or affidavits given in his absence, or when he is not

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<sup>29</sup> See *Barberà* 11 EHRR at 387 and no 82. The case of *Barberà* also refers to *Unterpertinger v Austria* App No 9120/80, 13 EHRR 175 (1986), where the European Court invalidated a decision based on alleged victim reports to the police, where those same witnesses were not available to testify or face cross-examination at ensuing judicial proceedings.

<sup>30</sup> The court viewed the use of the hearsay evidence as being unfairly prejudicial to the defendants. The court also stated that the applicants never had an opportunity to examine a person whose evidence had been taken in their absence and was deemed to have been read out at the trial. *Ibid* at 390-91.

<sup>31</sup> I tend to agree with Riordan's viewpoint. Riordan also maintains that the European Court could have ruled that the state may not use statements of criminal suspects, as a result of their generic unreliability, to convict anyone other than the declarant, unless the statements are subjected to testing of adversarial examination, by the party against whom they are to be admitted. The party could use the option of representation at such an examination. It should be noted that the European Court decision led to the Constitutional Tribunal in *Barberà*, finding that a violation of a right of the European Convention is a violation of the Spanish Constitution. The trial eventually awarded to the defendants was adversarial and fair, and placed great emphasis on the right of the accused to confront the evidence against him. Riordan *op cit* 402-403.

<sup>32</sup> *Id.*

granted the opportunity to cross-examine. Confrontation is essential because cross-examination is essential. It is only through cross-examination that the truth and veracity of the testimony of witnesses can be tested. Any violation of the right amounts to a failure of justice. This will lead to the setting aside of the conviction by a higher court.

### **9.3 EXCEPTIONS TO THE RIGHT TO CONFRONTATION**

#### **9.3.1 SECTION 170A OF THE CRIMINAL PROCEDURE ACT**

##### **9.3.1.1 REASON FOR INTRODUCTION OF SECTION 170A**

As a result of the severe hardships experienced by child witnesses who are victims of sexual abuse, the South African Law Commission conducted a research entitled "Protection of the Child Witness". They concluded that the ordinary adversarial procedure, with its strong emphasis on cross-examination, was insensitive and unfair to the child witness.<sup>33</sup> The Law Commission recommended that an intermediary be appointed in certain cases, and that face-to-face confrontation be eliminated by using electronic or other devices.<sup>34</sup> As a result of these recommendations, the Criminal Procedure Act 51 of 1977 was amended, with the insertion of section 170A into the Act.<sup>35</sup> Section 170A relates to evidence given by child witnesses. The witness may give evidence with the aid of an intermediary via closed-circuit television. Although the witness can be observed by the accused by means of technological aids, he cannot observe the accused.<sup>36</sup> Confrontation between the accused and the witness is thus excluded in this way. The reason for this exclusion

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<sup>33</sup> This usually applied in the case of the alleged sexually abused child witness, who had to undergo the traumatic experience of facing the accused in court, and to be subjected to rigorous cross-examination. Such cross-examination may be intimidating, aggressive and humiliating. See Gqiba "Child witnesses in the criminal justice system" (1999) *The Judicial Officer* 75. Also see Schwikkard "The abused child: a few rules of evidence considered" (1996) *Acta Juridica* 148 at 155.

<sup>34</sup> See *South African Law Commission Working Paper 28 Project 71 "Protection of the Child Witness"* (1989) at 29.

<sup>35</sup> Section 170A was inserted by s 3 of the Criminal Law Amendment Act 135 of 1991 into the Criminal Procedure Act 51 of 1977.

<sup>36</sup> See Schwikkard (SACJ) *op cit* 44.

is to reduce trauma for youthful witnesses, and to reduce the stress and suffering of testifying in the accused's presence. Therefore, section 170A of the Act tries to protect child witnesses.

### **9.3.1.2 SECTION 170A: THE RIGHTS OF CHILD WITNESSES VS THE ACCUSED'S RIGHT TO CONFRONTATION**

Section 170A provides for the screening of a child witness from the courtroom and the questioning of that witness through an intermediary.<sup>37</sup> Section 170A(4) provides that the intermediary may be appointed from a list of persons or categories of persons compiled by the Minister of Justice.<sup>38</sup> The intermediary conveys the general meaning or significance of any question to the witness, unless the court directs otherwise.<sup>39</sup> Where an intermediary is appointed, the court may direct that a child witness testify in a place which is situated far away from the presence of a person

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<sup>37</sup> Section 170A(1) of the Act provides that the court may appoint an intermediary when it appears that it would "expose any witness under the age of 18 years to undue mental stress or suffering if he testifies at criminal proceedings". The intermediary is the medium whereby evidence is furnished except for examination by the court in terms of s 170A(2)(a) of the Act. Thus, examination, cross-examination and re-examination of the child will take place through the intermediary. The South African Law Commission believes that there may be cases where vulnerable adult witnesses should also be assisted by an intermediary and recommends so. See *South African Law Commission Project 107 "Sexual offences: process and procedure"* (February 2002) at 44.

<sup>38</sup> In practice, these intermediaries are usually selected from social workers and psychologists. It is clear that the emphasis is on people who are presumed to be skilled at communicating with children. According to Müller, the prosecutor or the parent of the child may not be well equipped in the eyes of the court to offer an independent opinion about "undue" since they are not experts in the relevant field such as child psychology. Rather, relevant experts such as psychologists, psychiatrists and social workers would be better able to testify as to whether the child will experience undue mental stress. See Müller "The child witness in the South African law of procedure" (1995) *Expert Evidence* 52 at 54. Also see Müller "Theory v practice: are children once again the victims of interpretation?" (2001) *South African Journal of Criminal Justice* 373-377, where the writer criticises the decision in *S v Bongani* 2001 (1) SACR 670 (C) which held that a retired educator could not act as an intermediary. Müller recommends that the categories of persons who are listed as competent intermediaries should be reviewed in the light of the daily practical problems experienced by the courts. This must be done to avoid children becoming the victims of legal interpretation.

<sup>39</sup> In terms of s 170A(2)(b) of the Act.

who may upset the witness.<sup>40</sup>

The constitutionality of section 170A(2) of the Act was challenged in *Klink v Regional Magistrate No.*<sup>41</sup> The court held, *inter alia*, that the ordinary procedures of criminal justice were inadequate to address the needs and requirements of a child witness. The aim of section 170A was to address this problem and to provide protection for young witnesses. The interests of the child witness had to be balanced against the accused's right to a fair trial. The court held that the use of an intermediary did not affect the fundamental fairness of the process, and therefore, section 170A was not unconstitutional.<sup>42</sup>

The question arises whether an intermediary is necessary to overcome the stress and suffering which the child witness will experience by testifying in court. According to Steytler, the holding of the hearing *in camera* in terms of section 153(5), would

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<sup>40</sup> In terms of s 170A(3)(b) of the Act.

<sup>41</sup> 1996 (3) BCLR 402 (SE). See Schwikkard and Jagwanth "K v *The Regional Court Magistrate NO 1996 (1) SACR 434 (E): The constitutionality of s 170A of the Criminal Procedure Act*" (1996) *South African Journal of Criminal Justice* 215-220, for a discussion of the case. Also see *S v Mathebula* 1996 (2) SACR 231 (T), which is instructive regarding the appointment of an intermediary. The court found that the magistrate had not considered the purpose of s 170A. The complainant sat in court after the close of the state's case. This would have been incomprehensible if the mere sight of the accused would have upset her to such an extent, that it would have caused her mental stress. Also see *S v Stefaans* 1999 (1) SACR 182 (C), where the Cape High Court laid down certain guidelines for the application of s 170A in light of the Constitution. Since the accused *prima facie* has the right to confront his or her accusers, s 170A was fairly narrowly construed by the court. It held that the section requires the court to be satisfied that the stress of being directly confronted by the accused will be "undue", which is more than ordinary stress. This view has been endorsed by Müller who maintains that the mental stress or suffering experienced by the child will have to be more than the ordinary. Müller (*Expert Evidence*) *op cit* 54.

<sup>42</sup> Also see Van der Merwe "Cross-examination of the (sexually abused) child witness in a constitutionalized adversarial trial system: is the South African intermediary the solution?" (1995) *Obiter* 194 at 215, where the learned writer states that s 170A strikes a fair balance between due process and crime control. However, Müller and Tait argue that although the procedure in s 170A does not interfere with an accused's fundamental right to a fair trial, its application may in a specific case result in an unconstitutional interference with the right to a fair trial. See Müller and Tait "The child witness and the accused's right to cross-examination" (1997) *TSAR* 519 at 530.

address this concern.<sup>43</sup> The witness should be removed from the presence of the accused, if his presence causes stress to the witness. Steytler also suggests that section 170A could be interpreted to mean that the court may appoint an intermediary only if it is necessary to protect a child witness from undue mental stress or suffering which may result from being questioned by the accused personally or the defendant's lawyer.<sup>44</sup>

Protective measures for child victims of sexual assault have also been introduced in foreign systems such as the **United States**. The US Supreme Court has never held that the right to confrontation is an absolute right. In 1895, the Supreme Court first recognised an exception to a defendant's right to full face-to-face confrontation in *Mattox v US*.<sup>45</sup> Thus, exceptions to the right to physically face witnesses have been recognised where public policy considers the exception to be necessary to achieve more compelling goals.<sup>46</sup> The right to confrontation can give way to important policy interests when strict adherence to the face-to-face confrontation requirement would provide only "incidental benefit or unnecessary protection for the accused".<sup>47</sup>

The court recognised another exception to face-to-face confrontation in *California v*

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<sup>43</sup> Steytler *Constitutional criminal procedure* 349.

<sup>44</sup> *Id.* The South African Law Commission has recommended the presence of a support person whilst the witness in a criminal proceeding involving an alleged sexual offence is giving evidence. Such person would fortify the witness emotionally by his presence. See the *South African Law Commission Project 107 supra* at 49.

<sup>45</sup> See *Mattox v US supra* at 237. The court held that a criminal defendant's right to confrontation was not violated by the admission of testimony presented at a previous trial by government witnesses who had since died. The testimony in question had previously been subject to cross-examination. The court held that the testimony was admissible as an exception to the confrontation clause.

<sup>46</sup> See *United States v Farley* 992 F 2d 1122, 1124 (10<sup>th</sup> Cir 1993).

<sup>47</sup> See *Mattox v United States supra* at 244.

*Green*.<sup>48</sup> Cross-examination of a witness who is not physically present in the courtroom is not the same as face-to-face confrontation, because a witness's demeanour cannot be observed as acutely on video monitor as in court. However, it may be justified to exclude a witness from the courtroom in certain circumstances. Sufficient reason should be advanced to exclude the normal practice of face-to-face confrontation, such as protecting child victims of sexual abuse.

As a result of the increased number of repeated child abuse cases, many states have adopted laws designed to facilitate the prosecution of child abuse offenders and to protect children in the courtroom. Protective measures such as videotaping testimony, allowing testimony by way of one-or two-way closed-circuit television, and testifying outside the presence of the accused are available for child sexual assault victims in a number of states.<sup>49</sup> Since the enactment of child protection statutes, the accused's right to confront his accuser (the child witness) has become a thorny issue at both state and federal levels. In *Coy v Iowa*<sup>50</sup> the court upheld the accused's contention that his rights had been violated. Its decision was based on the "confrontation clause" of the Sixth Amendment, which, according to the majority, guaranteed an accused a face-to-face meeting with witnesses appearing before the court. However, the court objected to the fact that the legislation created a presumption that all juvenile victims of sexual abuse suffered from emotional trauma, when testifying in the accused's presence. This prevented the trial court from making an individualised assessment of the case. The *Coy* decision has been criticised as

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<sup>48</sup> 399 US 149, 158 (1970). The issue in *Green* was whether a defendant's constitutional right to confront the witnesses against him was violated when the extrajudicial statement made by the witness, the events which the witness was unable to recall, was admitted as substantive evidence. The court found that although the witness failed to remember the content of the extrajudicial statement, the fact that the witness was available for cross-examination alleviated any constitutional violation. The US Supreme Court held that the trial court had acted properly in allowing the prior statements, emphasising that the accused's lawyer had subjected the witness to extensive cross-examination at the preliminary hearing. The court identified three purposes of confrontation namely, that it ensures that the witness will give his or her statements under oath; that it forces the witness to submit to cross-examination and that it allows the jury to assess his or her credibility.

<sup>49</sup> Brannon *op cit* 440.

<sup>50</sup> See *Coy v Iowa supra* at 1012. The question arose whether a large screen, which separated the complainant from the accused, violated the accused's right to a fair trial.

not being supportive of child abuse victims who are called upon to testify in open court.<sup>51</sup> However, in *Maryland v Craig*<sup>52</sup> the court came to an opposite conclusion. The court concluded that the interests of the child justified the dispensing of face-to-face confrontation.<sup>53</sup> According to Friedman, the procedure employed in *Craig* may be justified if the accused's wrongful conduct has intimidated the child thus preventing him from testifying in the conventional manner. This brings the forfeiture principle into play.<sup>54</sup> Although the *Craig* decision has been widely welcomed by some writers, it has received a fair amount of criticism as well.<sup>55</sup>

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<sup>51</sup> See Watkins "The double victim: the sexually abused child and the judicial system" (1990) *Child and Adolescent Social Work* 29.

<sup>52</sup> 497 US 836, 860-861 (1990). Here, the complainant in a sexual abuse case, the prosecutor and the defence counsel withdrew to a separate room where the witness was examined and cross-examined while a video monitor recorded and displayed the witness's testimony to the judge, jury and defendant in a courtroom. The majority held that a confrontational clause in the Sixth Amendment did not absolutely prohibit this procedure. However, dissenting judge, Justice Scalia indicated his preference for the originalist approach. This approach directs judges to enforce the constitutional provisions according to their original meaning, that is, as they were understood by those who proposed and ratified them. According to the judge, the purpose of the clause was to ensure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. This approach is supported by Cornelius Murphy, who maintains that Justice Scalia's confrontation clause jurisprudence illustrates why originalism is the superior method of adjudicating individual rights, including those rights guaranteed to criminal defendants. See Murphy *op cit* 1266.

<sup>53</sup> The inference from *Craig* is that states are free to enact legislation to protect child-victim witnesses provided that the statute requires the state to show the following: (1) the use of one-way closed-circuit television is necessary to protect the welfare of the child witness; (2) the child witness would be traumatised by the presence of the defendant, and not just the courtroom generally; and (3) the state is furthering an important public policy. See Conklin *op cit* 331.

<sup>54</sup> The basis for allowing the procedure would not be fear of trauma but rather forfeiture of the confrontation right by the accused, given the victim's refusal or inability to testify in court, and the court's finding that this refusal or inability is attributed to the accused's wrongful conduct. The forfeiture principle is now expressed in Fed Rule Evidence 804(b)(6). See Friedman "The conundrum of children, confrontation, and hearsay" (2002) *Law and Contemporary Problems* 243 at 247-255.

<sup>55</sup> See Bloe "*Maryland v Craig*: The court's use as evidence of videotaped testimony of a child who has been sexually abused is declared not to violate a criminal defendant's Sixth Amendment rights to confront his accuser" (1991) *Southern University Law Review* 275-291, where the writer agrees with the Supreme Court decision that the defendant's confrontation right is not violated by the videotaped testimony of a child abuse victim. However, he finds the court's constitutional standard for determining the admissibility of closed-circuit testimony to be questionable. He maintains that the court should have laid down specific guidelines for defining necessary circumstances and the degree of psychological trauma necessary to trigger the exception. Murphy also criticises the majority opinion in *Craig*. He argues that the court's departure from the

In *Spigarolo v Meachum*<sup>56</sup> the court held that the accused's right to confrontation was not violated by the use of the child victim's videotaped testimony. Exclusion of the accused from the videotaping of the testimony was found to be a compelling state interest because children would be too intimidated by the presence of the accused to ensure reliable and trustworthy testimony. However, in *Cumbie v Singletary*<sup>57</sup> the court held that the defendant's right to confrontation had been violated because there was insufficient evidence that the victim was afraid of the defendant or that she would be traumatised by his presence during the testimony. The Child Victim's and Child Witnesses' Rights (CVCWR) statute was enacted by Congress after the ruling

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original meaning of the Confrontation Clause and its explicit guarantee of face-to-face confrontation, leads to special protection being granted to child sexual abuse victims at the expense of the accused in such cases. The court also does not address the question of victims of other types of crimes such as rape victims or witnesses who participate in the witness protection programmes. See Murphy *op cit* 1243. Also see King "The molested child witness and the Constitution: should the bill of rights be transformed into a bill of preferences?" (1992) *Ohio State Law Journal* 49-99; also see Cusick "Televised justice: towards a new definition of confrontation under *Maryland v Craig*" 40 (1991) *Catholic University Law Review* 967-1000. Also see Fuhrman "State v Foster: Washington state undermines confrontation rights to protect child witnesses" (2000/01) *Gonzaga Law Review* 7-47, where the writer criticises the Washington Supreme Court for adopting *Craig* in *S v Foster* 957 P 2d 712, 714 (Wash 1998), when it permitted a child witness to testify via one-way closed-circuit television, in lieu of face-to-face confrontation. Fuhrman further argues that the *Craig* ruling weakened the constitutional guarantee of face-to-face confrontation, in that the court failed to differentiate the confrontation rights hearsay exceptions and non-hearsay exceptions. In so doing, it mistakenly applied the *Craig* rule as a hearsay exception. He maintains that the *Foster* court should not have dispensed with established modes of confrontation until steps were taken to alleviate anxiety factors for child witnesses, such as moving proceedings out of the courtroom or recommending other trauma reducing measures.

<sup>56</sup> 934 F 2d 19 (2d Cir 1991). In another case involving child sex crime victims, the court held that there is no right of face-to-face confrontation at an in-chambers hearing to determine the competency of a child victim to testify, since the defendant's attorney participated in the hearing, and since the procedures allowed "full and effective" opportunity to cross-examine the witness at trial and request reconsideration of the competency ruling. See *Kentucky v Stincer supra* at 744. It has also been held that there is no absolute right to confront witnesses with relevant evidence impeaching those witnesses. A failure to comply with a rape shield law's notice requirement can validly prevent introduction of evidence relating to a witness's prior sexual history. See *Michigan v Lucas* 500 US 145 (1991).

<sup>57</sup> 991 F 2d 715 (11<sup>th</sup> Cir 1993). Also see *Commonwealth v Loudon* 638 A 2d 953 (Pa 1994), where the Supreme Court of Pennsylvania held that a statute allowing children to testify outside the physical presence of a defendant by means of videotape of closed-circuit television violates the defendant's constitutional right to confront witnesses face-to-face. The court further held that Art 1, s 9 of the Pennsylvania Constitution requires a face-to-face confrontation between a defendant and a witness, and allow exceptions only when the defendant has previously had the opportunity to physically confront and cross-examine the witness.

in *Craig*. The statute provides for two-way closed-circuit television and videotaped depositions. The constitutionality of the CVCWR statute was upheld in *US v Farley*.<sup>58</sup> These cases indicate that a child may testify against the defendant (accused) by videotape or closed-circuit television only if the trial court makes specific findings, such as the child will be traumatised, prevented from testifying reliably, or prevented from testifying at all if forced to testify in the accused's presence. The above case law demonstrates that the public interest in protecting child witnesses overrides the accused's right to personally confront the witnesses against him.

However, in *Gonzales v State*<sup>59</sup> the Texas Court of Criminal Appeals departed from precedent by allowing a child witness to testify via closed-circuit television when the **child was not herself the victim** of the offence for which she was testifying. The court held that the use of the closed-circuit television procedure in lieu of face-to-face confrontation did not violate Gonzales's right to confrontation under either the Federal or State constitution. According to Stacey Jones, the procedures in *Coy* and *Craig* were aimed at protecting minor victims, whilst in *Gonzales*, the closed-circuit procedure tried to protect a minor witness.<sup>60</sup> The *Gonzales* decision raises questions about where the court will draw the line in allowing non-victim witnesses to use the closed-circuit procedure in lieu of face-to-face confrontation.<sup>61</sup> Therefore, Jones

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<sup>58</sup> See *US v Farley supra* at 1122.

<sup>59</sup> 818 SW 2d 756, 757 (Texas Criminal Appeals, 1991). Gonzales was convicted of the murder of a 5-year-old on the basis of testimony of a witness, the deceased's sister.

<sup>60</sup> Jones *op cit* 969. However, Alaska's statute may be used to protect child witnesses who were themselves not the victims of crime. See *State v Blume* (Alaska Superior Court), (Nos 3 ANS -86-2547 Cr, 3 ANS-86-1847 Cr), Appeal Docket, Nos A-1799, A-1902 (Alaska Ct App Sept 19, 1989), where the judge allowed the child, a sister of the victim (not herself a victim of the alleged abuse), to testify while her parents watched from behind a one-way mirror. According to James Rowe, the fact pattern in *Blume*, in which the child was to testify against her parents, and there had been evidence that her parents had instructed her not to testify, presents a compelling case for the appropriateness of protecting certain non-victim witnesses. See Rowe "Protection of child witnesses and the right of confrontation: a balancing of interests" (1990) *Alaska Law Review* 223-246.

<sup>61</sup> Jones *op cit* 970. The *Craig* exception has already been extended to allow an adult male robbery victim to testify by closed-circuit television. See *Gilpin v McCormick* 921 F 2d (9<sup>th</sup> Cir 1990). It is noteworthy that s 170A of the Act refers to "... any witness under the age of 18 years...". This section does not specify whether the witness must also be a victim. Therefore, the interpretation of "any witness" may well include non-victim witnesses. This would include

recommends that when an individual's constitutional rights are at stake, the courts should proceed cautiously so as not to allow the exceptions to swallow the rule.<sup>62</sup>

American writers also support the introduction of protective measures for child sexual assault victims.<sup>63</sup> According to Brannon, protective measures such as videotaping interviews can reduce the number of times a child must relate her story, thereby reducing the emotional distress for the child.<sup>64</sup> However, these protective measures are often resisted by the accused because they prevent face-to-face confrontation between the accused and the witness, and thereby violate the accused's constitutional right to confrontation.<sup>65</sup> Such protective measures are not

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a child who has witnessed an attack on a parent, and is not herself a victim of the crime. Also see Müller *op cit* 53.

<sup>62</sup> Jones *op cit* 971.

<sup>63</sup> Brannon *op cit* 442. Also see Watkins *op cit* 33 and Rowe *op cit* 230 respectively. Rowe suggests that child witness protection statutes advance two important public policies which would suffice to override the defendant's right to face-to-face confrontation, such as reducing the trauma child witnesses may suffer as they testify in the defendant's presence, and providing an atmosphere in which the child witnesses may communicate effectively to the jury. See Mosteller "Remaking confrontation clause and hearsay doctrine under the challenge of child sexual abuse prosecutions" (1993) *University of Illinois Law Review* 691. Also see Lathi "Sex abuse, accusations of lies, and videotaped testimony: a proposal for a federal hearsay exception in child sexual abuse cases" (1997) *University of Colorado Law Review* 507.

<sup>64</sup> *Id.* However, the use of videotaped child testimony is far from being a settled matter in US law. For a more detailed discussion about the arguments for and against using videotaped testimony, see Perry and McAuliff "The use of videotaped child testimony: public policy implications" 7 (1993) *Notre Dame Journal of Law, Ethics and Public Policy* 387 at 399-405.

<sup>65</sup> According to Rowe, the intimidation or fear created by the courtroom may be cured by remedies which do not compromise the defendant's right to confrontation, such as reducing the degree of courtroom formality or allowing the child to sit in an appropriately sized chair. He refers favourably to the Alaskan statute which grants the trial court significant discretion to adjust courtroom procedures in a number of ways which do not effect the defendant's right of confrontation, such as, the court may control the spatial arrangements of the courtroom and the location, movement and deportment of those present in order to minimise emotional harm or stress to the child. See Rowe *op cit* 231. Also see Perry and McAuliff *op cit* 420, who also favour alteration of courtroom procedures as long as the accused's rights are preserved in the process. Also see Anderson "The Sixth Amendment: protecting defendants' rights at the expense of child victims" (1997) *The John Marshall Law Review* 767, for a discussion about the conflict between a defendant's constitutional rights to confrontation and society's interest in protecting child abuse victims from further trauma. Also see Smith "When to hear the hearsay: a proposal for a new rule of evidence designed to protect the constitutional right of the criminally accused to confront the witnesses against her" (1999) *The John Marshall Law Review* 1287.

only necessary for the child's benefit, but also to ensure that the truth is not obscured. There is a greater chance that the child will provide accurate and complete testimony if the child testifies away from the accused's presence. The negative feelings that child witnesses experience about facing the defendant in court, support the use of protective measures in which the child is able to testify away from the defendant's presence.<sup>66</sup> The use of screens, shields, videotaping and one or two-way television can improve the trustworthiness and accuracy of a child's testimony by reducing the trauma present in the legal process. However, Brannon maintains that there is insufficient research to determine which methods best protect the child victim, so case-by-case determinations are necessary to protect the child and to protect the confrontation rights of the accused.<sup>67</sup> Studies have indicated that viewing a child's testimony through a television will not diminish a jury's ability to assess the credibility of the witness, allowing the primary check on false testimony to remain intact.<sup>68</sup> The medical profession has also endorsed the practice of testifying away from the presence of an alleged attacker, as a more productive method of seeking the truth in child sexual abuse cases.<sup>69</sup> Therefore, the purpose of the confrontation clause which is to reveal the truth, should be enhanced by the use of protective measures such as screens, videotapes and closed-circuit television.

The **Canadian** courts have also wrestled with the question of whether the rights of child victims of sexual assault should take precedence over the confrontation rights of the accused. Legislation was introduced in Canada in 1988 to reform some of the substantive offences and procedural rules that apply to child abuse cases. These reforms contained provisions which allowed the use of testimonial aids such as videotaped statements, screens and closed-circuit televisions. These testimonial

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<sup>66</sup> Brannon *op cit* 443.

<sup>67</sup> *Ibid* at 446. However, Rowe believes that the more desirable approach is to allow an individual showing of necessity to be made without an initial confrontation between the defendant and the child. See Rowe *op cit* 245.

<sup>68</sup> Conklin *op cit* 349.

<sup>69</sup> *Id.*

aids facilitate the giving of evidence by children and reduce the trauma of the legal process for children in sexual offence cases. The Supreme Court of Canada upheld the constitutional validity of these provisions in 1993, and it emphasised that these provisions facilitate the truth-seeking function of the criminal justice process without compromising the rights of the accused to a fair trial.<sup>70</sup> Thus, the Canadian legal system has also displayed greater recognition of the needs and capacities of child witnesses.<sup>71</sup>

A similar approach has been followed in the **United Kingdom**, where protective measures for child witnesses have also been introduced. A measure of anonymity may be achieved in the courtroom by the use of a screen, where the witness, although known to the accused, is unwilling to face him or her directly. A television link may be used where the witness is outside the court's jurisdiction or is a child witness.<sup>72</sup> The United Kingdom has also instituted widespread use of videotape

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<sup>70</sup> See *R v L* (DO) [1993] 85 CCC (3d) 289; *R v Levogiannis* [1993] 85 CCC (3d) 327 (SCC) and *R v F* (CC) [1997] 120 CCC (3d) 225. The question arose in *Levogiannis* whether s 486(2.1) of the Canadian Criminal Code violated any section of the Canadian Charter of Rights and Freedoms. Section 486(2.1) provides that a judge, can in certain circumstances, order that a complainant under the age of 18 years testify outside the courtroom or behind a screen or other device that would allow the complainant not to see the accused, if the judge believed that the exclusion was necessary to obtain a full and candid account of the acts complained of from the complainant. The court held that where an order is made pursuant to the section of the code, the requisite elements of confrontation, that is, the accused's rights to face his or her accusers in court, were limited. According to the court, the screen between the accused and the complainant did not undermine the presumption of innocence or operate unfairly against him and hamper cross-examination. The court remarked that even in a case of jury trial, a jury would follow judicial instructions and would not be biased by the use of a screen. (It should be noted that s 486(2.1) can be compared to s 170A of the Criminal Procedure Act 51 of 1977, which provides for the screening of a witness under the age of 18 years from the courtroom, and the questioning of that witness through an intermediary).

<sup>71</sup> For a more detailed discussion of the Canadian experience with testimonial aids, see Bala *et al* "Testimonial aids for children: the Canadian experience with closed-circuit television, screens and videotapes" 44 (2001) *Criminal Law Quarterly* 461. Bala argues for a continued reformation of the justice system to find a better balance between the rights of the accused and the interests of children and society. He believes that statutory reform will only play a limited role in increasing the use of testimonial aids. Professional training, attitudes and access to resources also play an important role. Also see Bala "Child witnesses in the Canadian criminal courts" 5 (1999) *Psychology, Public Policy and Law* 323.

<sup>72</sup> See s 32(1) of the Criminal Justice Act 1988. Also see Spencer "Child witnesses, video-technology and the law of evidence" (1987) *The Criminal Law Review* 76, where the writer argues that the use of videotapes in child abuse cases is a step in the right direction towards the protection of child witnesses. However, see McEwan "Child evidence: more proposals for reform" (1988) *The Criminal Law Review* 813, where the writer prefers the examination of a child witness

procedures when children testify.<sup>73</sup> In *R v Lynch*<sup>74</sup> the 18-year-old victim of an indecent assault was so distressed that the judge allowed her to testify behind a screen, and have a representative of Victim Support present with her in the witness box. The court of appeal rejected the appellant's submission that this would have prejudiced the accused in the eyes of the jury. It has been held that the judge must warn the jury not to read anything into the use of screens, but the court rejected the argument that screens were *per se* prejudicial to the accused.<sup>75</sup> The introduction of the Youth Justice and Criminal Evidence Act 1999 enables courts to give "special measures" directions to protect child witnesses and other vulnerable witnesses. These measures include the use of communication aids, an intermediary, a screen or a direction for evidence to be heard *in camera*.<sup>76</sup> Therefore, the British courts have also endorsed protective measures for youthful witnesses.

According to Warner, there is no constitutional right to confront witnesses in

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to be conducted by an experienced judge rather than a lay intermediary or video recording. The judge is an ideal person because he is a practised interrogator and has no preconceptions or preference, and he or she could sit with an assessor or have the benefit of expert evidence to ascertain the child's credibility.

<sup>73</sup> See the British Criminal Justice Act of 1991 in this regard, which provides national guidelines for the use of previously recorded and "live link" testimony. However, a study of actual cases in the United Kingdom has also concluded that the use of televised testimony does not appear to affect the verdicts obtained. See Perry and McAuliff *op cit* 390-401.

<sup>74</sup> [1993] Crim LR 868.

<sup>75</sup> See *R v Foster* [1995] Crim LR 333. The issue of screens was also raised in *X v UK* (1992) 15 EHRR CD 113, where the commission rejected the complaint, finding that the decision to screen witnesses did not interfere with the accused's rights under art 6, which pertains to the examination of witnesses. However, **German law** has avoided the use of screens altogether. In the German inquisitorial system, the judge questions the child witness; so the adversarial process of direct examination and cross-examination is avoided. When hearing witnesses below the age of 16, the court is empowered to exclude the accused if his presence is deemed likely to be harmful to the child. Therefore, this system avoids the need for protective screens, live links and the like. See Perry and McAuliff *op cit* 388.

<sup>76</sup> See Hoyano "Striking a balance between the rights of defendants and vulnerable witnesses: will special measures directions contravene guarantees of a fair trial?" (2001) *The Criminal Law Review* 948.

**Australia**, but a common law right to do so exists.<sup>77</sup> However, the prosecution's failure to call a child victim of assault as a witness in a criminal trial, may in some circumstances, be regarded as a failure to conduct the prosecution fairly amounting to a miscarriage of justice.<sup>78</sup> Thus, a balance is required between the rights of the accused and the interests of the child victim. However, in some Australian jurisdictions, closed-circuit television or "live-link" provisions are now the normal method whereby children in child sexual abuse cases may testify.<sup>79</sup> It has also been recognised that comprehension problems frequently arise when child witnesses are examined.<sup>80</sup> In Western Australia, the court may appoint someone to act as a "communicator" for the child. The communicator's task is to communicate and explain to the child the questions put to him or her, and to communicate and explain to the court the evidence given by the child.<sup>81</sup> Therefore, the use of the communicator or the intermediary will reduce the trauma of testifying. However, unlike South Africa, the Western Australian provisions provide no

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<sup>77</sup> See Warner "Child witnesses in sexual assault cases" 12 (1988) *Criminal Law Journal* 286, where the writer argues that the challenge in reforming the law in the area of child abuse, is guard against over reaction and maintain a balance between the rights of suspects and the protection of victims. The broader issues of the social structure which gives rise to child abuse must also not be ignored. According to Boyce, the accused's common law right to confront witnesses has been abrogated by s 37C of the Evidence Act 1958 (Vic), which allows for alternative arrangements for giving evidence by child witnesses and witnesses with impaired mental functions. He calls for the inclusion of the right to confrontation in a legislative bill of rights. See Boyce "An accused person's right of confrontation versus protection of witnesses" (2002) *Law Institute Journal* 70.

<sup>78</sup> See *Whitehorn v The Queen* (1983) 152 CLR 657.

<sup>79</sup> There are provisions in some jurisdictions for certain witnesses to give evidence without being physically present in the courtroom, or in some other way to be protected from embarrassment or intimidation. This can include evidence being taken by closed-circuit television, videotape, use of statements and by providing the witness with a support person, or giving evidence behind a screen. For a more detailed discussion about closed-circuit television, "live-link" provisions and videotapes in Australia, see Palmer "Child sexual abuse prosecutions and the presentation of the child's story" (1997) *Monash University Law Review* 171 at 185-187. Also see *Miller v The Queen* (1995) 13 WAR 504 (WA Sup Ct FC), where the court held that a witness in a sexual offences case could give evidence by way of closed-circuit television.

<sup>80</sup> Therefore, in the Northern Territory, the court may disallow any question which is "confusing, misleading or phrased in inappropriate language". See s 21B of the Evidence Act 1939 (NT).

<sup>81</sup> See s 106F of the Evidence Act 1906 (WA). Also see Palmer *op cit* 193.

guidance regarding when the communicator might be ordered.<sup>82</sup> Thus, protective measures for child witnesses have also been introduced in certain Australian jurisdictions.

The above discussion on protective measures demonstrates that the court's most sensitive and hotly contested area of law concerning the right to confrontation, involves the testimony of child sex abuse victims. Many victims endure much trauma and unease when they are forced to testify in the physical presence of the accused who is often a family member or trusted adult. The right to confrontation is regarded as being fundamental to a fair trial. However, this right is not absolute. In exceptional circumstances, the rights of child victims of sexual offences will prevail over the accused's right to confrontation. The court must be of the opinion that the child witnesses will suffer severe emotional stress and trauma if they confront the accused face-to-face. Then only, will the right to confrontation be limited. American states have enacted statutes which seek to shield child sexual abuse victims from these anxieties.<sup>83</sup> The introduction of section 170A in South African law has also been lauded as a step in the right direction.<sup>84</sup>

### 9.3.1.3 THE EFFECT OF SECTION 158 ON SECTION 170A OF THE ACT

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<sup>82</sup> *Ibid* at 198. It is noteworthy that New Zealand legislation also provides for the limited use of an intermediary in cases of sexual violence involving children. See s 23E(4) of the Evidence Act 1908 (NZ).

<sup>83</sup> The constitutionality of these measures have been addressed by the American courts in *Coy v Iowa* and *Maryland v Craig supra*.

<sup>84</sup> According to Müller, s 170A goes further than its American and British counterparts in that it attempts to afford protection to children up to the age of 18 years, and does not appear to have the restrictions which the American courts have imposed upon their equivalent section, which reads as "unreasonable and serious mental and emotional harm or trauma". In South Africa, the courts have not interpreted this phrase as strictly as the American courts. Rather, they have held that the application to use an intermediary will only be granted if the witness is going to suffer any mental stress beyond the norm. The South African courts also do not require a finding that the child will experience undue mental stress or trauma. It is sufficient that the expert witness believes that the child will. See Müller (*Expert Evidence*) *op cit* 54-55 and *S v Klink supra*.

Section 158(1) of the Act provides that all criminal proceedings in any court must take place in the presence of the accused, except where this has been expressly excluded by any other law. The recent amendment to section 158 makes it possible for people to give evidence via electronic means without actually being present in court.<sup>85</sup> Section 158(2)(a) provides that the court may on its own initiative or on application by the prosecutor, order that a witness or accused give evidence by means of closed-circuit television or similar electronic media, provided that the witness or the accused consents to this.<sup>86</sup> Section 158(4) of the Act provides that a court may impose the necessary conditions provided that "the prosecutor and the accused have the right by means of that procedure, to question a witness and to observe the reaction of the witness". This discretion must be exercised with the purpose of ensuring a fair and just trial. According to Steytler, this amendment does not appear to be inconsistent with the accused's right to be present.<sup>87</sup>

According to Müller and Tait, section 158 may also present an improved alternative to section 170A.<sup>88</sup> Melunsky J referred to the anomaly created by the wording of section 170A in *Klink v Regional Court Magistrate NO*.<sup>89</sup> This anomaly created by

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<sup>85</sup> Section 158 was amended by s 7 of the Criminal Procedure Amendment Act 86 of 1996. Refer to 8.4 above for a more detailed discussion on s 158 and the relevant case law.

<sup>86</sup> An accused or witness may apply for such an order in terms of s 158(2)(b) of the Act. A court may make such order only if facilities are readily available or obtainable and there are sound reasons for doing so in terms of s 158(3) of the Act. Refer to 8.4 above where the reasons are set out. In *S v F supra* at 571, it was held that the provisions of s 158(3) required a party making an application for an order in terms of s 158, to satisfy the court that all the requirements in paragraphs (a)-(e) were met. This decision was found to be wrong in *S v Staggie and Another supra* at 43, where the court held that the various paragraphs of subsection (3) had to be read disjunctively. This led to the criminal courts being faced with two opposed interpretations of s 158 of the Act. The conflict was resolved in *Domingo v S supra* at 213, where the court held that the decision in *S v F* regarding the meaning and interpretation of s 158, was wrong. The provisions of s 158(3) had to be read disjunctively.

<sup>87</sup> Steytler *Constitutional criminal procedure* 295.

<sup>88</sup> Müller and Tait (SACJ) *op cit* 59.

<sup>89</sup> See *Klink v Regional Court Magistrate supra* at 407J-408B. He states that the effect of the section is that a witness who reasonably needs to give evidence in a separate room will also have to be examined through an intermediary although he may not be exposed to undue mental

the wording of section 170A indicates an obvious need for the amendment of the section so that evidence of a child can be given from outside the courtroom without the use of an intermediary, where the latter is not required. The learned authors note that section 158 does not refer to section 170A, nor does it mention child witnesses.<sup>90</sup> Section 158 is also advantageous in that the application to give evidence via closed-circuit television can be brought by the witness herself if she wishes to use this provision.

According to Müller and Tait, section 170A may be unconstitutional because it unfairly discriminates against children on the basis of age.<sup>91</sup> It is possible to use section 158 in cases where an intermediary is not required while section 170A will be used where the assistance of an intermediary is necessary. However, in practice, section 158 will not assist young children as they will not be able to testify with the assistance of an intermediary. Section 158 can also be used in instances where section 170A is not an option due to the lack of qualified people to act as intermediaries.<sup>92</sup> Section 158 can now assist in these cases by enabling child witnesses to testify at least away from the accused's presence even though they may do so without the assistance of an intermediary. Müller and Tait suggest that until such time as section 170A has been amended to remove any anomalies or discrepancies created by the wording of the section, section 158 can in the interim

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stress and suffering if he testifies without the intermediary's assistance.

<sup>90</sup> It provides that evidence can be given via closed-circuit television or similar electronic media where such equipment is available and, it would be in the interests of justice to do so in terms of s 158(3)(d), or if it will prevent the likelihood that prejudice or harm might be experienced by any person testifying at such proceedings in terms of s 158(3)(e). The question arises whether it is possible for a child to give evidence via either s 158 or s 170A, or is s 170A limited to witnesses under 18 whilst s 158 caters for those excluded by s 170A that is, those over 18? Although s 170A expressly limits its application to children under 18, there is no similar limiting provision in s 158. The assumption is that a child may be allowed to give evidence in terms of s 158 as well. This will be useful where the child is older and does not require the assistance of an intermediary. This is said to resolve one anomaly created by s 170A. See Müller and Tait (*SACJ*) *op cit* 60.

<sup>91</sup> This refers to the under 18 age restriction. They suggest that the legislature should remove this discrepancy. *Ibid* at 61.

<sup>92</sup> In certain areas, there has been a lack of persons who are qualified to act as intermediaries for black children. *Id.*

be used to allow child witnesses to testify via closed-circuit television in those instances where intermediaries are not required or are not available, or to avoid the problems inherent in section 170A.<sup>93</sup> The learned authors make a very strong case for the use of section 158.

### 9.3.2 SECTION 171 OF THE CRIMINAL PROCEDURE ACT

Section 171 of the Act provides for evidence on commission, that is, evidence of a witness resident in the Republic whose attendance cannot be obtained without undue delay, expense or inconvenience, or of a witness resident outside the Republic whose attendance cannot be obtained. The section further provides that the court may appoint a commission if it concludes that such a step is necessary in the "interests of justice". It is necessary that a magistrate or other competent person must proceed to the place where the witness is, to take down the evidence.<sup>94</sup> The section confers a wide discretion on the trial judge to grant or refuse such an application.<sup>95</sup> Accordingly, no confrontation takes place between the accused and the witness. However, the power to allow a commission must be exercised with great care.<sup>96</sup> The court will not allow a commission if it believes that the respondent is likely to be prejudiced, or the demeanour of the witness is likely to be important.<sup>97</sup>

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<sup>93</sup> These problems pertain to, *inter alia*, the age discrepancy and the anomaly referred to in *Klink supra. Id.*

<sup>94</sup> See s 171(2)(a) of the Act. It should be noted that the procedure takes place at the instance of either the state or the accused. Also see *S v Mbongwa* [2002] 1 All SA 457 (O), which held that such a competent person must be intimately acquainted with the proceedings thus far as well as with the legal process itself.

<sup>95</sup> See *R v Levy* 1929 AD 312 at 332 and *S v Hassim and Others* 1973 (3) SA 443 (A) at 452.

<sup>96</sup> *R v Morrison* 1933 NPD 741 at 746.

<sup>97</sup> *Id.* The court also remarked in *Morrison*, that the state should pay the expenses of the accused where it fails to produce a witness in court, and the accused has no means to pay for his own representation. It should be noted that in *Pennington v Minister of Justice and Others supra*, the Minister of Justice had directed in terms of s 111 of the Act, that the trial should be held in Johannesburg, while the accused and most of the defence witnesses lived near Cape Town. The accused lacked the funds to ensure attendance of the defence witnesses at the trial in Johannesburg. The Constitutional Court suggested for the trial court's guidance, that it would be appropriate for the state to use its own resources to ensure the presence of any defence

Therefore, it has been held that when the court is of the opinion that the demeanour, personality and conduct of a witness will be important when assessing his credibility, the application ought to be refused.<sup>98</sup> It was held in *S v Hoare and Others*<sup>99</sup> that the fact that the evidence cannot be observed by a judge is a relevant factor, but not enough reason for the refusal of a commission, because the evidence will not be judged by a jury, but by “men of some legal experience”. The court found that such men are fully aware of the dangers of accepting the disputed evidence of witnesses who they had not personally heard in preference to the evidence of witnesses who had given evidence *viva voce*, and they would approach such a problem with great care.<sup>100</sup>

According to Müller and Tait, the amendment to section 158 has improved the procedure used for the taking of evidence on commission, namely that provided for by section 171 of the Act.<sup>101</sup> Schwikkard argues that the assertion that it is an

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witnesses that the trial court may regard as material for a just disposition of the case, and that consideration be given by the trial court for the taking of evidence on commission in Cape Town.

<sup>98</sup> See *S v Hassim and Others supra*.

<sup>99</sup> 1982 (3) SA 306 (N). In this case, the prosecution had requested the evidence of certain persons to be taken on commission because it was unable to persuade them to come to South Africa to give evidence voluntarily or because they have been prevented from coming here by orders of their own Government. The court found that there was a real possibility that the interests of justice might be prejudiced if the application was refused. Thus, it held that this was an exceptional case in which the court should exercise its discretion to order a commission. Also see *S v Basson* 2000 (2) SACR 188 (T), where the court held that evidence from two witnesses could be obtained in the USA by means of a commission in terms of s 2(1) of the International Co-operation in Criminal Matters Act 75 of 1996, despite the fact that the accused would be unable to be present when the witnesses testify. The court found that the defence team will be able “with the aid of cellphones, telefaxes, computers and the like” to make contact with the accused in South Africa during the hearing. The court added that if it would appear that due to the accused’s absence certain relevant things were not taken up by the defence, that will have to be considered when the evidence thus obtained is eventually evaluated. Also see Joubert (2001) *et al op cit* 79.

<sup>100</sup> This approach tends to provide some consolation to the accused, in that the principle of confrontation does not address the judge’s impression of the evidence and its presentation, but the impressions affecting the accused’s further conduct.

<sup>101</sup> As stated earlier, the amendment to s 158 enables people to give evidence via electronic means without actually being present in court. The learned authors state that the procedure provided for by s 158 was used in the unreported case of *S v De Grandhomme* (unreported) case 5518197 4-12-97 (C). In this case, the state had successfully applied to lead evidence via

inalienable right of an accused to be seen by the witness in court is inconsistent with section 171 of the Act, which permits evidence to be taken on commission in public circumstances, and does not require that the accused be present when such evidence is recorded.<sup>102</sup> However, the accused still has a right of cross-examination through his legal representative.

The position in the **United States** is similar to our law, in that the use of criminal depositions is similar to our law regarding evidence on commission.<sup>103</sup> Rule 15 of the Federal Rules of Criminal Procedure provides that the deposition of a party's prospective witness may be taken and preserved for trial whenever it is in "the interests of justice" due to "the exceptional circumstances of the case". Part or all of the deposition transcript may be used at the trial, in place of live testimony if the witness is "unavailable" within the meaning of Federal Rule of Evidence 804(a).<sup>104</sup> According to Elliot Epstein, criminal depositions are necessary to preserve the testimony of a witness who is likely to be unavailable for trial.<sup>105</sup> The use of any substitute for live courtroom testimony, including depositions is regarded with suspicion, because of the constitutional right of confrontation given to defendants under the Sixth Amendment.<sup>106</sup> Therefore, Epstein maintains that both Rule 15 and

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electronic media, and a video-conference facility was set up so that the state witnesses could give evidence from Russia and the United States. See Müller and Tait (SACJ) *op cit* 59.

<sup>102</sup> See Schwikkard (SACJ) *op cit* 47.

<sup>103</sup> A deposition refers to a statement which is written and attested.

<sup>104</sup> Fed R Crim P 15(e) describes unavailability as follows: Unavailability as a witness includes situations in which the declarant is *inter alia*, unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity; or ... is absent from the hearing and the proponent of a statement has been unable to obtain the declarant's attendance by a process or other reasonable means. It should be noted that the requirements of Rule 15 apply both to the prosecution and the defence. This is similar to s 171 in that the procedure can take place at the instance of either the state or the accused.

<sup>105</sup> Epstein "Criminal depositions and the Sixth Amendment" (1990) *Maine Bar Journal* 178.

<sup>106</sup> According to Cristian DeFrancia, the use of affidavit testimony blends the question of admissibility with the right of confrontation. Therefore, excessive use of affidavit evidence can undermine the purposes of cross-examination. The practice of accepting written witness testimony into evidence without the opportunity to examine the witness affidavit, creates doubt about the reliability of the statement, thus impairing the fact-finding process. See DeFrancia "Due

case law require a party, especially a prosecutor, who offers such evidence, to justify not only the taking of the deposition but its use at trial.<sup>107</sup>

Similarly in **Australia**, there are provisions for the crown (state) to submit the depositions or statements of a witness where the witness is dead, ill or otherwise unable to give evidence that is, out of Australia at the time of the trial. Certain portions of the deposition can be rejected on the basis of the trial judge's common law discretion to reject evidence which would operate unfairly.<sup>108</sup> There is also power to use evidence taken on commissions outside the State or Territory in which the trial is being held.<sup>109</sup>

The right to confrontation in an adversarial system requires that any testimonial evidence must be subject to the application of a "cross-examining nature".<sup>110</sup> If the accused cannot challenge the veracity, sincerity and accuracy of the statement through cross-examination, the use of that testimonial evidence may severely

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process in international criminal courts: why procedure matters" 87 (2001) *Virginia Law Review* 1381 at 1398-1399, where the writer criticises the use of affidavit testimony at trials. **English law** also prefers live testimony. However, a statement may be admitted if a credible witness testifies under oath that the deponent is dead, ill, or prevented from attending by the defendant or his agent. However, the deposition must take place in the defendant's presence, and the defendant or his lawyer must be given the opportunity to cross-examine the witness. See Sherman "Sympathy for the devil: examining a defendant's right to confront before the international war crimes tribunal" (1996) *Emory International Law Review* 833 at 857. Similarly, in **Germany**, both the accused and their attorneys are allowed to be present at an examination in commission. An examination in commission is usually conducted in the case of witnesses who could endanger themselves with their testimony. To illustrate this, so-called undercover investigators whose identities may not be disclosed, are not required to testify in the main hearing. They may be subject to an examination conducted by an appointed judge outside the main hearing. See Samson "German criminal proceedings" in Weissbrodt and Wolfrum (1998) *op cit* 525.

<sup>107</sup> Epstein *op cit* 178.

<sup>108</sup> See *Radford* (1993) 66A Crim R 210 at 229 CCA (VIC). The judge is also obliged to warn the jury that they have not seen or heard the witness whose deposition has been admitted. See *inter alia*, *R v Horan* (1951) VLR 249 at 251 SC (VIC).

<sup>109</sup> *Id.*

<sup>110</sup> DeFrancia *op cit* 1425.

compromise the rights of the accused.<sup>111</sup> Therefore, depositions in a criminal case must be used sparingly.<sup>112</sup> They should be used in circumstances where the departure of a material witness prior to the trial remains certain, his return is improbable and a subpoena or alternative methods of securing his attendance at trial are ineffective. The prosecution should exercise care in taking and using depositions, because any prosecutorial conduct which indicates bad faith or lack of due diligence, or causes prejudice to the defendant may violate the Sixth Amendment.<sup>113</sup> This will lead to the exclusion of deposition evidence at the trial, a dismissal of the government's case, or a reversal on appeal.

The above discussion illustrates that a commission may be held in exceptional circumstances to obtain the evidence of a witness who is "unavailable" for purposes of trial. However, such a step may only be taken in the "interests of justice". A commission will be refused if the court believes that the respondent will be prejudiced, or the demeanour of the witness will be important. Both the state and the defence can request this procedure.

### 9.3.3 HEARSAY EVIDENCE

The confrontation principle forms the basis of rules of evidence for the exclusion of hearsay evidence.<sup>114</sup> Hearsay evidence is usually excluded because of the doubt and suspicion which is attached to the accuracy of such evidence. The denial of witness confrontation affects the truth-finding process. However, certain statements are admissible even though they are hearsay, such as the statements by deceased

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<sup>111</sup> *Ibid* at 1438-1439.

<sup>112</sup> Epstein *op cit* 181. Similarly, it has been held that the power to grant a commission must be exercised with great care. See *R v Morrison supra* at 746.

<sup>113</sup> *Id.* Similarly, a South African court will not allow a commission if it believes that the respondent will be prejudiced. See *R v Morrison supra* at 746.

<sup>114</sup> Hearsay is evidence of statements made by persons not called as witnesses, which are tendered to prove the truth of what is contained in the statement. Refer to subsection 10.2.5.2 for a more detailed discussion on hearsay evidence.

persons against their interest and dying declarations.<sup>115</sup> The reason for the admissibility of the exceptions to hearsay is that such statements are made at a time and under such circumstances that they are unlikely to be false.<sup>116</sup>

In the **United States**, the right to confront prosecution witnesses also prevents the use of hearsay statements against the accused, unless the statement has sufficient "indicia of reliability", and the declarant is not available for trial.<sup>117</sup> Thus, the right to face-to-face confrontation in terms of the Sixth Amendment is not absolute.

However, the United States Supreme Court has recognised the validity of hearsay exceptions in many cases.<sup>118</sup>

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<sup>115</sup> See Zeffertt *et al op cit* 381, regarding the status of the common law and statutory exceptions before the advent of the Law of Evidence Amendment Act 45 of 1988.

<sup>116</sup> See *Estate De Wet v De Wet* 1924 CPD 341. The court found that the same principle regarding exceptions to hearsay, can be extended to statements made by an insolvent when something has occurred which may have caused him to wish to give a false impression of his previous state of mind as in this case. Thus, the court held that statements by an insolvent are original evidence and not hearsay, since they are tendered to prove the state of mind of the insolvent at the time and not the truth of such statements.

<sup>117</sup> See *Ohio v Roberts supra*. This case addresses the hearsay rule regarding the right to confrontation. The court had to decide whether to admit an out-of-court statement made by a non-testifying declarant. The court reaffirmed that the use of hearsay statements of an unavailable declarant does not violate the Confrontation Clause. However, the court emphasised that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that the primary purpose of the Confrontation Clause is to ensure the right of cross-examination. In **Canada**, hearsay is not automatically excluded, but it may be admitted when it is necessary in the case and there are reasons to believe that it is reliable. See *Khan* (1990) 59 CCC (3d) 92 (SCC). The decisions by the European Court demonstrate that where hearsay evidence is the main or decisive evidence against the accused, reliance on it in court will lead to a breach of the Convention's fair trial right. See *inter alia*, *Kostovski v The Netherlands supra* and *Unterpertinger v Austria supra*. In *Barberà, Messegué and Jabardo v Spain supra*, the court regarded the use of hearsay evidence as being unfairly prejudicial to the defendants.

<sup>118</sup> See, *inter alia*, *Mattox v US supra* at 244-50 (1895), where the validity of the dying declaration hearsay exception was recognised. However, see Schulman "The Florida Supreme Court vs The United States Supreme Court: the Florida decision in *Conner v State* and the federal interpretation of confrontation and Federal Rule of Evidence 807" 55 (2001) *University of Miami Law Review* 583, 614-617 where the writer criticises the Florida Supreme Court's decision in *Conner* declaring the elderly hearsay exception s 90.803 (24) of the Florida Statutes to be unconstitutional. The Florida Supreme Court had found that the relevant section violated the accused's right to confrontation, was too broad, and was not supported by sufficient policy concerns to justify its existence. The writer finds it unacceptable and inconsistent that the state would take extra steps to protect its youngest class of citizens (that is, child victims of sexual abuse), but decline to take such steps to guard its oldest class of citizens who are just as vulnerable. The writer remarks that the elderly hearsay exception would pass constitutional muster as defined by the United States Supreme Court, as it adheres to the US Supreme Court

Therefore, hearsay evidence is generally excluded because of its unreliability, unless it falls under one of the recognised exceptions.

#### 9.4 CONCLUSION

The history of the right to confrontation can be traced back to the beginnings of Western legal culture.<sup>119</sup> It is a requirement of a fair hearing that the trial should take place in open court, and the accused has the right to see and know his accusers. Therefore, confrontation is fundamental to a fair trial. Any violation of the right to confrontation amounts to an irregularity, which will lead to a setting aside of the conviction.<sup>120</sup> The right to confrontation entails that the accused must be able to observe the witness whilst he is giving evidence against him.<sup>121</sup> The accused can thus test the recollection of the witnesses testifying against him through confrontation. The right of confrontation is said to be important to the fact-finding process because most courts presume that witnesses are less likely to lie in the presence of the accused.<sup>122</sup> Indeed, "a fact which can be primarily established only by witnesses cannot be proved against an accused ... except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode

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requirement of a showing of some "indicia of reliability" for hearsay statements to be in accord with the accused's right to confrontation.

<sup>119</sup> Jones *op cit* 960.

<sup>120</sup> See *S v Motlatla supra* at 814. Similarly, the European Court has held in *Kostovski v The Netherlands supra*, that a denial of the right to confrontation was a violation of the Convention's fair trial right. Also see *Chambers v Mississippi supra* at 294, where the court remarked that the rights "to confront and cross-examine witnesses ..." are fundamental to the right to a fair trial, and cannot be dispensed easily.

<sup>121</sup> The right to confrontation deals with the right to present and access impulses in court from the bench, prosecution and witnesses. It also deals with the right to receive these impulses.

<sup>122</sup> Conklin *op cit* 325.

authorised by the established rules governing the trial or conduct of criminal cases".<sup>123</sup> Reliable results are said to be more likely when there is confrontation, as the court can observe the witness's demeanour as they face the accused, and judge the witness's credibility.

However, the right to confrontation is not absolute. In exceptional circumstances, compelling reasons of public policy will prevail over the right to confrontation. Where there is a conflict between the protection of a vulnerable witness and the requirement of a face-to-face confrontation, the latter must yield to the greater public interest in the protection of the witness. Similarly, the right may be waived, but it must be a knowing, intelligent waiver uncoerced from the defendant.<sup>124</sup> One such exception is section 170A of the Act, which relates to evidence given by child victims of sexual abuse. Section 170A was introduced to protect child witnesses.<sup>125</sup> The witness may give evidence with the aid of an intermediary via closed-circuit television. Confrontation between the accused and the victim is thus excluded. The reason for this exclusion, is to reduce the emotional stress and suffering of the child witness. The constitutionality of this section was challenged in *Klink v Regional Magistrate NO*.<sup>126</sup> The court held that a proper balance can be achieved between the protection of a child witness and the rights of an accused to a fair trial by allowing the witness to testify in congenial surroundings and out of sight of the accused. However, the court found that section 170A was not unconstitutional, and that the use of an intermediary did not affect the fundamental fairness of the criminal process.<sup>127</sup> Accordingly, the

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<sup>123</sup> See *Kirby v United States* 174 US 47, 55 (1899).

<sup>124</sup> See *Brookhart v Janis* 384 US 1 (1966).

<sup>125</sup> Müller and Tait make a very strong case for the use of s 158 as an alternative procedure. See Müller and Tait (SACJ) *op cit* 59.

<sup>126</sup> See *Klink v Regional Court Magistrate supra* at 402.

<sup>127</sup> Also see *S v Mathebula supra* at 231 and *S v Stefaans supra* at 182. These cases are instructive regarding the appointment of an intermediary in terms of s 170A. Similarly, in *R v Levogiannis supra*, the court held that s 486(2.1) of the Canadian Criminal Code, which contains protective measures for child witnesses and prevents face-to-face confrontation between the witness and the accused, did not violate the Canadian Charter. The wording in s 486(2.1) is also similar to s 170A.

interests of the child witness prevailed over the accused's right to a fair trial.

In the United States, the Confrontation Clause has been interpreted by the Supreme Court as guaranteeing a criminal defendant the right to come face-to-face with adverse witnesses at trial.<sup>128</sup> The Sixth Amendment guarantees the accused the right, not only to be present during the trial, but also the right to be seen by the witnesses for the prosecution. Therefore, the use of a one-way screen or closed-circuit video image, preventing a child sex abuse witness from seeing the defendant, violates the Sixth Amendment unless the trial court specifically finds that the full face-to-face confrontation would cause the child serious emotional distress.<sup>129</sup> Thus, *Maryland v Craig* and subsequent case law have established that when a judge determines that a child witness will be traumatised by the presence of the accused in the courtroom, the court should allow the child to testify away from the accused's presence.<sup>130</sup> The court should also decide whether the particular child witness requires protection.<sup>131</sup> This case law has established that the public interest in protecting child witnesses overrides the accused's right to personally confront the witnesses against him. The decision in *Craig* led to the introduction of the Child Victims' and Child Witnesses' Rights Statute. This statute has been interpreted to guarantee the same constitutional mandates set forth in *Craig*. Many states in the United States, are said to have similar statutes to the Child Victims' and Child

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<sup>128</sup> See *Coy v Iowa supra* at 1012, where the court held that it must find that the child will be traumatised not simply by giving evidence in court but by giving evidence in the presence of the accused. The trauma suffered by the child must also be more than mere nervousness or excitement or a reluctance to testify.

<sup>129</sup> *Id.* Also see *Maryland v Craig supra* at 836.

<sup>130</sup> See *inter alia*, *Maryland v Craig supra*; *Spigarolo v Meachum supra* and *Cumbie v Singletary supra*. However, in *Gonzales v State supra*, the closed-circuit procedure was used to protect a minor witness rather than a minor victim. This decision has been rightly criticised by Stacey Jones. See Jones *op cit* 969. Also see *State v Blume supra* and *Gilpin v McCormick supra*, where protective measures were used to protect minor witnesses and adult witnesses respectively. It is noteworthy that s 170A refers to "any witness". It leaves the door open for the courts to appoint an intermediary even in the case of minor witnesses rather than minor victims.

<sup>131</sup> See *Coy v Iowa supra* and *Maryland v Craig supra*.

Witnesses's Rights Statute.<sup>132</sup> The Canadian and British courts have also come out in favour of protecting the rights of youthful witnesses.<sup>133</sup> Therefore, our law conforms with international trends by introducing protective measures for child witnesses. Such measures are not only necessary for the child's benefit, but they also enhance the truth-finding process which is part and parcel of the confrontation principle.

The second exception to the right to confrontation is section 171 of the Act, which provides for evidence on commission. The court may appoint a commission where a witness is "unavailable", and his attendance cannot be obtained in court. Such a step must be necessary in the "interests of justice". The court has a discretion whether or not to order a commission. The application may be refused where there is a likelihood that the respondent will be prejudiced or the demeanour of the witness is important.<sup>134</sup> The taking of criminal depositions in terms of Rule 15 of the Federal Rules of Criminal Procedure in the US, has similar characteristics to section 171 of the Act. To illustrate this, the deposition of a witness should be taken whenever it is in "the interests of justice", due to "exceptional circumstances of the case". The witness may be "unavailable" for whatever reason such as death or illness, and the requirements of Rule 15 apply both to the prosecution and the defence.<sup>135</sup> The admission of hearsay evidence is also regarded as a major exception to the right to confrontation. Hearsay evidence is generally excluded unless it falls under one of the recognised exceptions.<sup>136</sup>

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<sup>132</sup> Brannon *op cit* 460.

<sup>133</sup> See, *inter alia*, *R v Levogiannis supra* and *R v Lynch supra* respectively. In both these cases, the use of screens between the accused and the complainant, were found not to be prejudicial to the accused. Some Australian jurisdictions have also introduced protective measures for child victims of sexual abuse. Also see Palmer *op cit* 185-187.

<sup>134</sup> See *R v Morrison supra* at 746 and *S v Hassim and Others supra* at 443.

<sup>135</sup> Similarly, the procedure in terms of s 171 may take place at the instance of either the state or the accused.

<sup>136</sup> See, *inter alia*, *Estate De Wet v De Wet supra* at 341; *Ohio v Roberts supra* at 56.

Thus, by far our law is in line with international law. It recognises that although the right to confront adverse witnesses in court is not absolute, it is nevertheless, an important component of a right to a fair trial. However, one should proceed cautiously when an individual's constitutional rights are at stake, so as not to allow the exceptions to swallow the rule.<sup>137</sup> The courtroom process should be reformed by introducing judicial procedures which are more sensitive to the needs of the child victim, but at the same time preserve the rights of the accused. The courts should look into alternatives to avoid abridging the accused's right to confrontation, such as moving proceedings out of the courtroom, making courtrooms more "friendly" to children, using special "child interpreters" or recommending other trauma reducing measures.<sup>138</sup> The broader issues of the social structure which gives rise to child abuse must also be addressed.<sup>139</sup> It is important to develop legal measures that can achieve a sensitive balance between these competing interests. Indeed, one must strive to ensure that the right to confrontation remains a venerable tradition for generations to come. It has long been recognised that the right to confrontation is "one of the fundamental guarantees of life and liberty ... long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action ...".<sup>140</sup>

The accused's right to confrontation is closely related to the accused's right to present his case. The accused is able to challenge opposing evidence in court when he confronts his accusers. The right to challenge evidence encapsulates the right to cross-examine state witnesses. If an accused has access to statements of state

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<sup>137</sup> See Jones *op cit* 971.

<sup>138</sup> See Fuhrman *op cit* 46-47. Also see the suggestions made by Michael Bell in Bell "Recent decisions" 33 (1995) *Duquesne Law Review* 361 at 375-376. Andrew Ashworth opines that defendants should have the right to the involvement of independent experts, such as forensic psychologists and special training, both to protect the child during questioning and to provide the court with an assessment of the victim's behaviour and testimony. See Ashworth "Human rights: case and comment" (2002) *The Criminal Law Review* 831 at 832.

<sup>139</sup> See Warner *op cit* 302.

<sup>140</sup> See Kirby *v United States supra* at 55-56.

witnesses, he can adduce evidence to conduct his defence. Therefore, an informed accused will be able to adduce and challenge evidence effectively in court. The next chapter will discuss the accused's right to present his case in court.