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***SIMPLIFICATION OF THE SOUTH AFRICAN CRIMINAL TRIAL  
PROCESS: A PSYCHOLINGUISTIC APPROACH***

BY

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submitted to the Faculty of Law  
in accordance with the requirements of the degree of

**Doctor Legum**

in the Department of Criminal and Procedural Law  
at the University of the Orange Free State

Promoter: Professor T Verschoor

November 1998

Port Elizabeth

*For the three women in my life*

*My mother, Corrie*

*My wife, Ronell*

*and*

*My daughter, Madeell*

## STATEMENT

I, **DEON ERASMUS**, declare that the thesis hereby submitted by me for the *Doctor Legum* degree at the University of the Orange Free State is my own independent work and has not previously been submitted by me at another university or faculty. I furthermore cede copyright of the thesis in favour of the University of the Orange Free State.

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Port Elizabeth: November 1998

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## CHAPTER 1

### *Introduction and problem statement*

#### 1.1 *Introduction*

This research is conducted within the broad framework of the right of an accused person to a fair trial, as embodied in section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996.<sup>1</sup> As a new human rights orientated order was introduced in South Africa with the implementation of the interim Constitution<sup>2</sup>, the provisions of both the interim Constitution and the Constitution relating to a fair trial will be discussed. The issue as to what constitutes a fair trial is a point under constant discussion at present.<sup>3</sup> This research however aims only to address specific aspects of what indeed constitutes a fair trial.

- 
1. Hereinafter referred to as "the Constitution".
  2. The Constitution of the Republic of South Africa Act, Act 200 of 1993. Hereinafter referred to as "the interim Constitution".
  3. The Minister of Justice for instance called a national conference titled "Legal Forum on Access to Justice" from 17-19 November 1995 in Durban. The aim of this conference was to find ways to make the justice system more accessible.

The criminal trial process in South Africa is almost entirely<sup>4</sup> regulated by the provisions of the Criminal Procedure Act, Act 51 of 1977.<sup>5</sup> The aim of the Criminal Procedure Act should therefore be to ensure that a fair trial takes place.<sup>6</sup> The question however is whether the current criminal trial process indeed ensures that "a fair trial" takes place. The importance of this question intensifies if one takes into account that the vast majority<sup>7</sup> of all accused persons in South Africa's Magistrates' Courts<sup>8</sup> do not have the benefit of legal representation.<sup>9</sup>

The criminal trial process is a communicative process. This communication takes place through the medium of language, in both its written and spoken (or oral) form. In a criminal trial the process of communication takes place almost exclusively oral communication.

- 
4. Some aspects of the criminal trial process are found in rules of practice, developed by the courts. Compare chapter 4 in this regard.
  5. Hereinafter referred to as "the Criminal Procedure Act".
  6. This assumption is made in view of the constitutional right to a fair trial. Compare paragraph 3.4 below in this regard.
  7. Compare Table 1 in annexure A. From this table it is clear that in 1993 more than 80% of accused persons appearing in South Africa's lower courts were not legally represented. The Department of Justice was not in a position to supply the researcher with statistics for the period after 1993, as these statistics were not "readily available" and not specifically kept. In the Port Elizabeth Magistrate's Courts 66,2% of all accused appearing in the Magistrate's Courts are not legally represented. Compare paragraph 2.2 in this regard.
  8. This research is limited to accused persons appearing in Magistrate's Courts. Compare chapter 2 in this regard. The majority of accused persons do in fact appear in Magistrate's Courts.
  9. In this research the term "undefended accused" will be used when referring to accused persons without legal representation.

The question now is whether the large majority of undefended accused persons understand what is communicated to them during the criminal trial process.

If it is determined that the majority of accused persons do not receive a fair trial because they do not understand the criminal trial process, it needs to be determined if this shortcoming can be remedied and more specifically how it could be remedied.

## **1.2 *Reasons for selection of the topic***

The reasons why the topic was selected as a research project, stem firstly from the fact that the researcher, apart from being an academic lawyer, also practises in criminal litigation on a limited scale. The researcher was furthermore previously employed by the Department of Justice as a prosecutor, magistrate and state advocate before pursuing an academic career.

Like most other court officials, the researcher soon realized that undefended accused persons have difficulties in understanding the criminal trial process. Despite this "general consensus" amongst court officials that the criminal trial system is unintelligible to undefended accused persons, the system relentlessly carries on.

At a national conference on "Access to Justice" during 17-19 November 1995<sup>10</sup>, the researcher delivered a paper in which it was suggested that video tapes should be used to explain the right of arrested persons to them.<sup>11</sup> The paper was delivered and the video was made without empirically testing the "general consensus".

At an international colloquium held at Vista University during 22-24 August 1996, the researcher again delivered a paper, with the title "'Do you understand so far?': A psycholinguistic evaluation of the standard explanation of an accused person's rights at the close of the case for the prosecution." This paper dealt with the intelligibility of procedural explanations afforded to undefended accused persons, after the researcher had become familiar with the work of the Charrows.<sup>12</sup>

Finally, a pilot study to test the correctness of the "general opinion" was conducted in March 1997. The pilot study proved that the "general opinion" was indeed correct. The information collected during the pilot study was thereupon used as a basis for the paper "'What do you wish to do?' Procedural choices and the right to a fair trial."

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10. Compare footnote 3 above.

11. Compare the paper attached as annexure "A". For practical reasons the video could not be attached as an annexure.

12. Compare footnote 14 below and chapter 5. A copy of the paper is annexed as annexure "B".

This paper was delivered at the Socio-Legal Studies Association Annual Conference, held at Cardiff in Wales during 2-4 April 1997.<sup>13</sup>

This research project is accordingly a culmination and next logical step of the above-mentioned research projects.

### 1.3 *Objectives and hypotheses*

The objectives of this research are to test the validity of the following two hypotheses:

- The criminal trial process in essence is a communicative process which aims at ensuring a fair trial for undefended accused persons ;  
and
  
- Ineffective communication takes place during the criminal trial process.

In addressing these hypotheses, various aspects of what a fair trial entails will be examined.

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13. A copy of this paper is attached as annexure "C". The video used with this paper is the same one used with annexure "A".

#### 1.4 *Structure*

The research is divided into three parts. In the first the following are set out in a descriptive-analytical way:

In chapter 2 the way in which the empirical research was conducted and how information was gathered, is set out.

In chapter 3 the jurisprudential framework concerning the concept of fairness, intelligibility and access to the criminal trial process will be addressed. The communicative nature of the criminal trial process will be addressed with reference to current communicative theories. The presiding officer is identified as the sender of the message and the undefended accused is the reader thereof. More specifically "legal language" as the message in the communicative process will be analysed.

Chapter 4 contains an exposition of the results of the communicative aspects of the criminal trial process obtained by means of the empirical research conducted in Magistrates' Courts in Port Elizabeth. This information is then analysed in chapter 6. Parts of the communicative process causing communicative or intelligibility problems are identified. The empirical research was aimed at determining whether the criminal trial process is intelligible and whether effective communication took place.



The second part of this research is an evaluation of the information obtained in the first part. The evaluation calls for a norm to test intelligibility and effective communication. The norm employed in this research is the psycholinguistic approach of the Charrows<sup>14</sup>. The application of this norm takes place in chapter 5.

In chapter 6 the information gathered by means of the empirical research will be evaluated.

The issue as to remedial action is addressed in the final part. Specific instances of remedial action are set out in chapter 7.

In chapter 8 it is reflected whether the hypotheses posed in this research were verified or disproved. Finally this chapter contains conclusions and recommendations regarding the research project.

---

14. Compare Charrow PR and Charrow VR "Making legal language understandable: A psycholinguistic study of jury instructions" *Columbia Law Review* (1979) at 1306-1374 (hereinafter referred to as "Charrows *Jury Instructions*") as well as Charrow VR, Crandall JA and Charrow RP "Characteristics and functions of legal language" in Kittredge R and Lehrberger J (Editors) *Sublanguage: Studies of language in restricted semantic domains* (1982) Walter de Gruyter at 175-190 (hereinafter referred to as "Charrows *Sublanguage*").

## 1.5 *Research methodology*

To obtain the necessary information to achieve the set objectives and test the hypotheses, the following methodology was employed:

- A literature study concerning the content and practical application of the concepts of a fair trial, procedural explanations and procedural choices was conducted in order to establish a theoretical background for this study. In addition a literature study was conducted regarding current communication theories, in order to analyse the criminal trial process as a communicative process. Textbooks, theses, articles in journals, conference proceedings and law reports provided valuable information for this topic.
- In order to test intelligibility of the communicative aspects of the criminal trial process, a norm to test intelligibility was elected. In this regard the psycholinguistic approach of the Charrows was adopted and applied.
- Qualitative empirical research, in the form of a field study, was then conducted at the Gelvandale Magistrate's Court in Port Elizabeth. Ten sample cases were attended and the procedural explanations afforded to the subjects by the presiding officer were recorded.

Immediately after an individual explanation had been given to an undefended accused and the accused had exercised his<sup>15</sup> procedural choice, the presiding officer switched the official court tape recorder off. The researcher then interviewed the subject and requested the latter to paraphrase the procedural explanation in question. The aim of the paraphrase exercise was to establish the intelligibility of the procedural explanation according to the norm set by the Charrows.<sup>16</sup>

- The information gathered during the field study was then analysed and used to read conclusions.

### 1.6 *Importance of this research*

Steytler<sup>17</sup> focused the attention of the South African legal fraternity on the plight of the undefended accused with the publication of a book, based on his Ph.D dissertation, on the issue. In this work<sup>18</sup> he advances three possible solutions to the plight of the undefended accused:

- 
15. In this research, for practical reasons, masculine personal pronouns will be used, without any discrimination towards the female gender intended. As it turned out in any event, all the subjects interviewed were of the male gender!
  16. Compare footnote 14 above.
  17. Steytler NC *The Undefended Accused on Trial* (1988) Juta.
  18. *op cit* at 1-2.

- The provision of State-funded legal aid. This solution he predicted would not meet the needs of the majority of indigent accused in South Africa in the (then) foreseeable future, due to the large number of potential candidates for legal aid, the shortage of lawyers and the lack of State-funding<sup>19</sup>;
- The simplification of the proceedings.<sup>20</sup> This would minimize the accused's need for legal knowledge; and
- The development of an activist judicial officer. This may require either assistance to the accused designed to make him an effective adversary, or inquisitorial-type intervention by the court on behalf of the undefended accused.

Since the publication of his work, the constitutional order in South Africa has changed to a human rights orientated order.<sup>21</sup> Every accused now has a right to a fair trial.

---

19. In the postscript to his book *op cit* at 234-242 he comments on the (then) watershed decision of *S v Khanyile* 1988 (3) SA 795 (A), where it was held that an indigent accused is entitled to legal representation as of right in certain circumstances. Compare however the discussion in paragraph 4.3.1 below.

20. He points out at 24 *op cit* that "in South Africa few attempts have been made to simplify the procedure."

21. Compare chapter 3 in this regard.

Steytler<sup>22</sup> correctly points out that an individual whose rights are in jeopardy should have a full opportunity to participate in the decisions which may affect those rights. Prerequisites of such participation include the physical and mental presence of the accused and the ability to understand the language spoken in court.

The assumption is often made that undefended accused persons do not understand the criminal trial process or the language employed.<sup>23</sup> Despite these and other assumptions, the courts operate as though there is full comprehension of the procedural explanations afforded to undefended accused persons.<sup>24</sup>

The assumption that undefended accused persons do not understand the criminal trial process has not been tested empirically. In the United States of America, the Charrows were the first to test the degree of comprehension of jury instructions. In this research, the norm applied by the Charrows will be modified and applied in order to ascertain whether undefended accused persons indeed do not understand the criminal trial process.

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22. *op cit* at 3.

23. Compare paragraph 3.5.3 in this regard.

24. Compare O'Barr WM *Linguistic Evidence: Language, Power and Strategy in the Courtroom* (1982) Academic Press at 27.

In the following chapter the empirical research or field study conducted during this research project, as well as the methodology employed, will be set out.

## CHAPTER 2

### *Empirical research and methodology employed*

#### 2.1 *Introduction*

In this chapter the following are discussed:

- In 2.2 the structure of the Port Elizabeth Magistrate's Courts as the object of the field research will be set out;
- In 2.3 relevant statistics pertaining to the Port Elizabeth Magistrates' Courts will be set out;
- In 2.4 the research methodology employed in this project will be set out.

#### 2.2 *The structure and positioning of the Port Elizabeth Magistrates' Courts*

The main seat of the Port Elizabeth Magistrates' Court is in North End. All the criminal courts are housed in one building, known as the "New Law Courts". A total of 8 (criminal) Magistrates' Courts sit there on a daily basis.<sup>1</sup>

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1. Due to staff shortages, some of the courts close at times and the rolls of these courts are then distributed amongst the remaining courts. It was confirmed with Senior Magistrate Pienaar that on 2 October 1998 only 17 of the allocated 33 magistrates' posts were filled in Port Elizabeth.

The majority of cases are conducted in either Xhosa, Afrikaans or English, or a combination of these languages.<sup>2</sup> As is normally done, the proceedings are translated by an official court interpreter when necessary.

Apart from this main centre, two satellite Magistrates' Offices were established<sup>3</sup>. One office operates in Gelvandale, a former Coloured area. Two permanent courts, court 29 and 30 sit at this office. The vast majority of cases are conducted in Afrikaans. The magistrates, prosecutors, witnesses and accused persons partake in the proceedings in Afrikaans. The other office operates in New Brighton, a former Black township. Four criminal courts, courts 23, 25, 26 and 27 sit at this office. The vast majority of cases are conducted in either translated English or Afrikaans<sup>4</sup>, as almost all the accused and witnesses are Xhosa speaking.

As a pilot project, a "one stop" criminal juvenile justice centre named "Stepping Stones" was created during 1997 in Bethelsdorp, a former and still predominantly Coloured area. All accused persons under the age of 18 years appear in this court.

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2. These three official languages are the most commonly spoken languages in the Eastern Cape Province.
  3. These separate Magistrate's Offices were established clearly in line with the policy of apartheid.
  4. Depending on the language preferred by the presiding officer and/or prosecutor.



### 2.3 *Relevant statistics pertaining to the Port Elizabeth Magistrates' Courts*

The field study was conducted during the period April to October 1998. To place the field study in context the following statistics pertaining to the Port Elizabeth Magistrates' Courts are relevant. The Senior Magistrate was able to supply the researcher with statistics pertaining to the period July 1997 to June 1998.

The total number of cases on the court rolls was 222 914, made up as follows:

■ Pleas in terms of section 112(1)(a) of the Criminal Procedure Act	7293
■ Cases transferred to High Court	12
■ Cases transferred to Regional Court	609
■ Cases withdrawn	133 951
■ Warrants issued	2376
■ Cases remanded and on the rolls	64 083

During this period 7536 cases were finalized by means of trials<sup>5</sup> and a total of 8247 accused appeared in those trials.

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5. Cases included in this category are section 112(1)(b) questioning and cases where the accused pleaded not guilty.

The position as to legal representation of the 8247 accused is as follows:

■	Represented by an attorney	2666
■	Represented by an advocate	131
■	Total	2792

Only 33,8% of accused persons who appeared in criminal trials therefore had legal representation.

During this period the total number of court hours were 14 584.

#### 2.4 *Methodology employed*

In order to test the validity of the hypotheses postulated in chapter 1, the researcher decided to employ a qualitative research methodology. The term qualitative research refers to social research based on field observations analysed without statistics.<sup>6</sup> The term participant observation often stands as a synonym for qualitative research and as this form of research always takes place in the field, it often goes by the name field research.<sup>7</sup>

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6. Dooley D *Social Research Methods* (3rd Edition) (1995) Prentice Hall at 259.

7. Dooley *op cit* at 259.

In contrast to qualitative research, the other major method employed in social sciences research is quantitative research. Quantitative research may be defined as research that involves measuring quantities of things, usually in numerical quantities.<sup>8</sup> It thus entails the collecting and reporting of observations numerically.<sup>9</sup> Due to the in-depth analysis of the data collected in this research project and the vast number of criminal trials taking place daily, it was decided not to employ this method.

The advantages of the qualitative method is that it entails direct observation and relatively unstructured interviewing of subjects in natural field settings.<sup>10</sup> In order to test the hypotheses posed in this research project, it is submitted that it is imperative to observe and interview the subjects in the courtroom setting, as the subjects need to understand the procedural explanations and choices afforded to them by the presiding officer at the time that the explanation or choice is given.<sup>11</sup>

This research project was furthermore framed in the form of a confirmatory research project, as it consisted of causal research that tested prior hypotheses.<sup>12</sup>

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8. Reaves CC *Quantitative Research for The Behavioral Sciences* (1992) John Wiley and Sons at 16.

9. Dooley *op cit* at 351.

10. Dooley *op cit* at 260.

11. Compare paragraph 4.3 in this regard.

12. Dooley *op cit* at 264.

The four major methods of qualitative research are observations, textual analysis, interviews and transcripts.<sup>13</sup> As is set out in more detail in paragraph 2.4.3-2.4.5 below, a combination of all four methods had to be employed in this research project in order to test the validity of the hypotheses posed.

At the outset of the research project, note was taken of the requirements of reliability and validity necessary to guarantee that the research project met scientific standards. The requirement of reliability refers according to Hammersley<sup>14</sup> to the degree of consistency with which instances are assigned to the same category by different observers or by the same observer on different occasions. In this research project it was not possible to repeat the experiment with the same subjects on different occasions, as actual criminal trials were attended.<sup>15</sup> An independent categorization of the paraphrased procedural explanations and choices were however conducted by two independent researchers.<sup>16</sup> It is submitted that the requirement of reliability regarding the categorizations made, was accordingly met.

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13. Silverman D *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (1993) SAGE Publications at 9.

14. Hammersley M *What's Wrong with Ethnographic Research: A Critical Guide* (1992) Routledge at 67.

15. Compare paragraph 2.4.1 in this regard.

16. The independent researchers were Prof. G Stead of the Department of Psychology at Vista University and Dr. K Müller of the Department of Procedural Law, Vista University. See also Silverman *op cit* at 165.

The requirement of validity refers to the truth value of an assertion made.<sup>17</sup> Silverman<sup>18</sup> summarizes this requirement by posing the question: "How can we be convinced by the plausibility and credibility of the evidence produced by field research?" He points out<sup>19</sup> that traditionally two methods are employed to ensure validity. The first of these methods is the triangulation of data and methods employed. Triangulation refers to the inclusion of multiple sources of data collection in order to increase the reliability of the observations.<sup>20</sup> The concept includes the concepts of respondent validation, which entails the going back to the subjects or respondents with tentative results in order to gain the latter's reaction on the results.<sup>21</sup> As is pointed out in paragraph 5.4 below respondent validation was neither possible, nor considered suitable in this research project. Silverman<sup>22</sup>, it is suggested, correctly argues that triangulation in the form of respondent validation, is not really appropriate to validate field research. He suggests<sup>23</sup> that field research may be adequately validated by methods of generalizing to a larger population, methods of testing hypotheses and the use of simple counting procedures.

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17. Dooley *op cit* at 353.

18. *op cit* at 155-156.

19. *op cit* at 156-160.

20. Mouton J and Marais HC *Basic concepts in the methodology of the social sciences* (1988) HSCR Press at 91.

21. Silverman *op cit* at 159.

22. *op cit* at 156-160.

23. *op cit* at 160-166.

In this research project the testing of hypotheses was employed.

#### 2.4.1 *The selection of sample cases*

This being a qualitative study, the researcher originally envisaged to attend 10 trials, randomly found suitable to include in the research project at the different Magistrates' Courts listed in paragraph 2.2 above.

After setting out to identify and attend sample cases, it became evident that it was not an easy task to find suitable sample cases to attend. The comment by Silverman<sup>24</sup> that cases are not likely selected on a random basis, but that a particular case is chosen because it allows access, proved to be true. In what follows the problems experienced in identifying suitable sample cases will be set out. These factors led to the researcher adapting the initially envisaged process of selecting sample cases. The factors are as follows:

- The sample cases had to be identified in actual courts conducting their daily business. This had the implication that the researcher had to fit in with the somewhat hectic routine of the courts and not *vice versa*. Although most magistrates and prosecutors were extremely co-operative they could only accommodate the researcher up to a certain extent.

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24. *op cit* at 160.

The researcher for instance attended a trial in court 18 on 06 April 1998. The matter became part-heard and was postponed to 09 April 1998. On that day the researcher was busy in court 16 attending a trial which was in progress and to be finalized on that day. The researcher thereupon requested the prosecutor to postpone the case to 13 April 1998 for sentence purposes so that the trial in court 16 could be attended until its finalization. On 13 April 1998 the researcher returned to court 18 in order to record the pre-sentence proceedings, only to find that the matter was in fact finalized on 09 April 1998 and not postponed as requested. The reason was that the Magistrates' term of duty in court 18 had ended on 10 April 1998 and the case had to be finalized.

- At the time of conducting the research the court rolls in Port Elizabeth were highly congested. At New Brighton, due to the closure of courts, hardly any trials commenced as the court hours were mainly spent on remanding cases. Due to this fact it was decided not to attempt to find any sample cases at this court. As most of the trials at these courts are conducted with the use of interpreters, no trials were attended here as well.
  
- With the forced closure of courts, due to a shortage of magistrates and/or prosecutors, cases were transferred between courts as the need arose.

This had the implication that the researcher may have organised with a particular prosecutor to keep a case over until an arranged time. In the interim another court ran out of work and the case had been transferred to that court. When the researcher turned up at the arranged time he was informed that the case was transferred. Upon arriving at the court to which the case was transferred, the case was either finalized or had already commenced.

- At the outset of the empirical research four cases with Xhosa speaking accused were attended as possible sample cases. In two of the four cases the relevant parts of the proceedings were recorded. After translation of the recorded parts, it was decided not to use the material. In one instance the effort was abandoned after the second procedural explanation and in the fourth the effort was abandoned during the first procedural explanation. It became evident that the use of an interpreter would not be in the interest of the research project for the following reasons:

- Interpreters who were dealt with did, with respect, not really grasp the aim and purpose of the research. In general they found it difficult to explain the research concept to the accused. One very helpful and friendly interpreter actually "assisted" the accused where she was not in a position to repeat the entire content of the procedural explanation.



- As the researcher was not conversant in Xhosa, he could not "monitor" the interpretation process. Due to lack of funds it was not possible to employ a private interpreter.
- Some of the interpreters encountered were suspicious of the research project, as they feared that it was merely an attempt to test or evaluate their standard of interpretation.
- Some of the court interpreters were somewhat "reluctant" to assist the researcher, as they viewed the input on their behalf as work falling outside the scope of their remunerated duties.
- After the first translations of the recorded interpreted explanations were received, it became evident that the interpreters, correctly, did not merely literally translate the explanations. The *ipse dixit* of the presiding officer was thus not communicated to the accused.
- The researcher had to explain to the accused persons (subjects), before the start of the court proceedings for the day, in detail what the research project entailed.<sup>25</sup> Unfortunately the period before the court commences in the morning is the busiest time for the interpreters, as they then have to write up the court registers. The interpreters therefore found it extremely difficult to assist the researcher.

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25. Compare paragraph 2.4.3 below.

- In two of the sample cases where interpreters were used, the interpreter who interpreted the researcher's explanation of the research project to the accused, was called to another court in order to complete a part-heard matter. The replacement interpreter then knew nothing of the project and the researcher had to "whisper" the gist of the experiment to the interpreter, as the researcher could not request the court to adjourn in order that the research project could be explained to the replacement interpreter.
  
- The vast majority of district court prosecutors at the time when the research was conducted were newly appointed and, with respect, inexperienced in their posts. Almost all these prosecutors knew the researcher in his capacity as their former lecturer. They were extremely helpful and interested in the project. Their lack of experience however made the task of the researcher more difficult in the following ways:
  - The majority of the prosecutors organized their rolls rather poorly and the researcher could not rely on arranged times when selected sample cases would be called.
  - In some instances prosecutors advised the researcher to wait for a case as it could possibly qualify as a sample case. After waiting for a few hours, it was discovered, when the case was called, that the accused in fact wished to plead guilty.

The researcher spent two working days searching for suitable sample cases without any success at the New Law Courts. During the entire week spent there, two cases were identified, both in which interpreters were used.<sup>26</sup>

After spending one day at the Gelvandale court, the researcher was able to find two suitable sample cases in court 30 without any difficulty. The researcher thereupon discussed the problem experienced at New Law Courts with the magistrate of court 30. The magistrate expressed great interest in the project and undertook to assist the researcher as much as possible.

The prosecutor of that court, a former student of the researcher, was even more helpful. This prosecutor had been prosecuting in the same court for more than a year. He was confident in his position and organised his court roll well. He undertook to hold undefended cases over until the researcher arrived at court. He undertook to phone the researcher to come to court when suitable cases were available. A further advantage of the Gelvandale court was the fact that the rolls were not as congested as the rolls of New Brighton and New Law Courts. Trials actually commenced and were finalized mostly on the same day.

The researcher accordingly decided only to attend this court in order to find sample cases.

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26. As was pointed out above, "interpreted cases" were not used eventually.

Although this decision was initially motivated by the practical problems experienced as pointed out above, the decision had the following advantages:

- All the sample cases were conducted in Afrikaans. This had the positive implication that the presiding officer, prosecutor, witnesses and accused all spoke and understood the same language. Afrikaans was indeed the home language of all the subjects in the sample cases.
- It was not necessary to employ interpreters. All the problems experienced with interpreters were accordingly eliminated.
- Valuable time was saved as the researcher did not have to move from court to court. The researcher was indeed phoned in advance and told of sample cases coming up. The cases were held over and the court was willing to adjourn so that the researcher could explain the procedure to the accused persons.
- The researcher found it much easier to explain the research project directly to the accused persons, than through an interpreter.

If the accused had any questions regarding the research project, the researcher could clearly explain to them what they needed to know.<sup>27</sup>

- The fact that the presiding officer and the accused spoke the same language suited the research project, as an interpreted version is not a literal translation.
  
- The fact that only one court was used eliminated the need for the researcher to explain the research project and obtain permission to attend sample cases from different presiding officers and/or prosecutors.
  
- The fact that only one presiding officer explained the procedural explanations and/or choices "standardized" the explanations to a great extent.

#### **2.4.2 *Sample cases selected***

All ten sample cases were therefore selected from the daily court roll of court 30 at the Gelvandale Magistrates' Courts. The cases were identified by the prosecutor of the court.

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27. Out of all the respondents approached, only two respondents refused to partake in the project.

The criteria supplied to him by the researcher were that trials had to be short and accused persons had to be undefended. As was set out above in paragraph 2.4.1 above, the prosecutor phoned the researcher daily at about 10 o'clock and reported on the availability of sample cases.

After arriving at the court the researcher approached the identified accused persons individually and explained the research project to them as set out in paragraph 2.4.3 below. If the accused indicated that he or she was willing to participate in the project, the case sample form was completed. The prosecutor was then informed that the case would be a sample case. At the commencement of that case, the magistrate was accordingly informed.

#### **2.4.3 Explanation of the research process**

The researcher explained the following to the accused:

- That the researcher is not attending the trial as the accused's attorney<sup>28</sup>, but as a researcher from Vista University.<sup>29</sup>
- That the researcher is busy with a research project to simplify the criminal trial process.

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28. This was necessitated by the fact that the researcher, as a practising attorney had to robe when attending court. One subject was actually of the opinion that the researcher would assist him and act as his attorney.

29. It was decided to refer to my employer Vista University, as the Gelvandale community knows Vista University. The university is situated in and serves the area.

- That the researcher is attempting to establish to what extent lay people understand the explanations afforded to them by presiding officers.
- At this stage it was explained to first offenders that the magistrate will indeed explain the process and choices available to them as the trial progresses.
- It was then explained that they should listen carefully to these explanations.
- That after each explanation the proceedings would be interrupted and the researcher would approach them at the dock.
- That they will be required to paraphrase or repeat in their own words what the presiding officer had explained to them at each procedural stage.
- That this "paraphrasing" by the respondents would be taped.
- That their responses will be used in the research project.
- That the research project had nothing at all to do with their trial, but was a separate issue.
- That a form with the personal details of the accused will be completed.
- That they will not be contacted by or hear from the researcher again.

#### 2.4.4 *The procedure followed in the courtroom*

The following procedure was employed in the courtroom:

- A form with the relevant details of the case was completed with information supplied by the prosecutor.
- At the commencement of the case the prosecutor informed the presiding officer that the researcher is attending the case as a sample case.
- The prosecutor then read out the charge and the accused pleaded not guilty to the charge.
- The court tape recorder was then activated and the prosecutor placed the parties on record. No mention of the fact that the researcher was attending the trial was made at any stage.
- The first procedural explanation and choice was then explained by the presiding officer.
- This explanation of the presiding officer was then recorded by the researcher's own tape recorder.
- Immediately thereafter the presiding officer switched the court tape recorder off.
- The researcher approached the accused in the dock and asked the accused to repeat or paraphrase what the presiding officer had just explained to him.



- The responses of the accused were recorded by the researcher on his own tape recorder.
- The process was repeated after each and every procedural explanation.

#### **2.4.5 *Transcribing the tape recorded information***

After attending court for a particular day, the researcher would transcribe each relevant taped recording literally.

This process proved to be time consuming as certain parts had to be played back a few times, as the accused mostly spoke softly to the researcher. The acoustics of the courtroom in question were not of a high standard. The explanations and responses so transcribed were then used for further analysis.<sup>30</sup>

In the following chapter the concept of fairness within the jurisprudential and communicative framework will be discussed. This chapter, as well as chapter 4, will serve as theoretical foundations for the field study.

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30. Compare chapter 6 below.

## CHAPTER 3

### *Fairness within the jurisprudential and communicative framework*

#### 3.1 Introduction

In this chapter the following are discussed:

- In 3.2 the jurisprudential framework concerning fairness, intelligibility and access to the law is considered;
- In 3.3 the accusatorial nature of the South African criminal procedure is set out and inquisitorial elements present in the procedure are highlighted;
- In 3.4 the provisions of the interim Constitution and the Constitution regarding the right to a fair trial are set out and considered within the framework of South African case law and literature;
- In 3.5 the criminal trial process is analysed as a communicative process within the framework of current communication theories.

### 3.2 *The jurisprudential framework regarding fairness, intelligibility and access to the law*

#### 3.2.1 *Fairness within a jurisprudential framework*

As was mentioned in chapter 1 every accused person has the right to a fair trial.<sup>1</sup>

The question that needs to be addressed in this paragraph is what the concept of "fairness" means within a jurisprudential framework.

Du Toit<sup>2</sup> is of the opinion that the concept of "fairness" or *aequitas* entails the following:

"Die *aequitas* is nie *beginsel* (konstitutief of regulatief) nie, omdat dit nie in dieselfde sin *normerend* is nie. Uit die oogpunt van norminhoud beskou, is die *aequitas* inhoudsloos. Die neem van die woord "billikheid" op die tong, is nog *préalable* tot die vasstelling van 'n wye (in beginsel onbeperkte) spektrum van normmoontlikhede. As ons onder billikheid verstaan (op die voetspoor van De Groot) 'n korreksie of beperking van die positiewe reg uit hoofde van die noodwendige universaliteit daarvan (dit wil sê, wat denkbaar nooit in die konkrete spektrum van gevalle kan voorsien nie), is die billikheid 'n *metode*, en kan individuele oplossings nie sonder meer *daaruit* afgelei word nie. Die billikheid sê nog nie *wat* die individueel-konkrete oplossing is nie. Dit beskryf slegs die proses wat ons volg om die positiewe reg te korrigeer of te beperk.

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1. Compare section 25 of the interim Constitution and section 35 of the Constitution, discussed in paragraph 3.4 below.
  2. Du Toit DC "Die Aequitas en Regulatiewe Regsbeginsels" *TRW* (1976) at 38.

*Die billikheid is 'n metodiese hulpmiddel gerig op die herstelling van die geregtigheid in die menslike (positiewe) reg en behels die regs-kulturele ontsluitingsproses van die regs-vinding om die regs-betekenis van regs-reëls te bepaal."*

Although focusing on the concept of fairness in the field of interpretation of statutes, the view of Du Toit is endorsed and adopted in this research. Fairness is indeed not a substantive concept affording rights to an accused as such. As Du Toit states it is a methodological aid and as such refers to the **method** or **process** to be followed during the criminal trial process. This process refers of course to both the pre-trial and trial processes.<sup>3</sup>

Fuller<sup>4</sup> is of the opinion that the essence of a "fair trial" lies not in the correctness of the decision made, but in the procedures by which the correctness of the decision is guaranteed. These procedures according to Steytler<sup>5</sup> encompass certain legal principles protective of the individual. He points out that these principles are common to legal systems of the Western world, irrespective of whether the mode of procedure is adversary or inquisitorial in nature.

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3. In the pre-trial phase procedural actions such as arrest, search and seizure procedures will resort.

4. Fuller LL "Collective Bargaining and the Arbitrator" *Wisconsin Law Review* (1963) at 18.

5. *op cit* 2.

In *S v Makhatini*<sup>6</sup> the court pointed out that the accused's rights to a fair trial mean precisely that and do not guarantee the fairest trial which the system permits. The concept of fairness is described by the court as follows:

"It follows from the very concept of fairness that, for the accused to enjoy a fair trial, from the various options which may present itself, the procedure which should be preferred to decide the objective is that which best serves to prevent any actual or potential prejudice to him in the conduct of his defence. *If a procedure is employed that infringes any of his rights, prejudice may well arise depending on the circumstances of the case and the right in question.*"<sup>7</sup>

The court furthermore emphasised that the current notion of a fair trial differs considerably from the position prior to the Constitution taking effect.

In *S v Rudman: S v Mthwana*<sup>8</sup> the position prior to the new constitutional era was summarized as follows:

"What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice."

The rejection of the former position was endorsed by the Constitutional Court in *S v Zuma and Others*<sup>9</sup>.

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6. 1995 (2) BCLR 226 (D) at 232B.

7. At 233C-D. My italics.

8. 1992 (1) SA 343 (A) at 387.

9. 1995 (4) BCLR 401 (CC) at 411G-I.

The court pointed out that the right to a fair trial conferred by section 25(3) of the interim Constitution is broader than the list of specific rights set out in paragraphs (a) to (j)<sup>10</sup> of the subsection.

The right embraces a concept of *substantive fairness*<sup>11</sup> which is not to be equated with what might have passed muster in our criminal courts before the interim Constitution came into force.

In *S v N*<sup>12</sup> Dukada AJ correctly comments that the formalities, rules and principles of procedure which the law requires, referred to in the *Rudman*-case<sup>13</sup>, are not an end, but a means to an end. They are deployed in criminal proceedings to ensure that the verdict is fair. Fairness, according to the court, is the most fundamental requirement in our modern criminal law jurisprudence. It is imperative that the courts should conduct proceedings fairly in order to achieve the objectives of the Constitution.

Van Wyk<sup>14</sup> rightly points out that it is not correct to characterise legal procedure as essentially a mechanical process not concerned with substantive human and civil rights.

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10. Compare chapter 4 below.

11. My italics.

12. 1998 (1) BCLR 97 (Tk) at 101D-E.

13. *Supra* n8.

14. Van Wyk D, Dugard J, De Villiers B and Davis D (Editors) *Rights and Constitutionalism: The New South African Legal Order* (1994) Juta at 401.

The course of a procedure may well have a decisive effect on the exercise or enjoyment of a human or civil right. If the rules of criminal procedure are not shaped by principles of fairness, the trial will not be a fair trial.

Chaskalson<sup>15</sup> in addition correctly submits that the right to a fair trial does not only relate to fundamental justice and fairness in the procedure and proceedings at a trial. It also includes the right to be treated fairly, constitutionally and lawfully by policing authorities and state organs prior to the trial.

In order thus for the criminal trial process to comply with the constitutional requirement of a fair trial the process itself has to be fair. The aim of the criminal trial process is thus to ensure a fair trial. The question remains to be answered whether it indeed ensures a fair trial.

### **3.2.2. *Fairness within the framework of accessibility and intelligibility***

In order to be fair, the criminal trial process must be accessible to all the actors in the process. The term "accessible" is defined as "able to be reached or entered".<sup>16</sup> In order to be accessible, the accused must be in a position to "enter" the process and participate meaningfully therein.

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15. Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D and Woolman S *Constitutional Law of South Africa* (1996) Juta at 27-18.

16. *The Concise Oxford Dictionary* at 9.

It is of the utmost importance that the criminal trial process should not only be accessible and intelligible to the professional actors<sup>17</sup>, but to lay actors as well.<sup>18</sup> In the case of lay actors especially, care should be taken that the process is intelligible to them. In the criminal trial process it is often forgotten that the entire process centres around the accused (who is in most cases a lay actor) and the determination of his guilt. It should however be kept in mind that the concept of a fair trial, embraces fairness, not only to the accused, but in a criminal case to the society as a whole, which usually has an interest in the outcome of the case.<sup>19</sup>

In *S v Kester*<sup>20</sup> the court emphasises that an undefended accused must be properly and meaningfully informed of his rights, including the choices available to him. *In casu* the court found that the appellant was not fully appraised of his rights at the close of the case for the prosecution by the court *a quo*. His rights were not fully explained to him, nor was he informed that he had a choice to ask for his discharge. The court held that this omission was an irregularity, resulting in a failure of justice, in that the accused did not have a fair trial.

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17. Due to their training and background the following actors in the criminal trial process may be labelled "professional" actors: the presiding officer, public prosecutor, legal representatives, court interpreters, police officials and expert witnesses.

18. "Lay" actors would include: the accused (especially when undefended), witnesses and members of the community, such as the family of the victim.

19. *S v Sunday and Another* 1994 (5) BCLR 146 (C).

20. 1996 (1) SACR 461 (B) at 472h-j.



If the criminal trial process thus fails to ensure that the accused is fully appraised of his rights, so that he can make informed choices, the trial itself will not be a fair one.

This research will be focused on the degree of intelligibility and accessibility the criminal trial process affords the undefended accused. The reasons for this are twofold:

- undefended accused persons account for the majority of accused persons;<sup>21</sup>
- it is evident that this group would indeed stand the greatest chance to experience problems with accessibility and intelligibility.

The procedure to be followed in the criminal trial process is almost entirely codified in the Criminal Procedure Act. The provisions of the Criminal Procedure Act are mandatory in the sense that a criminal trial must be conducted in the way the Act prescribes. The Criminal Procedure Act thus contains instructions as to how a criminal trial is to be conducted.

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21. Compare table 1 in this regard.

The medium through which these instructions are transmitted in a criminal trial is the medium of language, in both its written and spoken form. In the case of a criminal trial almost exclusive reliance is placed on the spoken word.<sup>22</sup> On the other hand, in the case of a civil trial, written language is used much more frequently. The entire civil trial process is in the form of written pleadings until the actual hearing.

In the case of an undefended accused the communication process takes place mainly between the presiding officer and the undefended accused.<sup>23</sup> This communication process takes place through the medium of spoken texts (when the presiding officer orally explains the procedure to the accused) and written texts (when for instance documentary evidence is introduced).

In order for the criminal trial process to comply with the constitutional notion of fairness, these texts should be intelligible to the undefended accused.

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22. Compare paragraph 4.2 below.

23. In the case of a defended accused, the communication takes place between the presiding officer and the legal representative. No procedural explanations are given, as the legal representative is presumed to know the procedure. There are only two instances of direct communication between the presiding officer and the defended accused. The first instance is the confirmation by the accused of any statement made on his behalf in terms of section 115 of the Criminal Procedure Act. The second instance is a confirmation of replies by his legal adviser as to facts in dispute in terms of section 212B(5) of the Criminal Procedure Act. Regarding section 115 compare paragraph 4.3.2 below.

The degree of intelligibility will *inter alia* be influenced by the following two factors:

- the readability of the written texts and intelligibility of spoken texts;  
and
- the background and level of education of the reader of or listener to the texts.

In this research only the first factor will be considered.<sup>24</sup>

### ***3.3 The accusatorial nature of the South African law of criminal procedure and the identification of inquisitorial elements present in the system***

#### ***3.3.1 The accusatorial nature of the South African law of criminal procedure***

A further aspect which may influence fairness, or the lack thereof, is the nature of the criminal trial process itself.<sup>25</sup>

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24. The second factor is a field for future research on its own and falls outside the scope of this research.

25. It falls outside the scope of this research to analyse the nature of the law of criminal procedure in detail. The reason why reference is made to inquisitorial characteristics, is the fact that some of the remedial action in chapter 7 recommends a more inquisitorial approach.

In general accusatorial models of criminal procedure are found in Anglo-American legal systems, whilst inquisitorial systems are common in Continental legal systems.<sup>26</sup> It is furthermore generally accepted that the South African criminal procedure system is accusatory in nature.<sup>27</sup>

Snyman and Morkel<sup>28</sup> state the following with regard to the nature of the accusatorial system:

"Ingevolge die akkusatoriese stelsel - ook soms genoem die teenstanderstelsel ("adversary system") - word die voorverhoor en verhoorprosedures gekenmerk deur 'n gelyke en ope konfrontasie tussen die beskuldiger (dws die staat of aanklaer) en die beskuldigde. Die rol van die voorsittende beampte (dws die landdros of die regter) word dikwels vergelyk met diè van 'n skeidsregter wie se enigste taak dit is om op objektiewe en passiewe wyse toe te sien dat die konfrontasieproses binne die neergelegde reëls geskied. In die vervulling van die taak speel hy 'n passiewe rol. Hy is nie belas met die taak om getuies voor die hof te bring of te laat bring en om hulle te ondervra nie. Dit is die onderskeie take van die staat en die beskuldigde: elke party bring sy eie getuie(s) ter ondersteuning van sy eie saak voor die hof. Van die voorsittende beampte word slegs verwag om na aanhoor van al die getuienis in die saak tot 'n beslissing te kom."

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26. See Dugard J *Introduction to Criminal Procedure* (1977) Juta at 117.

27. Snyman JL and Morkel DW *Strafprosesreg* (2nd Edition)(1988) Juta at 17.

28. *op cit* 17.

The accusatorial system views the litigants (the public prosecutor and the accused) as opponents. In this regard the following *dictum* from *S v Sefadi*<sup>29</sup> is of interest:

"Section 25(3) guarantees every accused person a fair trial. A trial in a criminal case is in the nature of a contest. A fair trial requires, by its nature, equality between the contestants, subject only to the two supreme principles of criminal jurisprudence, namely the presumption of innocence and the requirement that the guilt of the accused be proved beyond any reasonable doubt. When only one of the contestants has access to the statements taken by the police from potential witnesses the contest can, in my judgment, be neither equal nor fair."

The presiding officer should as far as possible be neutral and should merely judge the case on what the parties have placed before him.<sup>30</sup> The role of the presiding officer has been described as that of an umpire.<sup>31</sup> In the accusatorial system the prosecutor is the opponent of the accused, although it is not the duty of the prosecutor to secure a conviction. The accusatorial system is thus party or litigant centred.

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29. 1994 (2) BCLR 23 (D) at 39C-D.

30. Under certain circumstances in South African law the presiding officer however has a duty to assist an undefended accused. This aspect is discussed in more detail in chapter 4 below.

31. Snyman *op cit* 103.

As a general rule, because the accused is also a party to the proceedings, the prosecutor or presiding officer may not put questions to the accused, unless the latter elects to testify.<sup>32</sup> According to Hermann<sup>33</sup> the essence of the accusatorial trial is a process of "dialectic dispute and challenge".

It is evident that an undefended accused is not a worthy opponent to a qualified public prosecutor. In *S v Khanyile*<sup>34</sup> the court refers to a quote from the *African Law Review* where it was stated that it would be an exercise in self-delusion to think that at the end of the trial an unrepresented accused had a fair trial.<sup>35</sup>

The statement made by Snyman<sup>36</sup> that the accusatorial system leads to "an even and open" confrontation cannot be accepted unconditionally. As Steytler<sup>37</sup> correctly points out, due process or a fair trial in terms of the adversary system requires that persons to be affected by a court's decision should have some formally guaranteed opportunity to influence that decision.

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32. Herrmann J "Various Models of Criminal Proceedings" *SACC* (1978) 3 at 5.

33. *op cit* 6.

34. 1988 (3) SA 795 (N) at 813D.

35. This view is endorsed by Chaskalson A in his article "The unrepresented accused" *Consultus* October 1990 at 99. Chaskalson is at present the President of the Constitutional Court.

36. Compare footnote 27 above.

37. *op cit* 6.

In the case of the inquisitorial model on the other hand, the role of the presiding officer is pivotal. The trial centres to a great extent around him. The presiding officer calls witnesses, examines them and makes a finding on the evidence available. In contrast to the accusatorial model, the accused is viewed as a valuable source of information. The presiding officer may therefore question the accused.<sup>38</sup>

In the inquisitorial system therefore, the truth is ascertained by means of judicial questioning by the presiding officer.<sup>39</sup>

Dugard<sup>40</sup> correctly states that "an equitable system of criminal justice may be achieved under either system, provided that adequate procedural safeguards are afforded to the individual".

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38. Hermann *op cit* 5.

39. Hermann *op cit* 6.

40. Dugard *op cit* 117 footnote 4.

In the recent decision of *S v Nkabinde*<sup>41</sup> the following comments were made about the adversarial nature of the South African law of criminal procedure in view of the provisions of the Constitution:

"Our legal system espouses the adversarial, as opposed to the inquisitorial criminal procedure system. The adversarial system embraces the concept that an accused has the right to face his accuser in open court in view of the world at large, where he shall be entitled to test to the limit the veracity of the allegations made against him. To that end, the mechanism of cross-examination is effectually put to use. All of that is required to take place before a judge who, on the evidence placed before him, without fear or favour, shall rule upon the charges, convict, where necessary and discharge, should that be the outcome. In the past, our criminal procedure system contained elements of an inquisitorial nature, although it was preponderantly adversarial. Through our new Constitution those inquisitorial elements in the Criminal Procedure Act are being systematically hunted down and erased, where found to be inimical to the tenets of the Constitution, which is aimed at providing a mechanism to ensure that any accused person brought before a court will receive a fair trial. Under this system a fair trial is not only determined by what takes place in the trial itself. That lack of bias and fairness must also be reflected in the investigations which precede indictment and trial."

In the next paragraph those inquisitorial elements still present in our criminal trial process will be highlighted.

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41. 1998 (8) BCLR 996 (N) at 1001C-E.



### 3.3.2 *Inquisitorial elements present in the criminal trial process*

No system of criminal procedure is completely accusatorial or inquisitorial in nature.<sup>42</sup> This is true for the South African system as well. Our system is mainly accusatorial in nature, but contains certain inquisitorial elements.

The following sections of the Criminal Procedure Act contain procedures with inquisitorial elements:

#### 3.3.2.1 *Section 112 of the Criminal Procedure Act*

This section deals with the plea of guilty at a summary trial. In terms of section 112 (1)(b) the presiding officer shall, if he is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding R1500,00, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case. The purpose of this questioning is to ascertain whether the accused admits the allegation in the charge to which he has pleaded guilty. If the presiding officer is satisfied that the accused is guilty of the offence to which he has pleaded guilty, he may convict the accused on his plea of guilty and impose any competent sentence.

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42. Compare Snyman *op cit* 18, as well as Snyman CR "The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems" *CILSA* (1975) 100 at 101.

In *S v Ntlakoe*<sup>43</sup> it was held that this section introduces inquisitorial elements into our criminal procedure. In *S v Maseko*<sup>44</sup> it was held that section 112(1)(b) is not unconstitutional, as long as the presiding officer informs the accused of his constitutional right to silence. In *S v Damons and Others*<sup>45</sup> this position was however qualified, in that the court held that an accused person has no right to refrain from answering questions in relation to a plea of guilty. By tendering a plea of guilty correctly, the accused has chose to incriminate himself on each and every element of the charge. If he tendered the plea correctly, his right to silence will only survive in those respects in which he has not chose to incriminate himself. The court was of the opinion that should an accused person wish to preserve his right to silence, he should plead not guilty.

### 3.3.2.2 *Section 115 of the Criminal Procedure Act*

This section is discussed in detail below.<sup>46</sup> This section, known as the explanation of plea, empowers the presiding officer to ask the accused at the outset of the trial whether he wishes to make a statement indicating the basis of his defence.

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43. 1995 (1) SACR 629 (O) at 633*b-c*.

44. 1996 (2) SACR 91 (W) at 96*j-97c*.

45. 1997 (2) SACR 218 (WLD) at 225*b-d*.

46. Compare paragraph 4.3.2 below.

Even if the accused declines to make such a statement, or makes one and it is not clear from the statement to what extent the accused denies or admits the issues raised by the plea, the presiding officer may question the accused in order to establish which allegations are in dispute. The accused may however refuse to answer such questions.

### **3.3.2.3      *Sections 167 and 186 of the Criminal Procedure Act***

Section 167 empowers the presiding officer at any stage of criminal proceedings to examine any person, other than an accused, who has been subpoenaed to attend the proceedings or who is in attendance at such proceedings. The presiding officer may recall and re-examine any person, including an accused, already examined at the proceedings. The presiding officer must further examine, or recall and re-examine the person concerned if his evidence appears to the presiding officer to be essential to the just decision of the case.

This section thus affords wide powers to the presiding officer to call, recall and examine witnesses. This section could prevent the litigants to withhold evidence from the court. In this sense the presiding officer is not a mere umpire.<sup>47</sup>

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47. Compare footnote 31 above.

In order to give practical effect to the above-mentioned section, section 186 of the Criminal Procedure Act empowers the court at any stage of criminal proceedings to subpoena any person as a witness at such proceedings if the evidence of such witness appears to the court to be essential to the just decision of the case.

#### **3.3.2.4      *Section 210 of the Criminal Procedure Act***

According to this section the presiding officer is competent to rule that irrelevant or immaterial evidence which cannot conduce to prove or disprove any point or fact at issue, is inadmissible.

The powers contained in this section indicate that the parties are not at will to place any evidence before the court. The presiding officer thus has limited powers to exclude evidence, in the sense that he may rule that evidence that a litigant wishes to place before the court is irrelevant or immaterial and thus inadmissible. The presiding officer is thus not a mere passive umpire.

### 3.3.2.5 *Section 274 of the Criminal Procedure Act*

This section empowers a presiding officer to receive such evidence as he thinks fit in order to inform himself as to a proper sentence to be imposed. In practice presiding officers often question undefended accused to obtain information from the accused in order to impose a proper sentence. This section is discussed in detail below.<sup>48</sup>

### 3.4 *The provisions of the interim Constitution and the Constitution regarding the right to a fair trial*

With the implementation of the interim Constitution and the Constitution a whole new human rights orientated culture was introduced in South Africa. For the first time an accused person was guaranteed a fair trial in the Constitution. It was however correctly pointed out in *S v Zuma and Others*<sup>49</sup> that the concepts relating to a fair trial embodied in the interim Constitution are by no means an entirely new departure in South African criminal procedure.

So, for instance, the presumption of innocence and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law, and in some cases by judicial decision.

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48. Compare paragraph 4.3.6 below.

49. *Supra* at 410D-E.

The resulting body of common law and statutory law thus forms part of the background of section 25 of the interim Constitution.

Du Plessis and Corder<sup>50</sup> submit in this regard:

"Most of the rights entrenched in s25 are 'classics' which have evolved over a long period of time. They are well established in South African criminal law and procedure and are protected under the existing common law as well as the Criminal Procedure Act. Their constitutionalization, however, opens new vistas for their future operation. They are now entrenched in the supreme law of the land and are thus not simply obeyed as part of the 'law in force', but have become integrated into a value system which will help shape the evolution and development of both the criminal law and the law of criminal procedure."

Basson<sup>51</sup> describes the rights contained in section 25 of the interim Constitution as "procedural human rights", which ensure that a person's rights, including his substantive human rights, are justiciable and may only be infringed in a specified and just manner.

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50. Du Plessis L and Corder H *Understanding South Africa's Transitional Bill of Rights* (1994) Juta at 172.

51. Basson D *South Africa's Interim Constitution* (Revised edition)(1995) Juta at 38.

In terms of section 25(3) of the interim Constitution every accused person has the right to a fair trial, which shall include the right:<sup>52</sup>

- "(a) to a public trial before an ordinary court of law within a reasonable time after having been charged;
- (b) to be informed with sufficient particularity of the charge;
- (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
- (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
- (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction."

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52. Compare in general Geldenhuys T and Joubert JJ (Editors) *Strafprosesreghandboek* (1994) Juta at 21 and Van Wyk *op cit* at 401-417.

In addition to the rights contained in section 25 of the interim Constitution, an accused person also gained the right to insight in the police docket in terms of section 23 thereof. Section 23 reads as follows:

"Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

In terms of section 35 of the Constitution every accused has the right to a fair trial, which right includes the right:

- "(a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;



- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (o) of appeal to, or review by, a higher court.
- (4) When ever this section requires information to be given to a person that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

As to the right of access to information, section 32 of the Constitution now provides:

"Every person has the right of access to all information held by the State or any of its organs in any sphere of Government in so far as that information is required for the exercise of protection of any of their rights."

The relevant provisions of the interim Constitution and the Constitution quoted above will be reverted to in chapter 4 when the concepts of procedural explanations and procedural choices are discussed in detail.<sup>53</sup>

In the following paragraph, the criminal trial process will be analysed as a communicative process. As was pointed out in paragraph 3.2.2 above, in order to comply with the constitutional notion of fairness, the criminal trial process should be intelligible to the undefended accused. A better understanding of how communication takes place will assist recommending remedial measures in chapter 7.

### **3.5 *An analysis of the criminal trial process as a communicative process within the framework of communication models***

#### **3.5.1 *Communication***

According to Van Schalkwyk<sup>54</sup> communication in its broadest sense can be seen as the two-way process by which certain information is conveyed or transmitted from a communication source to a receiver who in turn will react to a stimulus.

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53. Compare paragraph 4.3 below in this regard.

54. Van Schalkwyk H *Language Communication - English* (1989) Lexicon Publishers at 1.

De Klerk<sup>55</sup> points out that the term communication is derived from the Latin verb *communicare*, which means to confer, talk together, conducting a discourse or to consult. *Communicare* is related to the noun *communitas* which means community or brotherhood, but it could also point to fairness in human negotiations. The term communication is however used to describe any action whereby one person wants to convey his intention to another person. Various means are employed to communicate, such as gestures, facial expressions, visual representations, signs, music, dance, mathematical and other scientific symbols and language. People employ various aids to help them communicate: alphabets, flag signals, heliographical signals, phonographic recordings, electric traffic signals, radio, radar, films and television.

The most important means of communication however is language. As De Klerk<sup>56</sup> correctly states, language is not just another communication system, it is the communication system *par excellence*. On the other hand, it is clear that communication does not only consist of verbal messages in the form of the spoken and written word.<sup>57</sup> It includes all non-verbal signs, such as body movements, posture, facial expression, feeling, tone and even silence.

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55. De Klerk WJ *Inleiding tot die Semantiek* (1978) Butterworths at 1.

56. *op cit* at 2.

57. Van Schalkwyk *op cit* at 2.

Van Schalkwyk<sup>58</sup> points out that some writers on communication attach more value to the non-verbal behaviour of a person during the communication process than to his actual words. As an example she refers to the "uneasy posture of the accused in court".

Communication is generally classified under four headings:<sup>59</sup>

- *Interpersonal communication*, which takes place between two persons, or between and amongst individuals in any small group. In the case of a criminal trial interpersonal communication takes place for instance between the accused or the legal advisor and the presiding officer, between the accused and legal advisor and presiding officer and witnesses;
  
- *Intrapersonal communication*, which takes place within a person who, for instance, considers within himself the advantages and disadvantages of a particular decision. An apt example would be the process whereby an undefended accused makes an election between two or more procedural choices;<sup>60</sup>

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58. *op cit* at 2.

59. Van Schalkwyk *op cit* at 1.

60. Compare paragraph 4.3 in this regard.

- *Extrapersonal communication*, which takes place between man and animal or man and plant or any inanimate object. In a certain sense the courtroom structure and architecture can "communicate" with the accused in that it may install a sense of fear in the accused; and
  
- *Mass communication*, which involves mass communication media like the press, radio, films, television, computers, telephones and satellites.

According to Mortensen<sup>61</sup> communication has the following general characteristics:

- It is dynamic and therefore in a constant process of change;
  
- It is irreversible in the sense that it assumes that people engaged in communication can only go forward from one state to the next;
  
- It is proactive in the sense that man is not a passive respondent to stimuli;
  
- It is interactive, because man does not live as a self-contained and set-off entity; and

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61. Mortensen CD *Communication: The Study of Human Interaction* (1972) McGraw-Hill Book Company at 14-21.

- It is contextual and never takes place in a vacuum.

Van Schoor<sup>62</sup> correctly argues that a person does not merely communicate to transfer his intentions in the form of messages to others. Implicit in the entire process is the desire that the message should be understood by the person who receives it. In the case of a criminal trial the procedural explanations given by a presiding officer to an undefended accused should be understood by the accused in order that he can make an informed choice. Every presiding officer surely intends to give an explanation that is properly understood by the accused. The question to be answered however is whether these explanations are indeed understood.

### 3.5.2 *Communication models*

In the field of communication studies, models are employed to illustrate how communication works.<sup>63</sup> Mortensen<sup>64</sup> defines a model as "a systematic representation of an object or event in idealized and abstract form". He advances the following advantages of employing models:<sup>65</sup>

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62. Van Schoor M *Wat is Kommunikasie?* (1986) Van Schaik at 3.

63. Van Schalkwyk *op cit* at 2-3.

64. *op cit* at 29.

65. *op cit* at 30-32.

- They provide a coherent frame of reference for scientific inquiry;
- They clarify the structure of complex events; and
- They provide new ways to conceive of hypothetical ideas and relationships.

However, models have the following limitations:<sup>66</sup>

- They invite oversimplified ways of conceiving problems;
- They are too readily confused with reality; and
- Model designers may escape the risks of oversimplification and map reading, but still fall prey to dangers inherent in abstraction.

In the following paragraphs, bearing the advantages and disadvantages mentioned above in mind, the communicative process that takes place when a presiding officer explains procedural explanations and choices to undefended accused persons will be explained according to communication models.

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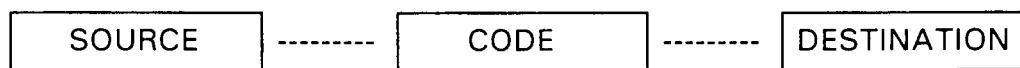
66. Mortensen *op cit* at 32-34.

It will be noted from the most basic model, through to the elaborate model of Nadeau,<sup>67</sup> that communication is an interactive process where due to various factors ineffective communication could take place.

### 3.5.2.1 *Model 1*

Van Schalkwyk<sup>68</sup> supplies the following simple presentation of the communication process as illustrated in Figure 3.1:

**FIGURE 3.1: A SIMPLE PRESENTATION OF THE COMMUNICATION PROCESS**



The model illustrated in Figure 3.1 shows that communication originates from a source or transmitter (Tx). A code (message) is conveyed to a destination where it is received by the receiver (Rx). This model is very basic and merely sets out the communicative process in broad outline.

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67. Compare paragraph 3.5.3.4 below.

68. *op cit* at 2.

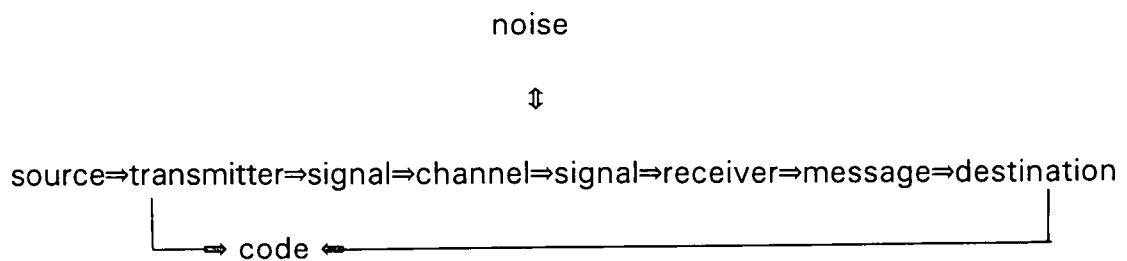


In the case of the communicative process involved in procedural explanations and choices, the presiding officer is the source of the message. This message is transmitted by means of the code of language. The destination of the message is the undefended accused (receiver).

### 3.5.2.2 *Model 2*

In Figure 3.2 a more detailed, yet basic model is supplied by Eco<sup>69</sup>:

**FIGURE 3.2 COMMUNICATION MODEL ACCORDING TO ECO**



A similar model is advanced by De Klerk.<sup>70</sup> He explains the various components of this model as follows:

- The source supplies the crude information or message that needs to be transmitted;

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69. Eco U *A Theory of Semiotics* (1979) Indiana University Press at 33.

70. *op cit* at 3.

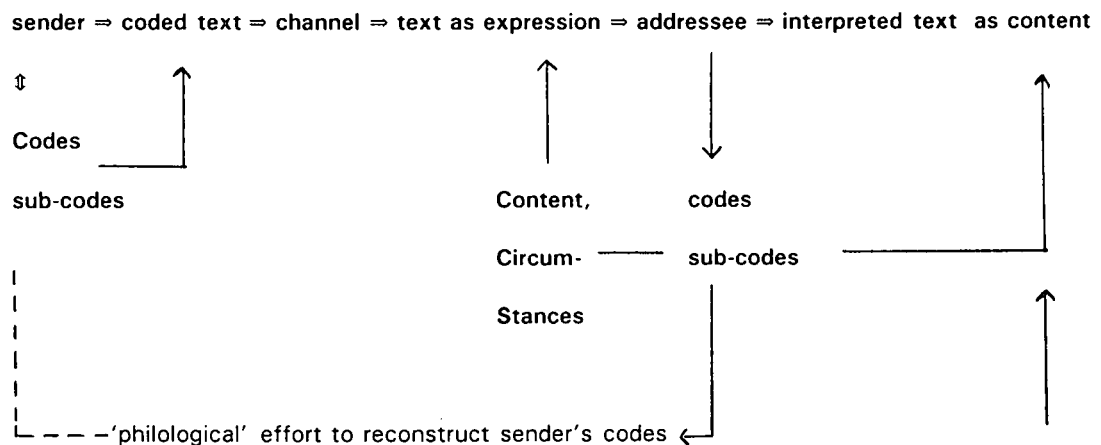
- The source supplies the crude information or message that needs to be transmitted;
- The sender encodes the message in a medium, such as spoken or written language, that is suitable for the channel. The encoded message is called a signal;
- Due to noise in the channel, the signal is subject to distortion;
- The receiver decodes the signal to the original message sent; and
- If the message reached the intended receiver, the aim of that particular communication was achieved.

This model is more elaborate than the first model and more in touch with what happens in reality. The source is once again the presiding officer, who transmits a signal (the explanation or choice) through a channel (the spoken word). This message is directed at the receiver (accused) who is the destination. The code in this instance would be legal language as a form of sublanguage. The noise that influences the signal are those factors that negatively impact on the communicative process. Noise would include difficult legal concepts, legal language and the general intimidating atmosphere of the courtroom.

3.5.2.3 *Model 3*

In a later work, Eco postulates the improved model of the communicative process as illustrated in Figure 3.3:<sup>71</sup>

**FIGURE 3.3: AN IMPROVED MODEL OF THE COMMUNICATIVE PROCESS ACCORDING TO ECO**



He motivates the improved model as follows:

"As is clearly maintained in *Theory* (2.15), the standard communication model is proposed by information theorists (Sender, Message, Addressee - in which the message is decoded on the basis of a Code shared by both the individual poles of the chain) does not describe the actual functioning of communicative intercoursures.

71. Eco *U The Role of the Reader* (1984) Indiana University Press at 5.

The existence of various codes and sub-codes, the variety of sociocultural circumstances in which a message is emitted (where the codes of the addressee can be different from those of the sender), and the rate of initiative displayed by the addressee in making prepositions and abductions - all result in making a message (insofar as it is received and transformed into the *content* of an *expression*) an empty form to which various possible senses can be attributed. Moreover, what one calls 'message' is usually a *text*, that is, a network at different levels of signification. Therefore the usual communication model should be rewritten (even though to a still extremely simplified extent) as in Figure 0.1."

The quotation above clearly explains the working of this model. It is based on the second model, but makes provision for the addressee's (accused's) philological efforts to reconstruct the message sent by the sender (the presiding officer). What this model takes into account is the fact that a message intended to be "decoded" as X could be "decoded" as Y as a result of factors outside the field of control of the sender.

#### 3.5.3.4 *Model 4*

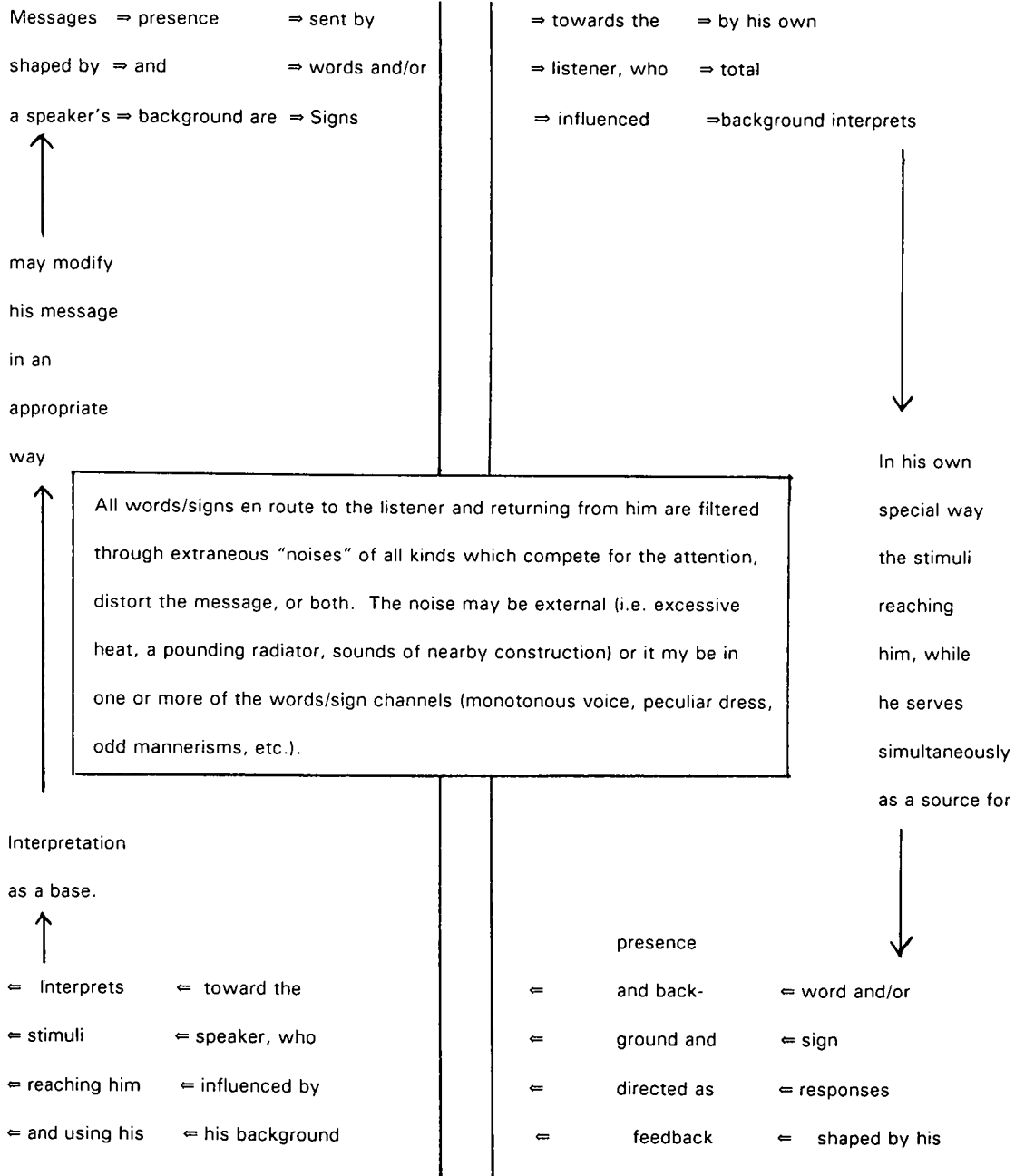
In the case of language communication (which is used almost exclusively in criminal trials<sup>72</sup>), the communicator tries to influence the reader of the message by his words and signs and the latter will in turn respond. The process thus becomes a constant interchange of stimuli, as clearly illustrated by the model postulated by Nadeau as illustrated in Figure 3.4.<sup>73</sup>

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72. Compare paragraph 4.2 in this regard.

73. As quoted with approval by Van Schalkwyk *op cit* at 5.

FIGURE 3.4: COMMUNICATION MODEL POSTULATED BY NADEAU



The application of this model to the criminal trial would explain the process as follows:

- The procedural explanations and choices are shaped by the presiding officer's presence and background and are sent by means of words towards the accused;
- The accused then, influenced by his own total background, interprets in his own special way the stimuli reaching him;
- The accused serves simultaneously as a source for the word and/or sign responses shaped by his presence and background as feedback toward the presiding officer;
- The presiding officer interprets the stimuli reaching him and using his interpretation as a base, may modify his message in an appropriate way, for instance when an accused indicates that he does not understand the explanation just given to him.

A very important part of the model is the middle part. Nadeau correctly indicates that all words or signs *en route* to the listener and returning from him are filtered through extraneous noises which compete for the attention or distort the message or both. External noises are for instance real noises, such as sounds of a nearby construction site.

The noise may otherwise appear in one of the word or sign channels, such as a monotonous voice or in the case of a criminal trial, the general "intimidating" nature of the courtroom.

As was pointed out in paragraph 3.5.1 above, language is the communication system *par excellence*. An additional factor that is relevant in legal communication, and courtroom communication in particular, is the fact that the law employs its own sublanguage. In the following paragraph the sublanguage of the law is discussed as an additional factor that might impact negatively on the communicative process and ultimate intelligibility of the criminal trial process.

### **3.5.3 Legal language**

The interrelationship between language and communication becomes even more important in the field of legal communication. As Danet<sup>74</sup> correctly points out one should not enquire what language and law have in common, but rather what their interrelations are. Words are of paramount importance in the law; in a most basic sense, the law would not exist without language.

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74. Danet B "Language in the Legal Process" *Law and Society Review* Volume 14 Part 3 (1980) 445-465 at 448. Hereinafter referred to as "Danet Language".

In this regard the following statement by Philbrick<sup>75</sup> is apt:

"Lawyers are students of language by profession ... They exercise their power in court by manipulating the thoughts and opinions of others, whether by making speeches or questioning witnesses. In these arts the most successful lawyers reveal (to those who can appreciate their performance) a highly developed skill ..."

Until the late seventies, linguists have paid relatively little attention to professional jargons, as it was commonly assumed that the differences between professional jargons and ordinary usage were purely lexical. It is now realized that professional sublanguages - such as medical language, scientific language and legal language - in fact have important distinctive features beyond the lexical level.<sup>76</sup>

Like other occupational specialities, the law also developed its own communicative code. Legal language is also referred to as "legalese".<sup>77</sup> Occupational jargons are functional in order to facilitate communication about technical matters, but are dysfunctional if they create undesirable barriers between members of the group and outsiders.

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75. Philbrick FA *Language and the Law: the semantics of forensic English* (1949) Macmillan at vi.

76. Charrows *Sublanguage* at 175.

77. Compare Charrows *Jury Instructions* at 1307.



The origin of such "trade languages" was traced back to the "secret language of gypsies and thieves in the fifteenth century"!<sup>78</sup>

Many lawyers are aware of the difficulties that non-lawyers have in understanding legal discourse, but they tend to attribute these difficulties to a combination of esoteric vocabulary and the conceptual complexity of the law.<sup>79</sup> In general two claims regarding legal language are made: that it is incomprehensible to the lay person, and that it can and should be reformed.<sup>80</sup>

The following quote aptly sets out the current problems experienced with legal language:

"If the legal sublanguage is really to become accessible to non-lawyers, however, both lawyers and lay persons must acknowledge certain things: First, legal language *is* appropriate for lawyers to use in communicating with other members of the legal community, unless members of the general public need to be included as well. Second, lay persons have a responsibility to familiarize themselves with the law and with more common legal terms; they should not be afraid to demand clarification when necessary. However, lawyers are gate-keepers: even the most responsible lay person will not be able to gain access to legal language without the cooperation of the legal community."<sup>81</sup>

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78. Danet *Language* at 464.

79. Charrows *Sublanguage* at 176.

80. Danet *Language* at 463.

81. Charrows *Sublanguage* at 188.

Earlier studies on the nature of legal language have focused almost exclusively on the lexical level. In addition most studies regarding legal language by lawyers have focused on written rather than spoken forms.<sup>82</sup> Mellinkoff<sup>83</sup> for instance identifies the following thirteen characteristics of legal language:

- Common words with specialized meanings - *action* 'law suit', *instrument* 'legal document' and *serve* 'to deliver';
- Rare words from Old and Middle English - *aforesaid*, *forthwith*, *hereafter* and *whereby*;
- Latin words and phrases - *bona fide*, *mutatis mutandis* and *in casu*;
- French words not in the greater vocabulary - *assault*, *battery*, *counsel* and *plaintiff*;
- Terms of art - *contributory negligence*, *judicial notice*, *negotiable instrument* and *formal admission*;

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82. O'Barr WM "The Language of the Law" *Language in the USA* Ferguson CA and Heath SB (Editors) (1987) Cambridge University Press at 388.

83. Mellinkoff D *The Language of the Law* (1963) Little, Brown and Company at 11-29.

- Professional jargon - *inferior court, issue of fact or law, without prejudice* and *explanation of plea*;
- Formal expressions - *the deceased, the complainant, Your Worship* and *may it please the court*;
- Words with flexible meanings - *adequate, approximately* and *grievous bodily harm*;
- Attempts at extreme precision - absolutes such as *all, none* and *never*;
- Wordiness - *annul and set aside* and *null and void*
- Lack of clarity in certain explanations;
- Pomposity - use of words evoking respect, such as *solemn* and characterisations of contrary opinion such as *absurd*; and
- Dullness in general.

Levi<sup>84</sup> states that the study of the language of the judicial process rests on the fundamental assumption that research of this nature will lead to a better understanding of that process. The validity of this assumption was hardly recognised until the seventies, despite the fact that language is *the* vehicle by means of which the law is transmitted, interpreted and executed in all cultures. This realization led to the adoption of a linguistic approach in dealing with the problems experienced with legal language. Levi<sup>85</sup> comments in this regard:

"The vehicle was apparently so ubiquitous and so natural a part of our daily lives that it was simply taken for granted, and therefore largely ignored in earlier studies of judicial systems."

Legal processes are directly affected by language both in which the law has explicit rules for governing behaviour and in other areas where the rules are implicit or not to be found at all.<sup>86</sup> Some even believe that legal language should be classified as a separate language or dialect.<sup>87</sup> In applying a psycholinguistic approach, the Charrows<sup>88</sup> identified certain lexical features of legal language that affect comprehensibility.

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84. Levi JN "The Study of Language in the Judicial Process" in *Language and the Judicial Process* Levi JN and Walker AG (Editors)(1990) Plenum Press at 4 (hereinafter referred to as "*Levi Judicial Process*").

85. *Levi Judicial Process* at 4.

86. *Levi Judicial Process* at 4.

87. Danet *Language* at 470.

88. Compare chapter 5 in this regard.

The assumption that spoken language in legal contexts is merely the actualization of the written model is according to O'Barr<sup>89</sup> clearly outdated.

As far as the issue of comprehension of legal language is concerned, some assumptions about what happens when an individual encounters a linguistic message have to be made. Johnson<sup>90</sup> proposes the following general model in dealing with communication and comprehension: Whenever an individual encounters a message, an interpretive process occurs which results in the "whatever" an individual experiences when comprehension occurs. He points out that one should distinguish between comprehension from the hearer's perspective or from the perspective of an outside observer. From the point of view of the recipient of the message, or from a first-person perspective, the interpretation of a message will be determined by many factors, all of which make up the message. These factors include the following:

- The hearer's knowledge of the concepts embodied in the words which make up the message;

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89. *op cit* at 399.

90. Johnson MG "Language and Cognition in Products Liability" in *Levi Judicial Process* at 297.

- The current concerns of the individual. These factors include whatever is currently occupying the thoughts of the hearer on either a temporary or long-term basis;
- The recipient's perception of the intentionality of the author of the message;
- The recipient's sense of knowledge shared by the author and recipient;
- The recipient's intentionality in interpreting the message;
- Whether the recipient is alert or tired or drunk or an almost unlimited number of factors.

All of these factors will effortlessly be integrated and factored into an interpretative process which ordinarily takes place without any conscious awareness on the part of the message recipient. Comprehension occurs, and from the point of view of the recipient of the message, it almost always occurs without any awareness of alternative interpretive possibilities.

Johnson further points out that if we take the point of view of an observer of the linguistic interaction, it will be more problematic to determine what the message recipient comprehends.<sup>91</sup> As we have no direct access to another individual's knowledge or phenomenological context, we cannot know *precisely* how a given message will be or has been interpreted by a given individual. Linguists, psycholinguists or everyday communicators are, however, capable of making some predictions about the comprehension of a message. If we were not able to, communication itself would not be possible.

The following factors make it possible to make some predictions about others' interpretations:

- Shared contexts;
- Shared knowledge;
- Knowledge about shared knowledge;
- A sense of the probabilistic characteristics of word meaning and usage; and
- Linguistic competence.

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91. *op cit* at 298.

All these factors are used automatically and usually effortlessly when people communicate.

It should be kept in mind that legal language does not only have a communicative function, but is in both its written and oral forms the primary tool of the legal professional.<sup>92</sup> Unlike other professionals who have instruments and procedures, lawyers have only legal language.

It needs furthermore to be kept in mind that one of the primary functions of legal language is a performative one. It carries the force of law: The statement is the act.<sup>93</sup> An accused who has been pronounced guilty is guilty, whether he is or not, in reality. An order by a judge granting a divorce has the effect that people previously married become "unmarried". An order pronouncing a missing person dead has the effect that the person concerned is "legally dead", although he may still be alive. This power of legal language, and the fact that the law can only be communicated through it, has led to legal discourse acquiring an almost ritualistic quality.<sup>94</sup>

From the above it is clear that legal language has specific functions, but is regarded in general as inaccessible to non-lawyers.

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92. Charrows *Language* at 180.

93. Charrows *Language* at 181.

94. Charrows *Language* at 181.



In chapter 5 below the issue of intelligibility of legal language will be reverted to when the psycholinguistic approach of the Charrows will be set out in detail.

A final factor that needs to be taken into account when analysing the communicative process that takes place in courtroom communication, is the fact that the criminal trial process is a dispute processing or resolution process. In the following paragraph the criminal trial process will be analysed as a dispute processing process.

### **3.5.5 *Language and dispute processing***

Apart from being a communicative process, the criminal trial process is a dispute resolution process. In the case of a criminal trial the dispute that the court must resolve, is whether the accused transgressed the provisions of the criminal law. Danet<sup>95</sup> defines a dispute as "the assertion of inconsistent claims with respect to either a resource or the breach of a social norm". This definition incorporates conflicts of interest as well as those arising out of broken rules.

A distinction needs to be made between conflicts of interest and disputes over normative violations.

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95. Danet *Language* 491.

Normative violations are typically retrospective in orientation as the conflicting claims emerge out of inconsistent evaluations of past behaviour.<sup>96</sup>

A typical example of a dispute over a normative violation is a criminal trial.

The State claims that the accused's behaviour constitutes a violation of the criminal law, whilst the accused denies the same.

Conflicts of interest, on the other hand are present-orientated. Danet<sup>97</sup> advances the example of two children claiming the same ball.

Figure 3.5 indicates the three broad stages disputes may be divided into:<sup>98</sup>

### FIGURE 3.5 THE THREE STAGES OF DISPUTES

CLAIM      →                  COUNTERCLAIM      →                  OUTCOME

Claims typically take the form of an *accusation* or a *challenge*. Accusations refer to perceived normative violations. Challenges can be accusatory or pertain to conflicts of interest. There is no dispute if an accused pleads guilty to the charge against him.<sup>99</sup>

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96. Danet *Language* 491.

97. Danet *Language* 491.

98. Danet *Language* 491.

99. Danet *Language* 491.

As was pointed out in paragraph 3.3 above, the criminal trial process in the adversary system is a communicative process and will include the three elements of the basic model suggested by Danet. She however correctly points out that the reading of the charge aloud at the beginning of the trial is a repetition of an accusation that has already been made and processed.<sup>100</sup>

The following sociolinguistic model, suggesting that eight sets of features exist in speech situations<sup>101</sup>, may be employed to explain the criminal trial process:<sup>102</sup>

- *Setting and Scene*: *Setting* refers to the physical circumstances of a communicative event, such as the time and place, whether it is indoors or outdoors and the type of furniture or props used. In the case of a criminal trial the setting is a courtroom, with a standard layout. Most courts have an elevated bench where the presiding officer is seated, a bar for legal representatives, a witness-box and a dock for the accused. *Scene* refers to the cultural aspects, such as whether the event is formal or casual. There can be no doubt that a criminal trial is formal, if not overly formal.

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100. Danet *Language* at 492.

101. Designated by the acronym SPEAKING.

102. Compare in this regard Danet *Language* at 492-493 and in general Batsford BT and Hymes D "Competence and Performance in Linguistic Theory" in *Acquisition of Language: Models and Methods* Huxley R and Ingram E (Editors) (1971) Travistock.

- *Participants*: This category includes not only who the participants are and their roles, but also who addresses whom at any given time, whether an audience is present and what its role is. As is pointed out in paragraph 3.2.2 the participants in a criminal trial include both professional and lay participants. The rules as to who may address whom at any given time are contained in the Criminal Procedure Act as well as rules of practice or conventions.<sup>103</sup>
  
- *Ends*: There are two kinds of ends. The *goals* of the participants and the actual *results* of the interaction. The latter is equivalent to *outcome*. The goal of the State in any criminal trial is to prove that the accused committed the offence in question. The result or outcome very often differs in that the accused is acquitted.
  
- *Act Sequences*: A communicative event consists of a series of speech acts having both *form* and *content*. The form of what is said constitutes its content. The various procedural explanations and choices could qualify as act sequences in that they have a prescribed content and form. This will particularly be the case when strict use is made of a roneod form.<sup>104</sup>

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103. In paragraphs 4.3.2 - 4.3.6 the entire criminal trial process following on a plea of not-guilty is set out. Rules of practice or convention for instance require participants to address the presiding officer as "Your Worship" or "My Lord".

104. Compare paragraph 4.3.4.2 in this regard.

- *Key:* The term *key* is borrowed from music to denote the tone, manner or spirit in which the act is done. The tone of a communicative event may be mock or serious, painstaking or perfunctory. It is clear that a criminal trial is conducted in a very serious tone and the set procedure must be followed painstakingly.
  
- *Instrumentalities:* These include the channels of communication involved and the style of communication. They refer to the forms of language, registers or language varieties. As is pointed out in paragraph 3.5.3 above legal language is employed in the criminal trial process. The criminal trial process is mainly oral in nature.<sup>105</sup> The law furthermore makes use of its own sublanguage with a specific register.<sup>106</sup>
  
- *Norms:* All societies elaborate norms to govern the flow of interaction: Who may speak, to whom, in what order, about what and when to remain silent. All these norms of communication are present in the criminal trial process. The accused may only speak when the process allows him to, he may only ask questions when the process so allows. The process excludes certain communications such as irrelevant evidence.<sup>107</sup>

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105. Compare paragraph 4.2 in this regard.

106. Compare paragraph 3.5.3 above.

107. Compare section 210 of the Criminal Procedure Act, where irrelevant evidence is excluded from the process.

- *Genres*: These refer to communicative forms recognized by a society, typically identified by the labels that society gives them. Examples are poems, novels or riddles. Once again there are several genres in a criminal trial: opening statements, testimony by witnesses and addresses on the merits and sentence. The various procedural explanations and choices also qualify as a genre. The explanation of plea for instance is a specifically labelled part of the communicative events in a criminal trial.

It is therefore important to realize that a criminal trial, as a dispute resolution process, is governed by socio-linguistic norms. As was pointed out above, the criminal trial process displays all eight features, and thus qualifies as a communicative process. When analysing the information gathered in the field study, these socio-linguistic features will be kept in mind.<sup>108</sup>

In the following chapter procedural explanations and choices are identified as specific communicative aspects of the criminal trial process. The information gathered during the field study<sup>109</sup> will be set out as well.

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108. Compare chapter 6 below.

109. Compare chapter 2 above.

## CHAPTER 4

### *Communicative aspects of the criminal trial process*

#### 4.1 *Introduction*

In this chapter the following are done:

- In 4.2 the criminal trial process is identified as a primarily oral process where communication takes place by means of the spoken word. Exceptions to the oral process are noted.
- In 4.3 procedural explanations given to accused persons during the process are identified and procedural choices that the accused must make are pointed out. The content of the procedural explanations are discussed with reference to "standard" forms available to magistrates in the Port Elizabeth Magistrate's Courts and relevant case law and literature.
- In 4.4 information gathered by means of the empirical research in Magistrate's Courts in Port Elizabeth is set out.

## **4.2 *The criminal trial process as a predominantly oral or spoken process***

In essence a criminal trial is conducted through the medium of the spoken word and thus essentially oral in nature.

Exceptions to this oral process are the following:

### **4.2.1 *The charge sheet and indictment***

In terms of section 84 of the Criminal Procedure Act the charge sheet shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.<sup>1</sup>

Although the charge sheet is in writing, it is read out in court to the accused. If the accused is legally represented the formal reading out of the charge sheet is often dispensed with.

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1. Compare section 84(1) of the Criminal Procedure Act.



In the High Court the charge against the accused is contained in an indictment in terms of section 144 of the Criminal Procedure Act. The indictment is more elaborate than the charge sheet and contains a summary of the substantial facts of the case and a list with the details of the State witnesses.

#### **4.2.2 *Documentary evidence***

Apart from *viva voce* evidence<sup>2</sup>, documentary evidence is admissible as evidence in criminal proceedings. The following sections of the Criminal Procedure Act relate to documentary evidence: 95, 99, 179, 222, 233, 234, 246, 247, 251 and 338.<sup>3</sup>

#### **4.2.3 *Copy of statement made***

In terms of section 335 of the Criminal Procedure Act, whenever a person has in relation to any matter made to a peace officer a statement in writing or a statement which was reduced to writing, and criminal proceedings are thereafter instituted against such person in connection with that matter, the person in possession of such statement shall furnish the person who made the statement, at his request, with a copy of such statement.

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2. Compare section 161 of the Criminal Procedure Act.
  3. A full discussion of these sections falls outside the scope of this research.

This section has the effect in practice that a copy of any statement or confession that an accused made in writing, or which was reduced to writing must be supplied to him.<sup>4</sup>

#### **4.2.4 Copies of the content of the police docket**

Prior to the implementation of the interim Constitution, the State enjoyed a "blanket privilege" on the content of police dockets.<sup>5</sup> Accused persons or their legal representatives could therefore not obtain copies of witnesses' statements, unless the State waived its privilege or consented to the discovery of the statement in question. The courts have however held that there is a duty on a prosecutor to disclose to the court and the defence whenever the *viva voce* evidence of a witness differs materially from his version in his statement.<sup>6</sup>

In *S v Fani*<sup>7</sup> it was held that the common law privilege was not inconsistent with the interim Constitution. The court however held that in view of an accused person's right to a fair trial in terms of section 25(3) of the interim Constitution more information should be supplied to an accused person.<sup>8</sup>

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4. This was the position even before the constitutional discovery discussed in the next paragraph.

5. *R v Steyn* 1954 (1) SA 324 (A) at 335A-B.

6. *Steyn supra* at 337A-B.

7. 1994 (3) SA 619 (E).

8. At 46J-47G.

A long line of judgments on this issue followed and the Constitutional Court finally held in *Shabalala and Others v Attorney-General of Transvaal and Another*<sup>9</sup> that the "blanket privilege" of the State was inconsistent with an accused person's constitutional right to a fair trial as entrenched in section 25(3) of the interim Constitution.<sup>10</sup>

An accused person is therefore entitled to request insight into the contents of the police docket. In the case of an undefended and illiterate accused, this right would not entail much in reality.

#### 4.3 *Procedural explanations and procedural choices*

From the first appearance of an undefended accused<sup>11</sup> in court until the imposition of a proper sentence should he be found guilty, explanations are directed at him by the presiding officer. These explanations aim to explain the process at intervals as the trial progresses.<sup>12</sup> These explanations are referred to as **procedural explanations**.

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9. 1996 (1) SA 725 (CC).

10. At 742D-743A-D.

11. In the case of an accused with legal representation none of the procedural explanations will follow, as the legal representative is presumed to know the process and acts on behalf of his client.

12. In this research only the criminal trial process following on a plea of not guilty will be addressed. The reason for this limitation is the fact that only the procedural explanation regarding the right to adduce evidence before sentence is explained to an accused who pleads guilty. Apart from this limited procedural explanation, the process in the case of the plea of guilty is inquisitorial in nature. Compare paragraph 3.3.2.1 above.

The trial is therefore divided into stages. At the commencement of each stage the presiding officer explains to the accused what will happen next.

After some of the explanations, the accused is required to make a choice between given alternatives. These choices that the accused has to make are referred to as **procedural choices**.<sup>13</sup> It is imperative that the undefended accused makes informed procedural choices, as they have important influences on the outcome of the trial.

Regarding the duty of the presiding officer to explain the procedural choices to an undefended accused, the following *dictum* from *S v Kester*<sup>14</sup> is of the utmost importance:

"It is necessary and propitious to reiterate the duty of the court where an accused is unrepresented. As stated herein where an accused person is unrepresented at his trial it is the duty of the judicial officer to diligently, deliberately and painstakingly inform the said unrepresented accused of his rights to ensure and confirm that the said accused understands his rights. He/she should also be informed that he/she is under no duty to assist the State in proving its case against himself/herself."

The court then postulated the following guidelines to be employed when the explanation of rights takes place:<sup>15</sup>

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13. Compare *S v Nzimande* 1993 (2) SACR 218 (N) at 220c-f where Didcott J refers to "procedural choices open to an accused person".
  14. 1996 (1) SACR 461 (B) at 472j-473a-b.
  15. At 473c-474c.

- The record must indicate and prove, where an undefended accused is involved in a criminal trial, whether or not his rights were explained to him in a proper manner, and that he understood the position;
- When explaining the position, a magistrate should sedulously inform the accused and confirm that the accused understands that he is entitled in an appropriate case to close his case without leading any evidence or to apply for his discharge;
- It is a salutary practice that the explanation of rights should appear on the record with adequate and satisfactory particularity to enable a judgment to be made on the adequacy thereof;
- This duty should not be delegated to an interpreter, but is the duty of the presiding officer;
- If rote forms are used, care should be taken to ensure that the said forms contain all the necessary explanations, together with the import thereof. Often, more needs to be explained than what appears on the form. In addition the presiding officer should ensure that the accused understands what he has been informed of by a question or statement confirming the same.

- A presiding officer should assist an undefended accused in the conduct of his case, and must strive to ensure that the accused is at ease and is able to present his case to the best of his ability.

During the criminal trial process, the following procedural explanations are given to undefended accused persons:

#### **4.3.1 *The right to legal representation***

At the first appearance of an accused person, he is informed by the presiding officer that he has a right to be legally represented.<sup>16</sup> In this regard section 73 of the Act reads as follows:

**"73 Accused entitled to assistance after arrest and at criminal proceedings**

(1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

(2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

(3) An accused who is under the age of eighteen years may be assisted by his parent or guardian at criminal proceedings, and any accused, who in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings."

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16. In terms of the South African Police Services "standard" warning to persons who are being arrested, this right is explained at the time of the arrest. This form is attached as "Form 6".

The provisions of this section are enabling, in the sense that they create the general right to legal representation in terms of the Criminal Procedure Act. The right of an accused person to legal representation is of course a fundamental right entrenched in section 35(3)(f) and (g) of the Constitution.

In practice this explanation is given to the accused at his first appearance in court. This first appearance is normally of a formal nature and the case is usually postponed for one of the following reasons:

- in order for the accused to obtain legal representation;
- in order for the accused to make a formal bail application;
- in order for the case to be further investigated;
- in order for the Attorney-General to decide on aspects of the prosecution;
- in order to arrange for a trial date, as the witnesses will most likely not be present at court.<sup>17</sup>

In some instances the trial may be finalised at the first appearance. Examples of such instances are where the accused pleads guilty to a trivial offence in terms of section 112(1)(a) of the Criminal Procedure Act.

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17. In exceptional circumstances an "instant trial" will follow. The courts have however warned against such instant trials. Compare Kriegler J *Hiemstra Suid-Afrikaanse Strafproses* (5th Edition) (1993) Butterworths at 178.

#### 4.3.1.1 *The content of the explanation and procedural choices available*

Section 73 affords no guidance as to the content of the explanation. The section merely states that the accused is entitled to be legally represented. In section 2 of the Criminal Procedure Amendment Act<sup>18</sup> provision is made for the insertion of section 2A into section 73. In the proposed insertion contains specific instructions regarding the explanation as to legal representation by a presiding officer. These amendments are however not in force yet.<sup>19</sup> As will be indicated in paragraph 4.3.1.2 below, the courts have explained this right to accused persons even before the new constitutional order.

In terms of section 35(3)(f) of the Constitution an accused has the right to choose to be represented by a legal practitioner and to be informed of this right promptly. Subsection (3)(g) extends this right by providing that the accused has the right to have a legal practitioner assigned to him by the State and at State expense, if substantial injustice would otherwise result. Once again the accused must be informed of this right promptly.

The standard form available to magistrates in the Port Elizabeth Magistrate's Courts complies with the content requirements laid down in the Constitution.

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18. Act 86 of 1996.

19. Compare Government Gazette No. 17596, dated 20 November 1996, read with Regulation Gazette No. 18231, dated 30 August 1997.



The relevant part from the form is the following:<sup>20</sup>

"COURT TO ACCUSED NO.: \_\_\_\_\_

You are entitled to be represented by an Attorney or Advocate of your own choice whom you have appointed out of own funds.

If you cannot afford a legal representative you may apply to the local Legal Aid officer for assistance. If your application is successful, an independent legal representative will be appointed for you by the Legal Aid Officer.

Rights of information contained in docket explained to accused.

DO YOU UNDERSTAND? \_\_\_\_\_

What do you wish to do? \_\_\_\_\_ "

The standard form goes even further than the content requirements of the Constitution. Provision is made to explain the right to information<sup>21</sup> and discovery of the police docket to the accused as well.

#### 4.3.1.2 *Case law and literature*

In the case law little guidance as to the specific content of the procedural explanation is found. Before the new constitutional dispensation the case law was divided on the issue whether the provisions of section 73 of the Criminal Procedure Act placed a duty on presiding officers to explain this right to accused persons.

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20. The actual form is annexed as "Form 1".

21. Compare paragraph 4.2.4 above.

In one line of decisions it was decided that this right should be explained to accused persons.

As to the procedural choice involved, it was decided that the explanation should be given timeously, so as to enable the accused to effect the choice.

The following decisions fall with the pro-explanation group: In *S v Yantolo*<sup>22</sup> it was held that it was "a somewhat inverted procedure" to ask the accused first whether she wishes to plead and then if she wishes to have an attorney. The court held that the purpose of enabling an accused person to obtain legal representation is, amongst other matters, to enable her to be advised upon whether she wishes to plead and how she wishes to plead.

In *Khumbusa v The State and Another*<sup>23</sup> the police were called in to investigate the occurrence of violence at a school. Order was restored and the pupils were told that they were going to be charged with public violence. They were then asked to assemble in the school hall the next day. They did so, and had their fingerprints taken, and shortly thereafter, on the same day, a magistrate constituted a court in the school hall to hear a charge of public violence against the pupils. A charge sheet was then produced for the first time, and all but one of the pupils were convicted and sentenced.

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22. 1977 (2) SA 148 (E) at 148G.

23. 1977 (1) SA 394 (N).

The applicant, aged 16, applied by way of review to have his conviction and sentence set aside on grounds of a number of alleged irregularities. One of the reasons was that his parents had not been warned to attend the court.

Another was that he had not been granted an adequate opportunity of obtaining legal representation or of preparing his defence.

The court, taking all the facts into consideration, concluded that on the probabilities the applicant had been in no position to really appreciate what was happening or what his legal rights were and that the proceedings should accordingly be set aside in their entirety on the ground that there had been a gross irregularity.<sup>24</sup> This view was approved and followed in *Siqodolo v Attorney-General and Another*.<sup>25</sup>

A contrary view was expressed in the following cases. In the case of *S v Mthetwa, S v Khanyile*<sup>26</sup>, it was held on the facts of the particular appeals that:

"there is no obligation cast on a judicial officer by the provisions of the Criminal Procedure Act either to explain the consequences of a plea of guilty to an accused person or to ask an accused person whether he desires to engage the services of a legal adviser.

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24. At 397H.

25. 1985 (2) SA 172 (E).

26. 1987 (2) SA 773 (N) at 776E-F.

It may well be desirable for a judicial officer to do all those things where the accused who appears before him is obviously an illiterate or uneducated person, but there is no duty cast upon him to do so, and indeed in this case there is not even any evidence before the Court that the appellant is an illiterate person."

In *S v Morrison*<sup>27</sup> it was held that although section 73(2) of the Criminal Procedure Act affords an accused a right to legal representation, no duty is placed on a presiding officer at every trial to spell this out to an accused person who is unrepresented. The court even commented that this right is "generally known to most people".

The cases holding that there is no duty on a presiding officer to explain the right to legal representation to accused persons were however not endorsed and followed. In *S v Masilela*<sup>28</sup> the following passage from *S v Radebe; S v Mbonani*<sup>29</sup> was quoted with approval:

"If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction.

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27. 1988 (4) SA 164 (T) at 167H.

28. 1990 (2) SACR 116 (T).

29. 1988 (1) SA 191 (T) at 196D-J.

Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right, but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation *per se* or the absence of the suggested advice to an accused person *per se* will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend on its own facts and peculiar circumstances."

The above approach of Goldstone J was followed in the following cases: *S v Gwebu*<sup>30</sup>, *S v Rudman*; *S v Johnson*; *Sv Xaso*; *Xaso v van Wyk NO and Another*<sup>31</sup>, *Nakani v Attorney General and Another*<sup>32</sup>, *S v Mthwana*<sup>33</sup>, and *S v Motsumi*.<sup>34</sup>

In the *Rudman*-case<sup>35</sup> it was held that knowledge of the right to legal representation is of no value to an indigent accused if he is unaware of his right to apply for legal aid.

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30. 1988 (4) SA 155 (W).

31. 1989 (3) SA 398 (E).

32. 1989 (3) SA 655 (Ck).

33. 1989 (4) SA 361 (N).

34. 1990 (2) SACR 207 (O).

35. *Supra* at 381G.

It was held that it is a corollary of a judicial officer's duty to inform an undefended accused of his entitlement to legal representation and to inform him of an indigent accused person's right to apply for legal aid under the Legal Aid Act.<sup>36</sup>

In *S v Mpata*<sup>37</sup> the view expressed in *Rudman* was followed and the court came to the conclusion that failure to explain these rights would amount to an irregularity. Each case will however have to be judged on its own merits in order to ascertain whether the irregularity warrants setting aside the conviction and sentence.

In *S v Nel*<sup>38</sup> for instance, the accused declined to cross-examine State witnesses, because his attorney was not present. The accused told his attorney not to be present, as he *bona fide* believed that the case against him would be withdrawn. The presiding officer later saw that the accused was not cross-examining because his attorney was not present. The accused was thereupon given time until 2 o'clock the same afternoon to get his attorney at court. It was not possible for the attorney to attend court and the court refused a further postponement. The court of appeal held that this constituted an irregularity.

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36. Act 22 of 1969.

37. 1990 (2) SACR 175 (NC) at 181*a-b*.

38. 1974 (2) SA 445 (NC) at 446.

Since the implementation of section 25(3)(e) of the interim Constitution, the position is simple. In *S v Gouwe*<sup>39</sup> it was held that failure to inform the accused of his right to legal representation will constitute an irregularity resulting in an unfair trial. It is suggested that a similar situation is applicable in the case of section 35(3)(f) of the Constitution.

In the *Gouwe*-case<sup>40</sup> the following *dictum* is quoted with approval from the unreported case of *S v Masango*<sup>41</sup>, wherein Stewart JP laid down the following guidelines:

- "1. The magistrate should advise the accused at the commencement of the case, before plea, that he is entitled to legal representation at his own expense.
2. If the accused wishes to obtain legal representation at his own expense, he should be given adequate time to do so.
3. If the case is complex, or the consequences of a conviction serious, then the magistrate should enquire into whether the accused can afford legal representation, and, if he cannot, should refer him to the Legal Aid Board or, if legal funds are not available, to organizations such as the Law Clinic of the University of Bophuthatswana or Lawyers for Human Rights.
4. ...

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39. 1995 (8) BCLR 968 (B) at 970C.

40. *Supra* at 969B-D.

41. 6 BSC 162 at 172.

5. Explanations given to the accused should be phrased in terms which are free of legal jargon and easily understood so that, at the end of the trial, the accused will feel that the magistrate has given him a fair hearing."

As to the choice of the services of a particular legal practitioner, it was decided in *S v Vermaas; S v Du Plessis*<sup>42</sup> that the right to be provided with legal representation at State expense where substantial injustice would otherwise result, in terms of s25(3)(e) of the interim Constitution, does not confer a right to be represented by a legal practitioner of the accused's personal choice. Didcott J concludes this judgment with the following *caveat*<sup>43</sup>:

"One can safely assume that, in spite of section 25(3)(e), the situation still prevails where during every month countless thousands of South Africans are criminally tried without legal representation because they are too poor to pay for it. They are presumably informed at the beginning, as the section requires them peremptorily to be, of their right to obtain that free of charge in the circumstances which it defines. Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it is not backed by mechanisms that are adequate for the enforcement of the right."

In terms of section 35(3)(g) of the Constitution the accused must be informed promptly of his right to be assigned a legal practitioner at State expense, if substantial injustice would otherwise result.

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42. 1995 (7) BCLR 851 (CC) at 859G-H.

43. At 860B-C.



It is thus clear that failure to inform an undefended accused of his right to apply for Legal Aid, would constitute an irregularity leading to an unfair trial.

#### 4.3.2 *The explanation of plea*

If an accused person has elected to plead not guilty to the charge against him, the procedure set out in section 115 of the Criminal Procedure Act is set in motion.<sup>44</sup>

This procedure has become known as the explanation of plea<sup>45</sup> and aims to eliminate unnecessary evidence by establishing exactly what the accused wishes to dispute by his plea of not guilty.<sup>46</sup> The section reads as follows:

**"115 Plea of not guilty and procedure with regard to issues**

(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.

(2) (a) Where an accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

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44. Kriegler *op cit* 319 correctly points out that although this procedure is voluntary in nature, it is used as a matter of course in criminal trials.

45. This term "pleitverduideliking" was suggested by Hiemstra. Compare 1977 TSAR at 118. The term was accepted by the (then) Appellate Division in *S v Imene* 1979 (2) SA 710 (A) 717G.

46. *S v Seleke* 1980 (3) SA 745 (A) at 753G.

(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

(3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not."

This section was introduced into the criminal trial process following upon proposals made by Hiemstra.<sup>47</sup>

At the time of its introduction, this section was seen as a radical departure from the accusatory system of criminal procedure followed in South Africa. The judicial questioning of the accused was seen as the importation of inquisitorial elements into the criminal trial process.<sup>48</sup> Klopper<sup>49</sup> has however suggested that the plea explanation is really a *sui generis* procedure: judicial examination is employed to determine the issues and, once these issues are established, the two opposing parties are required to present their respective cases in accordance with accusatorial or adversarial principles.<sup>50</sup>

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47. Compare generally the views of Hiemstra in 1963 *SALJ* at 187 and 1965 *SALJ* at 85.

48. See Kriegler *op cit* at 292 and 318.

49. 1978 *CILSA* 320 at 321.

50. Compare Du Toit E, De Jager FJ, Paizes A, Skeen A St Q and Van der Merwe S *Commentary on the Criminal Procedure Act* (1987) Juta at 18-1.

The purpose of the section was outlined in *S v Moloji*.<sup>51</sup> It was held that the section aims to secure an early outlining of the dispute or *lis* and to make the proceedings more efficient and less costly.

The advantages include the following: State witnesses do not have to stay present at the proceedings unnecessarily; the leading of evidence will be shorter and unnecessary remands will be avoided. This entire process can however only take place with the consent of the accused.

This procedure is now well entrenched in our criminal trial process, and as pointed out above is followed as a matter of course when an accused pleads not guilty.<sup>52</sup>

#### 4.3.2.1 *The content of the explanation and procedural choices available*

From the section, it is evident that the explanation should contain the following information:

- Whether the accused wishes to make a statement indicating the basis of his defence;

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51. 1978 (1) SA 516 (O) at 519H-520D.

52. *S v Bepela* 1978 (2) SA 22 (B).

- that this statement is voluntary;<sup>53</sup>
  
- if the accused does not make a statement the court may put questions to the accused in order to establish which allegations in the charge are in dispute;
  
- the accused may refuse to answer these questions;<sup>54</sup>
  
- if the accused makes a statement the court may put questions to the accused if it is not clear from his statement to what extent he denies or admits the issues raised by the plea;
  
- the accused may refuse to answer these questions as well;<sup>55</sup>
  
- the court may in its discretion put any question to the accused in order to clarify any matter raised;
  
- the court shall require from the accused whether an allegation which is not placed in issue by the plea of not guilty may be recorded as an admission by the accused of that allegation; and

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53. The voluntary nature may be inferred from the word "wishes". The accused clearly has a choice. The right to silence in terms of section 35(3)(h) of the Constitution makes this procedure voluntary as well.

54. Compare the previous footnote.

55. Compare footnote 50.

- if the accused consents to the recording of the admission, the admission shall be deemed to be an admission in terms of section 220 of the Criminal Procedure Act.

The constitutional requirements for this procedural explanation are to be found in section 25(3)(c) of the interim Constitution which afforded an accused the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.

In *S v Maseko*<sup>56</sup> it was held that the term "plea proceedings" refers to a plea of guilty in terms of section 112(1)(b) of the Criminal Procedure Act as well.<sup>57</sup> A presiding officer therefore must warn an accused who indicates that he wants to plead guilty, of his right to silence.

Section 35(3)(h) of the Constitution guarantees the right to silence and determines that every accused person has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. Although the specific reference to plea proceedings has been omitted in the Constitution, it is submitted that the position remains unchanged.

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56. *Supra*.

57. Compare paragraph 3.3.2.1 above where reference was made to *S v Damons (supra)* which qualifies the *Maseko*-judgment.

The relevant part from the standard form available to magistrates in Port Elizabeth reads as follows:<sup>58</sup>

"COURT TO ACCUSED

Do you wish to make a statement indicating the basis of your defence? You are not obliged to make such a statement. The statement must be voluntary.

ACCUSED IN REPLY: \_\_\_\_\_

Questioning of the accused in terms of Section 115(2)(a) of Act No. 51 of 1977 in order to establish which allegations in the charge are in dispute. The accused is informed that he is not obliged to answer the questions.

\_\_\_\_\_

Admissions in terms of sections 115(2) of Act No. 51 of 1977.

COURT TO ACCUSED

Do you agree that the following allegations are not in issue and that it may be recorded as admissions? You are not obliged to make any admissions. If you make admissions it will not be necessary for the prosecutor to prove the facts contained therein.

\_\_\_\_\_

Admissions as above read over to accused. Accused confirms and consents that it may be recorded as admissions in terms of section 220 of Act 51 of 1977."

**4.3.2.2 Case law and literature**

In the case of this procedural explanation, guidance as to the content and form of the explanation appears in the case law. The guidance emanated from the architect of the section, Hiemstra CJ.

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58. The actual form is attached as "Form 2".

In *S v Men Andere*<sup>59</sup> the following explanation is advanced by Chief Justice Hiemstra:

"Ten einde die juiste atmosfeer te handhaaf en nie die waarde van die pleitverduideliking verlore te laat gaan nie, word aan die hand gegee dat die pleitverduideliking ongeveer soos volg ingelei word:

"Wil jy 'n verklaring doen wat die grondslag van jou verdediging aandui? Die hof is geregtig om in elk geval vrae te stel om te bepaal wat jou verweer is, maar jy is nie verplig om daarop te antwoord nie."<sup>60</sup>

This proposed explanation was endorsed in *S v Evans*<sup>61</sup>. *In casu* the court held that the magistrate was obliged to explain to the appellant at the start of the proceedings that he had a choice whether or not to answer questions put to him by the court. The failure by the magistrate constituted an irregularity serious enough to set aside the conviction and sentence.<sup>62</sup>

In *S v Ramokone*<sup>63</sup> an illiterate, unrepresented juvenile accused, pleaded not guilty and indicated that he did not wish to say anything and did not wish to make a statement in terms of section 115.

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59. 1979 (4) SA 1044 (BH).

60. At 1050B.

61. 1981 (4) SA 52 (C) at 59B-C.

62. At 60B.

63. 1995 (1) SACR 634 (O) at 636f-g.

The court held that it was advisable that it be explained to him that the court is going to ask him questions which he need not answer. The questions which the court asks must be directed at limiting the issues in the case and not at inducing the accused to tell the court what had happened. The court cited with approval the following passage from the United States Supreme Court case of *Powell v Alabama*<sup>64</sup>:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law .... He is unfamiliar with the rules of evidence ... He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Schabert J correctly pointed out in *S v Mahlangu*<sup>65</sup> that a presiding officer should not merely ask an undefended and uneducated accused the question "What happened?". This question would urge such an accused to tell the court what had indeed happened instead of indicating his defence. The questioning in terms of this section should not lead to an enquiry into the evidence to be led and should be limited to the establishment of the accused's defence. Any further questioning would merely create material that could be used against the accused in cross-examination.<sup>66</sup>

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64. 287 US 45 (1932).

65. 1985 (4) SA 447 (W) at 4511-J.

66. *S v Msibi* 1992 (2) SACR 441 (W).



Regarding the recording of admissions in terms of section 115(2), it was held in *S v Mayedwa*<sup>67</sup> that where this procedure is adopted, it is desirable that the presiding officer clearly indicates to the accused, and records, that he intends to act in terms of this section. He should also record *verbatim* the questions put by him to the accused and the accused's reply to each question. Meticulous care in recording both such questions and answers will leave no doubt as to what facts have been formally admitted by the accused and what facts still remain to be proved by the leading of evidence.

According to Du Toit<sup>68</sup> the warnings and explanations contained in this section should contain the following:

- The presiding officer should inform the accused that he is under no obligation to make a statement indicating the basis of his defence;
- The presiding officer should also warn an accused that he is under no obligation to answer questions put by the court in terms of section 115(2)(a);

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67. 1978 (1) SA 509 (E) at 511D-F.

68. Du Toit *et al op cit* at 18-7 - 18-9.

- An accused should also be informed that the effect of a formal admission is to relieve the State of the necessity of proving, by evidence, the fact admitted and, further, that he is not obliged to consent to the recording of formal admissions;
  
- At the end of the State's case the court should inform the accused that his explanation of plea is no substitute for evidence and that if he wishes to place his version before the court, he should do so under oath or affirmation; and
  
- The presiding officer should explain the purpose of section 115(2) to an accused and should inform the latter that he proposes to act in terms of this section.

Kriegler<sup>69</sup> states that the majority of undefended accused do not understand the difference between the explanation of plea and evidence in chief. He suggests that the presiding officer should explain to the undefended accused that the admissions made by him stand as proof of the facts contained therein, but that the exculpatory portions of his explanation of plea is not evidence in his favour.

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69. *op cit* at 321.

#### 4.3.3 *The right to cross-examination*

The accused has the right to cross-examine every witness called by the prosecution. This right is contained in section 166 of the Criminal Procedure Act. Once a witness is called in a trial and a party makes that person his witness, he may be cross-examined by the other side and a denial of that right of cross-examination is an irregularity.<sup>70</sup> The right to cross-examination is explained to the accused after the first State witness has testified, so that the accused is in a position to cross-examine the witness. It is suggested that this right should be explained to the accused even before the leading of evidence. The advantage hereof would be that the accused can look out for and remember or write down aspects of the evidence he wishes to dispute.

Normally it is not explained again to the accused after the close of the case for the prosecution, unless the accused needs to cross-examine a co-accused or his witnesses.

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70. Compare *R v Ndawo and Others* 1961 (1) SA 16 (N) at 17E and *S v Mcolweni* 1973 (3) SA 106 (E) at 107A in this regard.

Section 166 reads as follows:

**"166 Cross-examination and re-examination of witnesses**

(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witnesses called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused."

**4.3.3.1      *The content of the explanation and procedural choices available***

Little guidance as to the content of the explanation of the right to cross-examination is found in section 166 of the Criminal Procedure Act. Cross-examination has been described by Wigmore<sup>71</sup> as "the greatest legal engine ever invented for the discovery of the truth". Hoffman and Zeffertt<sup>72</sup> however correctly remark that:

"(he) probably never saw the engine in action in a case in which the witness speaks in Afrikaans, counsel English, and the accused understands nothing but Xhosa."

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71. Wigmore JH *Evidence in Trials at Common Law* Volume 5 paragraph 1367 at 32 - 36 (1974) Little, Brown and Company.

72. Hoffmann LH and Zeffertt DT *The South African Law of Evidence* (4th Edition) (1988) Butterworths at 456.

The objectives of cross-examination were set out in *Caroll v Caroll*<sup>73</sup> as the following: to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness and to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.

In terms of section 25(3)(d) of the interim Constitution an accused has the right to adduce and challenge evidence. This clearly includes the right to cross-examination. Similarly worded rights are contained in section 35(3)(i) of the Constitution.

No standard form is employed in the Port Elizabeth Magistrate's Courts with regard to the explanation of the right to cross-examination.

#### 4.3.3.2 *Case law and literature*

In *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO*<sup>74</sup> Cooper J sets out the following principles applicable to the right to cross-examination<sup>75</sup>:

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73. 1947 (4) SA 37 (D&CLD) at 40.

74. 1989 (3) SA 368 (E).

75. The approach of Cooper J was adopted and approved in *S v Mkwedi* 1994 (1) SACR 216 (Tk) at 218a-c.

- During the State case the presiding officer is obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination, the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the state witnesses;<sup>76</sup>
  
- Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding officer should question - not cross-examine - the witness on the issues as to reduce the risk of a possible failure of justice;<sup>77</sup>
  
- The presiding officer should assist an undefended accused whenever he needs assistance in the presentation of his case and should protect him from being cross-examined unfairly.<sup>78</sup>

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76. At 378C-D.

77. At 379E-F.

78. 378J-379A.

In *S v Tyebela*<sup>79</sup> it was held:

"Furthermore, when the first State witness had finished his evidence in chief, there should have been an explanation to the appellant and his co-accused as to their right to cross-examine and some indication as to how they should conduct the cross-examination and that it was their duty to put to the State witnesses any points on which they did not agree with the State witnesses, and to put their version to the State witnesses. This was not done until a later stage and then only in a rough and summary manner ..."

In *S v Kibido*<sup>80</sup> the accused when pleading not guilty gave a fully detailed explanation of his defence, and some cross-examination was ineptly done by him. It appeared from the record that the accused did not know how to cross-examine properly or how to put questions. The magistrate drew an adverse inference against the accused for his failure to cross-examine fully. The court held that this constituted a failure of justice and that the accused did not have a fair trial.<sup>81</sup>

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79. 1989 (2) SA 22 (A) at 32A-C.

80. 1988 (1) SA 802 (C).

81. At 804H-J.

In *S v Khambule*<sup>82</sup> the court observed that in the case of an undefended accused, the presiding officer must not only see that the rules of the game are observed but he must actively see to it that the accused's version has been properly put to the state witnesses so his search for the truth bears some fruit.

The court with approval quoted the following passage from *S v Sebatana*<sup>83</sup>:

"Ondervinding het by herhaling geleer dat veral ongeletterde en eenvoudige swart beskuldigdes enkele irrelevant vrae aan 'n Staatsgetuie stel, of soos hier geen vrae hoegenaamd stel nie, en dan later getuienis aflê wat in verskeie wesenlike opsigte bots met wat die Staatsgetuie gesê het. Dit is na my mening die gevolg van onkunde omtrent die werklike aard en doel van kruisverhoor, nieteenstaande 'n verduideliking deur die landdros van die beskuldigde se "regte" in hierdie verband. Ek meen dat die voorsittende beampte in 'n geval soos die onderhawige 'n plig het om die beskuldigde te help om sy verdediging by wyse van kruisverhoor voor die hof te plaas deur byvoorbeeld vir hom uitdruklik te vra of hy saamstem met elke bewering wat teen hom gemaak is deur die Staatsgetuie. Op so 'n wyse behoort dit in die meeste gevalle gou duidelik te wees watter getuienis betwis word en kan die voorsittende beampte self die nodige vrae aan die Staatsgetuie stel of stellings aan hom maak. Dit sal minstens darem by die beskuldigde die indruk skep dat hy billik behandel word gedurende die verhoor."

It is of the utmost importance that an accused puts his case to the prosecution. It is no reason for not doing so that the answer would almost always be a denial.

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82. 1991 (2) SACR 277 (W) at 281*d*.

83. 1983 (1) SA 809 (O) at 812G-813A.



The court is entitled to see and hear the reaction of a witness to every important allegation.<sup>84</sup>

In the important decision of *Namib Wood Industries (Pty) Ltd v Mutiltha NO and Another*<sup>85</sup> it was held that a failure to explain to an undefended accused his right with regards to cross-examination would be tantamount to a failure to allow cross-examination, which would constitute a gross irregularity.<sup>86</sup> The court held that such a failure would further result in the accused not having a fair trial.<sup>87</sup>

As to the content of the explanation, the following passage from *S v Wellington*<sup>88</sup> is important:

"Although this perhaps does not mean that the accused, who in this case could read and write, was entitled to the same detailed explanation and assistance from the court as an illiterate person, he was entitled to an explanation that encompassed the following, namely (a) that he had a right to cross-examine; (b) that it was his duty to put to the State witnesses any points on which he did not agree with such witnesses; and (c) that the purpose of cross-examination was to elicit evidence favourable to himself and to challenge the truth and accuracy of the State's evidence."

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84. Compare in this regard *S v P* 1974 (1) SA 581 (RAD) at 582E-G, *Small v Smith* 1954 (3) SA 434 (SWA) at 438E-G and *R v M* 1946 AD 1023 at 1028.

85. 1992 (1) SACR 381 (Nm) at 384d-f.

86. Compare in this regard *S v Mcolweni* 1973 (3) SA 106 (E).

87. Compare *S v Tyebela* 1989 (2) SA 22 (A) at 29H.

88. 1991 (1) SACR 144 (Nm) at 148c-f.

In *S v Mngomezulu*<sup>89</sup> the court on review assumed that a full and correct explanation as to cross-examination was given.

The court however commented:

"It does not follow, however, that he understood what was really required of him, or that he had any idea of how to achieve it. One is not unaccustomed to trained lawyers, after all, to whom the art of cross-examination is a mystery, to whom it means little else than "putting " perfunctorily to the witness that he is not speaking the truth. More familiar still is the kind of performance one tends to get from laymen. Few have the wit to appreciate every point they should challenge or make, and to sort the wheat from the chaff in this respect. Few have the memories to store every detail of the evidence they hear, and not many more the literacy to note such as the trial progresses, or the means of doing so when it comes to that, the writing pads and ballpoint pens which judicial officers, prosecutors and defence counsel take for granted and without which each would be soon at sea. And he scarcely knows how to set about the task when the moment arrives. So many records one sees on appeal and review show a layman doing his best, only to find himself pulled up in time and again for assertions instead of questions, or for questions that are muddled or irrelevant, repetitive or argumentative, until eventually he tires of the effort.

Not only, I believe, is too much expected too frequently of laymen defending themselves in criminal trials. Too much is read too frequently into their failure to cross-examine or to do so thoroughly."

#### **4.3.4 Rights at the close of the case of the prosecution**

In this regard section 151 of the Criminal Procedure Act determines the following:

##### **"151 Accused may address court and adduce evidence**

(1) (a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence on behalf of the defence, and if he answers in the affirmative, he may address the court for the purposes of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence, and-

(i) if the accused answers in the affirmative, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or

(ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

(2) (a) The accused may then examine any other witness for the defence and adduce such evidence on behalf of the defence as may be admissible.

(b) Where any document may be received in evidence before any court upon its mere production and the accused wishes to place such evidence before the court, he shall read out the relevant document in court unless the prosecutor is in possession of a copy of such document or dispenses with the reading out thereof."

#### 4.3.4.1 *The content of the explanation and procedural choices available*

From the section, the explanation should have the following content:

- the court must ask the accused whether he wishes to adduce evidence on behalf of the defence;
- if the accused answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence;
- the court must ask the accused whether he himself intends giving evidence;
- if the accused answers in the affirmative, he shall (except where the court on good cause allows otherwise) testify before the other defence witnesses;
- if the accused answers in the negative, but decides to testify after the other defence witnesses, the court may draw such inferences as may be reasonable in the circumstances;<sup>90</sup>

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90. The court could, for instance, infer that the accused wished to ascertain what his witnesses had to say, prior to delivering his own evidence. The court could then decide to attach less weight to the evidence of the accused.

- the accused may call other witnesses and adduce such other permissible evidence; and
  
- documentary evidence admissible by mere production may be used.

The interim Constitution laid down the following rights in this regard: the right to remain silent and not to testify (section 25(3)(c)); the right to adduce and challenge evidence (section 25(3)(d)); to be tried in a language he understands, otherwise to have the proceedings interpreted in such a language (section 25(3)(i)). The Constitution provides for the following rights in this regard: the right to silence and not to testify (section 35(3)(h)); to adduce and challenge evidence (section 35(3)(i)) and the right to be tried in a language that the accused understands, alternatively to have the proceedings interpreted (section 35(3)(k)).

The relevant part from the standard form used in Port Elizabeth is the following:<sup>91</sup>

"RIGHTS OF THE ACCUSED:

The State has now closed its case. You now have the opportunity to place your version of the case before the Court. You can do this by testifying yourself and also by calling witnesses to testify on your behalf. If you testify, (your co-accused and)\* the State Prosecutor may cross-examine you and the Court may put questions to you. If you elect to call witnesses they may also be cross-examined in the same fashion that has just been explained to you.

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91. The complete form is attached as "Form 3".

You may also elect to remain silent. If you elect to remain silent you nevertheless retain the right to call witnesses. If you remain silent you may not be cross-examined by the State Prosecutor and the Court may not put questions to you.

Q. : Do you understand so far?

A. : \_\_\_\_\_

\* The statement(s) you made at the beginning of the proceedings in terms of Section 115 Act 51 of 1977 and the statement(s) made by you during cross-examination is/are not evidence in your favour unless you repeat it in evidence or call witnesses to confirm those statements on your behalf.

\* Admissions you made at the beginning of the proceedings in terms of 112(1)(b) stand as proof of those facts but the exculpatory statement(s) that you have made up to now as well as the statement(s) made by you during cross-examination is/are not evidence in your favour unless you repeat it in evidence or call witnesses to confirm those statements on your behalf.

Q. : Do you understand this explanation?

A. : \_\_\_\_\_

Q. : Do you understand that you have as yet not given evidence?

A. : \_\_\_\_\_

Q. : Do you wish to testify?

A. : \_\_\_\_\_

Q. : Do you wish to call witnesses?

A. : \_\_\_\_\_

(\* Delete which is not applicable.)"

#### 4.3.4.2 *Case law and literature*

From case law it is clear that an established practice has evolved that presiding officers must inform accused persons of the procedural rights at the close of the case for the prosecution.<sup>92</sup> Not much guidance as to the specific form of the explanation is however found in case law.

In *R v Sibia*<sup>93</sup> Schreiner JA stated the following:

"...the accused must have his mind directed separately to the question whether he wishes to give evidence himself and whether he wishes to lead evidence of other persons. But consideration of the fact that the accused may well be an ignorant person unacquainted with court procedure has led those courts before which the question has been raised to interpret the provisions strictly against the Crown. On this view the portion of the sub-section with which we are concerned should be interpreted so as to require the accused be asked both whether he wishes to give evidence himself and, separately, whether he wishes to call any other witnesses."

The court referred to the case of *R v Read*<sup>94</sup> where Tindall J stated the following:

"(it was) desirable for magistrates in every case to ask the accused expressly whether he desires to give evidence himself under oath or to call witnesses."

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92. This practice became established long before the coming into operation of the interim Constitution and the Constitution.

93. 1947 (2) SA 50 (A) at 54.

94. 1924 TPD 718.

The court held that it had become established practice to explain these rights and that this practice should be maintained without relaxation.<sup>95</sup>

In *R v Nqubuka*<sup>96</sup> Dowling J set out the position as follows:

"The magistrate noted on record:

'Accused gives no evidence but states: 'I think I said what happened. Complainant and I fought and the bottle got broken. In struggle the bottle cut her head. Complainant is a very quarrelsome type. That is all'.

There is no note in the record that the magistrate warned or informed the appellant of the courses which are open to him at the close of the Crown case in regard to the question of whether he should give evidence on oath or merely make a statement from the dock not subject to cross-examination.

The Court, in the case of *Frans Mtebele v Rex*, decided on the 10th June, 1947, not reported, laid down a rule (when I say 'laid down a rule' I mean re-affirmed a rule') that it is the duty of a magistrate to give such explanation to an accused person of his position, and that it is desirable that the fact that such explanation had been given should be noted on record ...

The Appellant states, on oath, that he was not aware of the position in regard to the desirability of giving evidence on oath. He says that he has never been in a court of law before in his life, and denies that it was explained to him that an unsworn statement is practically valueless. He states that, had he known that, he would have given certain evidence on oath and been subjected to cross-examination."

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95. At 55.

96. 1950 (2) SA 363 (T) at 364.



The magistrate's reasons for the judgment are quoted as follows:

"The accused called no witnesses and gave no evidence. It is generally explained to all undefended natives through the interpreter about calling witnesses and giving evidence under oath, the value of which compared to unsworn statement, is explained."<sup>97</sup>

The court, however, found the reasons of the magistrate unacceptable and set the proceedings aside, ordering that the matter be re-tried before a different magistrate.<sup>98</sup>

In *S v Vezi*<sup>99</sup> the court referred to *Sibia's*<sup>100</sup> case and commented as follows:

"Apart from the statutory requirement to which I have referred, practice requires that an accused who is unrepresented at his trial should be afforded an explanation of the courses open to him at the close of the prosecution case, namely that he may give evidence on oath or make an unsworn statement from the dock, that if he decided upon the latter course he may not be cross-examined nor questioned by the court... To the explanation of these two courses I consider there should be added information that a third course is available to him, namely to remain silent if he so wishes... This is not a case of a mere omission to the record that the accused's rights were explained to her; that it is not a case of omission is clear from the response of the magistrate who convicted her - he was at a loss to know what legal rights she had at that stage. Presumably his apparent view that she had no legal right to be explained to her arose from the fact that she had pleaded guilty, but I consider that to be an ill-founded view."

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97. At 365.

98. At 365.

99. 1963 (1) SA 9 (N) at 11C-D and G-H.

100. *Supra*.

In the more recent decision of *S v Motaung*<sup>101</sup> it was stated:

"It should be unequivocally stated that it is imperative that an accused's right in terms of s151 of Act 51 of 1977, in respect of the adducing of evidence on behalf of the defence, be explained by the magistrate ...

Not only should this be done but the magistrate should see to it that the fact is properly recorded. This is a material part of the proceedings and cannot be omitted from the record- ..."

In *S v Modiba*<sup>102</sup> it was held that the explanation of an accused's rights ought to appear on the record with sufficient particularity to enable the court of review or appeal to make a judgment on the adequacy of the explanation.

The failure of a presiding officer to adequately explain the rights of an accused person, may constitute an irregularity serious enough to set aside a conviction.<sup>103</sup>

Regarding the use of standard or roneod forms, the courts have held the use of these forms are not irregular, as long as they contain all the relevant information that needs to be given to an accused.

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101. 1980 (4) SA 131 (T) at 133A.

102. 1991 (2) SACR 286 (T) at 286.

103. *R v Parmanand* 1954 (3) SA 833 (A).

In *S v Makhubo*<sup>104</sup> a roneod form that was used by the magistrate was found to be inadequate, in that it did not contain an explanation that the failure to testify under oath may be to the detriment of the accused.<sup>105</sup> The court held the continued use of the form be ceased, alternatively that the form be altered.<sup>106</sup> In *S v Pretorius*<sup>107</sup> the following was said regarding the use of these forms:

"Ek het volkome begrip daarvoor dat afgerolde vorms gebruik word om landdroste se skryfwerk te probeer beperk. Daarmee is in beginsel niks verkeerd nie. Wat egter belangrik is, is dat daar nie in die proses versuim word om 'n onverteengewoordigde beskuldigde *behoorlik en volledig* in te lig oor watter keuses hy het en wat die gevolge en/of implikasies van sy keuse is nie. Ek kry byna daaglik op hersiening met gevalle te doen waar ek aanvoel dat 'n beskuldige versuim om te getuig omdat hy meen dat hy 'klaar gepraat het' tydens sy pleitverduideliking of tydens sy kruisondervraging van die Staatsgetuies.

Dikwels is dit gevalle van 'n enkele Staatsgetuie en dikwels sou 'n skuldigbevinding nie kon gevolg het indien die beskuldigde bloot sy pleitverduideliking onder eed herhaal het. Dan wonder ek tot hoe 'n mate hy sy 'regte' aan die einde van die Staatsaak begryp het?"

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104. 1990 (2) SACR 321 (O).

105. Compare in this regard *S v Mahooa* 1991 (1) SACR 261 (T) at 265*b* where it was held that an accused should be informed that if he declines to testify, an adverse inference may be drawn against him.

106. At 322.

107. 1990 (2) SACR 519 (O) at 521*i*-522*a*.

The court pointed out that it could not give a general opinion regarding the use of standard forms, but emphasised that it remains the duty of the presiding officer to see to it that the undefended accused properly understands his rights. This function should be exercised with patience, so that justice is not only done, but also seen to be done.<sup>108</sup>

According to case law a further procedural explanation (and choice) should be explained to an undefended accused at the close of the case for the prosecution. This explanation must direct the accused's mind to the fact that he may apply for his discharge at the close of the case for the prosecution in terms of section 174 of the Criminal Procedure Act. The provisions of this section are as follows:

**"174 Accused may be discharged at the close of case for prosecution**

If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

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108. At 522*b*.

In *S v Zulu*<sup>109</sup> the court on review set aside a conviction and sentence where it appeared that the accused, an unsophisticated black woman against whom there was not a shred of evidence at the end of the case for the prosecution, had had her rights explained to her in such a way that she was invited to enter the witness-box and thereby fill the gaps in the State's case. The court remarked that a mere setting out of the various procedural alternatives without coupling it meaningfully to the case of the state was no explanation of an accused's rights: the purpose of the explanation was in fact to counteract the accused's lack of skill.<sup>110</sup>

In *S v Amerika*<sup>111</sup> the court remarked as follows:

"In the vast majority of cases which are heard in the magistrates' courts the accused are unrepresented and more than likely ignorant about the whole legal process and how it works. It is thus of fundamental importance to the proper administration of justice that the presiding officer, in a manner consonant with the demands of his office, take it upon himself to look after the interests of an unrepresented accused."

In *S v Zimmerie en 'n Ander*<sup>112</sup> it was held that a presiding officer should *mero motu* apply the provisions of section 174 where the accused is undefended.

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109. 1990 (1) SA 655 (T).

110. At 664A-C.

111. 1990 (2) SACR 480 (N).

112. 1989 (3) SA 484 (C) at 409C-D.

In the *Amerika*-case<sup>113</sup> it was held that the magistrate should *mero motu* have discharged the accused. The court commented that the explanation of the rights of the accused *in casu* was a "meaningless exercise". The rights were expressed in language "totally inappropriate to the situation when there was not one tittle of evidence against her". The court labeled the effort as "a tongue in cheek exercise calculated to inveigle the accused into going into the witness-box so that she could convict herself."<sup>114</sup>

In *S v Brown en 'n Ander*<sup>115</sup> the court discussed the nature and content of the explanation that should be afforded to an undefended accused regarding his constitutional right to refuse to testify in his own defence.<sup>116</sup> The court referred with approval to the views of Van der Merwe<sup>117</sup> that it might be unconstitutional for a trial court to warn an undefended accused that he has a right to testify or not to testify, but if he chooses not to testify the court might make an adverse inference against him. It is suggested by Van der Merwe that the undefended accused should be informed that he has a constitutional right to testify or to refuse to testify.

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113. *Supra*.

114. At 484j-485a.

115. 1996 (2) SACR 49 (NC) at 65a-g.

116. Compare section 25(3)(c) of the interim Constitution.

117. Van der Merwe SE "The constitutional passive defence right of an accused versus prosecutorial and judicial comment on silence: must we follow *Griffin v California*" *Obiter* (1994) at 1.

Should he however remain silent, the court will have to decide the case on the uncontroverted *prima facie* evidence furnished by the State. The court was of the opinion that this explanation should go further and that it should be added that if the case must be evaluated on uncontroverted State evidence, adverse consequences might be attributed to the accused. It should be emphasised that adverse inferences will not be drawn from the mere silence of the accused, but from the fact that the *prima facie* State evidence is uncontroverted.

Du Toit<sup>118</sup> comments that in order to ensure that the accused receives a fair trial, he should be informed by the presiding officer of these rights. He advances the following guidelines to consider:

- The record must indicate and prove that the accused's rights were explained to him;
- The accused should in appropriate cases be advised of his right to apply for a discharge at the conclusion of the State case;
- The adequacy of the explanation of his rights should appear from the record with adequate and satisfactory particularity;

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118. *op cit* at 22-3.

- The duties above rest on the judicial officer and should not be delegated to the interpreter;
- If roneod forms are used care should be taken to ensure that the forms contain the necessary explanations; and
- Generally a presiding officer should assist an unrepresented accused in the conduct of his case.

Kriegler<sup>119</sup> states that it is the duty of the presiding officer to guard against the helplessness of the undefended accused leading to injustice. In this regard it is stated:<sup>120</sup>

"Die beginsel is eenvoudig: daar moet gesorg word dat die beskuldigde se gebrekkige kennis van die reg en sy prosesse voldoende aangevul word om te verseker dat die verhoor inderdaad regverdig is én as sodanig ervaar word. Die toepassing is eintlik ook eenvoudig: die beskuldigde moet weet - en verstaan - wat sy regte op elke stadium van die verrigtinge is. Die mate van voorligting wat nodig is om dit te bewerkstellig, sal afhang van die besonderhede van die besondere geval ..."

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119. *op cit* at 376.

120. *op cit* at 376.



#### **4.3.5 *The right to address the court on the merits***

Both the accused and the prosecution have the right to address the court on the merits of the case. In this regard section 175 of the Criminal Procedure Act determines as follows:

**"175 Prosecution and defence may address court at conclusion of evidence**

(1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.

(2) The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address."

##### **4.3.5.1 *The content of the explanation and procedural choices available***

Section 175 affords no guidance as to the content of this explanation. There is also no standard form employed for this purpose in Port Elizabeth. The section merely holds that the accused may address the court. This address on the "merits" of the case normally will be in the form of arguments on the facts and the law applicable. For an undefended accused with no legal training, this right seems illusory.

#### 4.3.5.2 *Case law and literature*

In *R v Parmanand*<sup>121</sup> it was held that it constituted an irregularity to deprive an accused of the right to address the court.<sup>122</sup> In *S v Mabote and Another*<sup>123</sup> the right to address the court on the merits was labelled as a fundamental principle of our criminal law. Failure to afford this opportunity would result in the manifestation of a gross irregularity. In *S v Kwindu*<sup>124</sup> Liebenberg J held that the failure to afford an accused the opportunity to address the court before judgment is a gross irregularity which will result in the setting aside of the proceedings, unless it is clear that the accused was not prejudiced thereby or that the failure was due to his own fault or if it is clear that he had waived his right to address the court. The presiding officer must afford the accused the opportunity to address the court by enquiring from him whether he wishes to avail himself of his right to do so and must record the response of the accused. *In casu* the court held that there was nothing on the record to show that the accused had not been prejudiced by this irregularity or that the omission had been due to his fault or that he had waived his right to address the court. The proceedings were accordingly invalid.

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121. *Supra* at 839C.

122. Compare in this regard *S v Bresler* 1967 (2) SA 451 (A) at 455H.

123. 1983 (1) SA 745 (O).

124. 1993 (2) SACR 408 (V) at 411e-f.

In *S v Zingilo*<sup>125</sup> the court held that the right to a fair trial includes the right of an accused to address the trial court before judgment on the merits. Failure to afford an accused this opportunity would amount to a denial of the right to a fair trial as guaranteed by section 25(3) of the interim Constitution. *In casu* the conviction was set aside on review, without regard to the question of whether but for the irregularity the accused would inevitably have been convicted.

Didcott J was of the view in *S v Dlamini*<sup>126</sup> that section 175(1) of the Criminal Procedure Act and the *audi alteram partem* rule require that, at the conclusion of the evidence, the prosecutor address the court before the accused. *In casu* the accused addressed the court before the prosecutor. The court held that an irregularity had been committed.

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125. 1995 (9) BCLR 1186 (O) at 1189G.

126. 1992 (2) SACR 533 (N) at 534b-d.

#### **4.3.6 *The right to address the court before sentence***

The competency of the court to receive evidence on sentence is contained in section 274 of the Criminal Procedure Act, which reads as follows:

**"274 Evidence on sentence**

(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of sentence, and thereafter the prosecution may likewise address the court."

##### **4.3.6.1 *The content of the explanation and procedural choices available***

From the section it is clear that the accused has a choice whether to address the court on evidence received by it prior to sentence. The section does not clearly stipulate whether the accused has a right to testify or call witnesses before the passing of sentence.

Neither the interim Constitution, nor the Constitution contains any specific right to address the court before the imposition of sentence.

No specific standard form for the purposes of section 274 is used in the Port Elizabeth Magistrate's Courts.

However in the standard forms with the pleas of guilty in terms of section 112 subsections (a) and (b) of the Criminal Procedure Act, the following relevant part appears:<sup>127</sup>

"Rights explained to the accused. He understands.  
Accused elects to/not to testify under oath.  
Accused calls/does not wish to call witnesses.

Accused states in mitigation of sentence: \_\_\_\_\_"

#### 4.3.6.2 *Case law and literature*

In *S v Bresler*<sup>128</sup> it was held that it is a fundamental principle in both civil and criminal matters that every litigant should be given a fair opportunity of addressing the court, either himself or through his representative. The mere failure on the part of the court to hear argument on behalf of a party would not necessarily constitute a fatal irregularity. The court furthermore held that in terms of the 1955 Criminal Procedure Act<sup>129</sup> there was no legal right for an accused to address the court in mitigation of sentence, but that there was, nevertheless, a rule of practice whereby the defence is generally afforded an opportunity to address in mitigation before sentence is passed.<sup>130</sup>

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127. These forms are attached as "Form 4" and "Form 5".

128. *Supra* at 355B-G.

129. Act 56 of 1955.

130. At 456D-E.

This statement of the law applicable was approved and confirmed in *S v Booysen and Another*.<sup>131</sup> In *S v Leso and Another*<sup>132</sup> it was held that although an accused does not have a statutory right to address the court before sentence, a mandatory rule of practice had developed in this regard. The mere fact that a convicted person was not afforded an opportunity to address the court prior to sentencing, albeit *per incuriam*, will amount to an irregularity.

In *R v Shuba*<sup>133</sup> the court pointed out that it is desirable that facts in mitigation should be proved in the ordinary manner and that the State should be in a position to cross-examine, if necessary.

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131. 1974 (1) SA 333 (C) at 334H.

132. 1975 (3) SA 694 (A) at 695G-H.

133. 1958 (3) SA 844 (C) at 845A.

In *S v Taylor*<sup>134</sup> the following guidelines were laid down regarding the duties of a court when an undefended accused qualifies for the imposition of a compulsory sentence:

"...when sentencing an undefended convicted person who qualifies for a compulsory sentence, the trial court must -

(a) inform the convicted person that he is entitled to lay before the court evidence of circumstances which if accepted may persuade the court to impose a lighter sentence than the compulsory sentence;

(b) ask the convicted person whether he wishes to lead such evidence, or make submissions, to persuade the court to impose such lighter sentence;

(c) whether the convicted person leads evidence and/or makes submissions or not, *mero motu* consider whether mitigating circumstances exist, and if it finds that they do exist in the particular case; and where the convicted person does not lead evidence or make submissions, question him in order to elicit whether such circumstances exist;

(d) in all cases, record in the record of proceedings whether or not in its opinion such circumstances exist, and if it finds that they do exist, state what they are. It is not sufficient, in my view, only to enter the circumstances upon the record if and when such circumstances have been found to exist. The court should record that it has considered the matter ..."

In the case of undefended accused persons it was decided in *S v Sithole*<sup>135</sup> that a duty rests on presiding officers to gain evidence before sentence, should none emanate from the accused.

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134. 1972 (2) SA 307 (C) at 312C-F.

135. 1969 (4) SA 286 (N) at 287G-H and 288E-G.

The court rightly pointed out that these mitigating factors could be obtained by asking a few pertinent questions.

The position under the 1955 Criminal Procedure Act was changed with the implementation of the current Criminal Procedure Act. In *S v Louw*<sup>136</sup> it was stated that section 274(2) of the Criminal Procedure Act makes it imperative for the court to afford the accused an opportunity to address it before sentence. The rule of practice thus became a right.

In *S v Kiewiets*<sup>137</sup> it was held that there is a duty on a presiding officer to try and elicit such extenuating circumstances as he can from an undefended accused. This duty should however not be used to obtain aggravating circumstances, as it would not amount to just and fair treatment.

In *S v Masina and Others*<sup>138</sup> the accused refused to participate in the proceedings. Application was made by counsel for the defence, on behalf of the family of the accused, to present evidence in extenuation on behalf of the family. The State alleged that there is no authority for such a procedure to be adopted.

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136. 1978 (1) SA 459 (C) at 460A-B.

137. 1977 (3) SA 882 (O) at 883.

138. 1990 (1) SACR 390 (T) at 391a-f.



The court however held that it would be in the interests of justice that both sides be heard. The family of the accused had an interest based on blood relationship to the accused and the evidence was of vital importance. The court accordingly allowed the evidence to be led.

As to the way in which evidence before sentence should be placed before the court, Du Toit<sup>139</sup> sets out the present position of our law as follows:

- It is highly desirable that mitigating or aggravating factors are placed before the court through evidence under oath, as such evidence can be tested in cross-examination and will place the court in a position to make a decision based on facts;
- In order to receive such evidence the opportunity will always be afforded the parties to call witnesses and lead evidence;
- Mitigating or aggravating facts can also be placed before the court from the bar or by way of *ex parte* statements, but will not weigh more than mere argument, unless admitted by the other party. When admitted, the statements will be afforded the same weight as accepted evidence under oath;

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139. *op cit* at 28-2.

- Where the court doubts *ex parte* statements, the party will be informed accordingly, and afforded the opportunity to present evidence; and
  
- In *S v Martin*<sup>140</sup> it was decided that in determining sentence, particularly for more serious crimes, no question to the accused is more important than "why did you do it?" An accused person therefore assumes some risk by not testifying in that no answer to that question would then be forthcoming and in the absence of an answer, the Court may deduce that the accused acted without reason or remorse, thereby leading to a harsher sentence than what may have been appropriate.

In the following paragraph the actual procedural explanations afforded to the subjects in the sample cases attended in this research project, as well as the paraphrased responses of the subjects, are transcribed.

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140. 1996 (1) SACR 172 (W).

#### 4.4 *Empirical data gathered by means of the field research*

In this paragraph, transcriptions of the empirical data gathered in the field research as set out in chapter 2 above, will be set out. In each of the following sub-paragraphs, the transcription of recorded data in each sample case will be set out.

Firstly, the personal details of the subject<sup>141</sup> are set out. This is followed by the details of the case. The transcription of the actual recording then follows. Each procedural explanation is numbered separately. The following abbreviations are used:

- "PO" stands for "presiding officer";
- "R" stands for "researcher"; and
- "S" stands for "subject".

Where specific important observations are noted, these appear in square brackets and do not form part of the recording.

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141. The accused in the particular case.

**4.4.1 Sample case 1**

**4.4.1.1 Personal details**

- (a) Name of accused: Mark Hobbs
- (b) Sex: Male
- (c) Age: 23 years
- (d) Home language: Afrikaans
- (e) Education level: Std.5
- (f) Number offender: First

**4.4.1.2 Case details**

- (a) Case number: 30/69/98
- (b) Charge: Robbery
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 08 April 1998

#### 4.4.1.3 *Transcription of recording*

##### 4.4.1.3.1 *Procedural explanation 1: The explanation of plea*

PO: Op die stadium weet ek niks van die saak nie, so ek gee vir u nou geleentheid as u wil om kortliks te verduidelik wat u verdediging gaan wees. U is nie verplig om dit te doen nie, maar dan kry ek 'n beter agtergrond van die saak. Wil u vir my kortliks vertel voor ons begin met die getuienis wat jou verdediging gaan wees?

S: Die edele het my gevra ek moet 'n klein stukkie sê wat het gebeur. Toe het ek vir hom gesê die ding het plaasgevind op 'n Vrydag oggend.

R: Wat het hy vir jou gesê kan jy doen?

S: Die edele het gesê hy weet nie wat aangegaan het nie. Ek moet verduidelik 'n klein stukkie wat aangegaan het.

##### 4.4.1.3.2 *Procedural explanation 2: The right to cross-examination*

PO: Kyk u kry nou kans om die getuie onder kruisverhoor te neem. Dit beteken jy behoort aan hom vrae te vra waar u nie met hom saamstem nie en dan kan u sodanige ander vrae vra as wat u mag goed dink.

S: Ek moet vir daai mannetjie vra wat het ek vir hom gemaak.

R: Is dit wat jy verstaan?

S: Ja, meneer.

**4.4.1.3.3 *Procedural explanation 3: Rights at the close of the case for the prosecution***

PO: Goed, jy het nou die getuienis teen jou gehoor. Wat jy sover gesê het was om 'n onbeëdigde verklaring te maak, en stellings aan die getuies. Normaalweg is 'n onbeëdigde verklaring nie soveel werd as getuienis onder eed nie. U het nou kans om self daar te gaan getuig en vertel wat gebeur het en dan kan die aanklaer vir jou onder kruisverhoor neem. U kan ook getuies roep en die aanklaer kan hulle ook vrae vra as hy wil. Die alternatief is u getuig nie self nie en u roep nie getuies nie, maar dan moet ons op daardie getuienis onder eed besluit of u skuldig is of nie. Wil u kom vertel wat gebeur het? Het jy getuies wat jy wil roep of nie?

R: Wat het die landdros nou verduidelik?

S: Ek kan onder eed gaan getuig en ek kan getuies roep. Ek sê toe ek het nie getuies nie.

**4.4.1.3.4 Procedural explanation 4: Right to address the court on the merits**

PO: Het jy nou gehoor wat die aanklaer gesê het. Hy sê u getuienis moet verwerp word en die staat se getuienis moet aanvaar word.

U kan nou vir die hof toespreek as u wil om verdere punte onder die hof se aandag te bring. Is daar iets wat u wil sê?

S: Nee.

R: Wat het die landdros nou gesê?

S: Die edele vra of daar nog iets is wat ek wil sê.

**4.4.1.3.5 Procedural explanation 5: Pre-sentence rights**

PO: Ons gaan nou vir u kans gee om getuienis ter versagting aan te voer.

U kan weer getuienis onder eed kom gee en my vertel hoekom u dink daar is versagting of u kan ook getuies roep of u kan die hof net vanwaar u staan toespreek. Nou wil u versagting aanvoer meneer?

R: Wat kan jy nou voor vonnis doen?

S: Die edele het gesê ek moet my getuies saambring.

R: Nee, wat kan jy nou voor vonnis doen? [No answer.]

R: Kan jy onthou?

S: Nee.

[The court proceeded by *mero motu* eliciting extenuating circumstances from the accused.]



#### 4.4.2 *Sample case 2*

##### 4.4.2.1 *Personal details of subject*

- (a) Name of accused: Charles Bernardus
- (b) Sex: Male
- (c) Age: 36 years
- (d) Home language: Afrikaans
- (e) Education level: Std.4
- (f) Number offender: Multiple [The official list of previous convictions was not available, but the accused informed the researcher that he was in "trouble" on a number of occasions.]

##### 4.4.2.2 *Case details*

- (a) Case number: 30/240/98
- (b) Charge: Assault
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 09 April 1998

#### 4.4.2.3 *Transcription of recording*

##### 4.4.2.3.1 *Procedural explanation 1: The explanation of plea*

PO: Jy het nou onskuldig gepleit. Kyk ek weet niks van die saak af nie ek hoor maar nou van die saak. Ek bied nou vir jou die geleentheid om as u wil, kortliks vir my te vertel wat u verdediging gaan wees. U is nie verplig om op hierdie stadium te verduidelik nie, maar dit help dat ons weet watter feite u in geskil plaas.

S: Ja, meneer.

PO: Wil jy enige verduideliking gee op hierdie stadium?

S: Dis redelik meneer.

PO: Goed wat wil jy sê?

S: Die landdros het mos vir my gesê, ek moet altans, net kortliks, verduidelik vir die hof watse rede pleit ek onskuldig.

R: Is jy verplig om dit te doen?

R: Ja, meneer. [The same question is asked, with the same answer supplied.]

#### **4.4.2.3.2 *Procedural explanation 2: The right to cross-examination***

PO: Jy kan hom nou onder kruisverhoor neem. Dit beteken jy behoort aan hom vrae te vra, waar jy nie met hom saamstem nie, en dan kan jy sodanige ander vrae vra, as wat jy graag wil vra.

R: Sê net vir my wat het die landdros nou vir jou verduidelik?

S: Die landdros het gesê, meneer, ek kan vrae vra, ek het die geleentheid om vrae te vra waar ek nie mee saamstem nie.

#### **4.4.2.3.3 *Procedural explanation 3: Rights at the close of the case for the prosecution***

PO: Wat jy sover gedoen het, jy het 'n pleitverduideliking gegee - jy het onskuldig gepleit. Gewoonlik dra dit nie soveel gewig as getuienis onder eed nie. Daar is verskille tussen u en die getuies. Ek gee u nou kans om self onder eed te gaan getuig, dan kan die aanklaer u onder kruisverhoor neem.

U kan ook getuies roep, dan kan die aanklaer hulle ook onder kruisverhoor neem. Die alternatief is, u is geregtig om te swyg - u hoef nie te getuig nie, u hoef nie getuies te roep nie, u kan u saak sluit. Dan moet die saak beslis word op daardie getuienis wat onder eed voor ons gegee is. Verstaan u dit?

R: Sê vir my wat het die landdros nou verduidelik?

S: Die landdros sê ek het 'n kans om onder eed te getuig oor die saak.

R: Wat nog?

S: En ek kan getuies roep as ek enige getuies wil roep. En ek moet onder eed gaan getuig, hoekom, want dan glo die hof wat die klaers getuig het. En meneer sien ek moet vanoggend onder eed gaan sweer.

#### **4.4.2.3.4 Procedural explanation 4: Right to address the court on the merits**

PO: U het nou die kans om die hof toe te spreek soos die aanklaer gedoen het om die getuienis te ontleed.

[The presiding officer omitted to stop the proceedings and switch off the official court recorder. The subject was acquitted and left the courtroom immediately thereafter. It was thus not possible to interview the subject.]

**4.4.3 Sample case 3**

**4.4.3.1 Personal details of subject**

- (a) Name of accused: Edwin Lesley Van Wyk
- (b) Sex: Male
- (c) Age: 26 years
- (d) Home language: Afrikaans
- (e) Education level: Std.7
- (f) Number offender: Third

**4.4.3.2 Case details**

- (a) Case number: 30/1576/97
- (b) Charge: Malicious Injury to Property
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 14 April 1998

#### 4.4.3.3 *Transcription of recording*

##### 4.4.3.3.1 *Procedural explanation 1: The explanation of plea*

PO: Kyk ek en die assesore weet niks van die saak nie, behalwe dit wat in die klagstaat staan nie. Jy kry nou kans om vir my te vertel wat u verdediging gaan wees en aan te dui watter bewerings u nie in geskil plaas nie. U hoef nie so 'n verklaring te maak nie. Is u bereid om so 'n verklaring te maak?

R: Sê net gou vir my wat het die landdros nou vir jou verduidelik?

S: Die landdros het gevra of ek 'n verklaring wil maak? Nou waaroor gaan die verklaring? Moet ek nou weer my verklaring maak wat ek daai tyd gegee het? My eerste verklaring?

R: Die landdros sê jy kan 'n verklaring maak. Wat nog?

S: Sê net hy moet asseblief weer vir my verduidelik.

PO: Gaan jy kortliks vir my vertel?

S: Ek wil net dieselfde verklaring maak wat ek die laaste keer gemaak het.

PO: Jy het nog geen verklaring gemaak nie. Wat jy in die polisdossier gesê het, ek weet niks wat daarin staan nie. Ek weet nie wat jy daar gesê het nie. Ek wil net weet of jy erken jy het die goed gebreek, of daar 'n rede was, of jy ontken dat jy dit gebreek het?

S: Edelaagbare ek het dit gebreek.

PO: En die rede?

#### **4.4.3.3.2 Procedural explanation 2: The right to cross-examination**

PO: Kyk, jy kry nou kans om die getuie onder kruisverhoor te neem. Dit beteken u behoort aan haar vrae te vra, waar u nie met haar saamstem nie en dan kan u sodanige ander vrae vra.

R: Wat het die landdros nou verduidelik?

S: Die landdros het gesê ek het die reg om die getuie vrae te vra met dinge wat ek nie mee saamstem nie moet ek haar terug vra en dit is dit.

**4.4.3.3.3 Procedural explanation 3: Rights at the close of the case for the prosecution**

PO: Meneer u het nou die getuienis teen u gehoor. Wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan die getuie gestel het. Omdat dit nie onder eed gewees het nie, dra dit gewoonlik nie so baie gewig nie - so baie werd nie - as getuienis onder eed nie. U het nou 'n keuse, u kan - u is geregtig om stil te bly.

Met ander woorde u het niks te sê nie of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem. U kan ook getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem. Die ander alternatief is, u roep nie getuies nie, u getuig nie self nie, u sluit u saak en dan moet ons die saak beoordeel volgens die getuienis wat reeds gegee is.

S: Die landdros het nou vir my gesê as ek getuies het, dan kan ek getuies in die saak in roep. Ek het getuies. Of ek kan niks sê nie. En dan word die saak onder kruisverhoor geroep. Ek het getuies.



**4.4.3.3.4 Procedural explanation 4: The right to address the court on the merits**

PO: Goed die aanklaer gaan die hof toespreek, jy moet nou luister en dan kan jy dieselfde doen sodra die aanklaer klaar is. [The prosecutor addresses the court.] Jy kry nou die kans om argumente aan die hof voor te lê hoekom jy nie skuldig is nie.

S: Die landdros het gesê ek kan dinges in die hof, hoekom ek die ruit uitgegooi het en waarom, hoekom ek die ruite uitgegooi het en waarom die argumente van die hof. Hulle gaan my mos nou vra.

**4.4.3.3.5 Procedural explanation 5: Pre-sentence rights**

PO: Ek gaan jou nou kans gee om getuienis ter versagting aan te voer. Vir daardie doel kan jy getuienis onder eed gee, getuies roep of die hof net toespreek. U het reeds te kenne gegee u is bereid om die skade te betaal. Lyk vir my dit is ongeveer so R30,00. Goed jy kan nou praat oor vonnis?

S: Die landdros het my nou gevra het ek getuienis ter versagting en ek het mos nou gesê ek het. Ek sal hulle terug betaal en daai. Ek het die reg om te vra vir versagting.

#### **4.4.4 Sample case 4**

##### **4.4.4.1 Personal details**

- (a) Name of accused: Romeo Jagers
- (b) Sex: Male
- (c) Age: 18 years
- (d) Home language: Afrikaans
- (e) Education level: Std.7
- (f) Number offender: Third

##### **4.4.4.2 Case details**

- (a) Case number: 30/199/98
- (b) Charge: Assault with intent to do grievous bodily harm
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 16 April 1998

**4.4.4.3      *Transcription of recording***

**4.4.4.3.1    *Procedural explanation 1: Explanation of plea***

[In this case the accused denied from the outset that he had stabbed the complainant and the presiding officer did not ask for an explanation of plea.]

**4.4.4.3.2    *Procedural explanation 2: Right to cross-examination***

PO: Jy het nou die geleentheid om die getuie onder kruisverhoor te neem. Dit beteken jy behoort aan haar vrae te vra waar u nie met haar saamstem nie en dan kan u ook sodanige ander vrae vra as wat u wil.

R: Okay, sê net vir my wat het die magistraat nou vir jou verduidelik?

S: Hy het nou gesê ek moet haar vrae vra as ek nie saamstem nie.

R: Is dit al?

S: Hmm.

**4.4.4.3.3 *Procedural explanation 3: Rights at the close of the case for the prosecution***

PO: U het die getuienis teen u gehoor. Wat u sover gedoen het was nie onder eed nie - u het nie gesweer dis die waarheid nie. U het onskuldig gepleit, 'n verduideliking gegee en deur middel van u vrae ook aangedui dat u onskuldig pleit. Gewoonlik is 'n onbeëdigde verklaring nie van soveel waarde as getuienis onder eed nie. U kry nou kans om self onder eed te gaan getuig wat gebeur het en die aanklaer kan u onder kruisverhoor neem, dieselfde wat u met die getuies gedoen het. U kan ook getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem. Die alternatief is, u getuig nie, u roep nie getuies nie, maar dan moet ons die saak beoordeel volgens die getuienis onder eed.

R: Wat het die landdros nou vir jou verduidelik?

S: Die landdros het gesê ek moet nie getuig nie, en ek moet stilbly en getuienis gaan kry.

[The accused did in fact testify, because the presiding officer asked him again whether he wishes to testify and tell his story.]

**4.4.4.3.4 Procedural explanation 4: Right to address on the merits**

PO: Jy kry nou die kans om die hof toe te spreek op die meriete van die saak. Dit is of jy skuldig is of onskuldig en die getuienis te ontleed.

R: Wat het die landdros nou gesê?

S: Ek kry kans om te praat of ek skuldig of onskuldig is.

**4.4.4.3.5 Procedural explanation 5: Pre-sentence rights**

PO: Goed u kry nou kans om getuienis ter versagting aan te voer. U kan dit doen deur middel van getuienis onder eed oor u persoonlike omstandighede te vertel. U kan ook getuies roep of u kan net die hof toespreek deur te sê watter wil u graag hê die hof moet in aanmerking neem.

R: Wat het die landdros nou verduidelik?

S: Ek kan 'n getuienige (sic) opbring, of ek kan die getuiene vrae vra.

R: Oor wat? [Accused pulls up his shoulders.]

#### **4.4.5 Sample case 5**

##### **4.4.5.1 Personal details**

- (a) Name of accused: Craigh Thyssen
- (b) Sex: Male
- (c) Age: 23 years
- (d) Home language: Afrikaans
- (e) Education level: Std.10
- (f) Number offender: First

##### **4.4.5.2 Case details**

- (a) Case number: 30/217/98
- (b) Charge: Possession of a fire-arm whilst under the influence of an intoxicating substance
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 17 April 1998

#### 4.4.5.3 *Transcription of recording*

##### 4.4.5.3.1 *Procedural explanation 1: explanation of plea*

PO: Goed, op hierdie stadium weet ek niks van die saak nie. U kan kortliks as u wil, maar dit is nie nodig nie, kan u vir ons net verduidelik wat die grondslag van u verdediging gaan wees. Wil u verduidelik?

S: Ja.

R: Wat het die landdros nou vir jou verduidelik?

S: Hy weet nie presies wat die klag is wat gelê is nie - die presiese klag, so die hantering. Ek verstaan self nie wat die klag is nie.

R: Jy het gesê jy gaan onskuldig pleit, wat kan jy dan doen?

S: Ek wil myself verdedig deur te sê wat gebeur het. Dis waarom ek nie 'n prokureur nodig het nie, want wat ek sê gaan net die waarheid is.

[The court then proceeded to ask the accused questions in terms of section 115.]

PO: Ek is geregtig om vrae aan u te stel, maar u is geregtig om te weier om daarop te antwoord as u wil.

R: Wat het die landdros gesê?

S: Ek kan weier om te antwoord op vrae wat gevra word.

R: Waaroor is die vrae?

S: Basies seker oor wat gebeur het die aand - presies wat gebeur het. Ek is bereid om presies te sê wat gebeur het.

#### **4.4.5.3.2 *Procedural explanation 2: Right to cross-examination***

PO: U het nou die getuienis teen u gehoor. U kry nou die kans om die getuie onder kruisverhoor te neem. Dit beteken u behoort vir hom vrae te vra waar u nie met hom saamstem nie. En dan kan u sodanige ander vrae vra as wat u wil.

R: Wat het die landdros nou verduidelik?

S: Ek kan vrae vra aan hom en dis nou kruisverhoor wat gaan plaasvind en op enigiets waar ek met hom wil verskil kan ek nou die volgende vrae vra.



**4.4.5.3.3 Procedural explanation 3: Rights at the close of the case for the prosecution**

PO: Goed, nou gaan ek vir u verduidelik dis die staat se saak. Kyk wat u sover gedoen het was nie onder eed gewees nie. U het onskuldig gepleit en 'n pleitverduideliking gegee. U kry nou die kans om self daar onder eed getuienis te gaan aflê en dan kan die aanklaer u vrae vra. U kan ook getuies roep en dan word dieselfde proses herhaal. Of u kan stilbly, maar dan is ons - moet ons die saak beslis op die getuienis onder eed.

R: Wat het die landdros nou verduidelik?

S: Ek gaan nou 'n kans kry om my storie te verduidelik, en 'n ... wel dit is basies dit. Dat dit onder eed gaan wees, die aanklaer gaan vir my vrae vra. Dieselfde gaan gebeur wat nou gebeur het. Konstabel Kahn kan vir my vrae vra en ek vir hom van my kant af.

[The state witness, Constable Kahn was in fact still sitting in court. The subject indeed addressed his evidence to the constable and even directed a question at him. He was in fact of the opinion that he could put questions to the state witness and *vice versa*.]

**4.4.5.3.4 Procedural explanation 4: Right to address on the merits**

PO: U kry nou kans om self die hof toe te spreek - nie om die getuienis te herhaal nie - en kommentaar lewer oor hoe die staat se getuie getuig het.

R: Wat het die landdros nou verduidelik?

S: Ek kan die bank benader - maar nie weer getuies gee nie - of sê wat ek alreeds gesê het nie.

**4.4.6 Sample case 6**

**4.4.6.1 *Personal details of subject***

- (a) Name of accused: Michael Pietersen
- (b) Sex: Male
- (c) Age: 26 years
- (d) Home language: Afrikaans
- (e) Education level: Std.8
- (f) Number offender: First

**4.4.6.2 *Case details***

- (a) Case number: 29/543/98
- (b) Charge: Assault with intent to cause grievous bodily harm
- (c) Language of proceedings: Afrikaans
- (d) 13 July 1998

#### 4.4.6.3 *Transcription of recording*

##### 4.4.6.3.1 *Procedural explanation 1: Explanation of plea*

PO: Jy is geregtig om 'n verduideliking te gee oor die grondslag van jou verdediging. Jy kry nou kans, want ons weet nie waarom die saak gaan nie. As jy wil kan jy nou kortliks vertel wat gebeur het. Jy moet nou net kortliks verduidelik, jy gaan later kans kry om in detail te verduidelik.

R: OK voor jy begin, wat het die landdros nou verduidelik vir jou?

S: Ek kan kortliks verduidelik hoekom ek onskuldig pleit.

R: En hoef jy dit te doen?

S: Nee, ek kan nie gedwing word nie.

##### 4.4.6.3.2 *Procedural explanation 2: Right to cross-examination*

PO: Jy kry nou kans om haar onder kruisverhoor te neem. Dit beteken jy behoort aan haar vrae te vra waar jy nie met haar saamstem nie. En jy kan sodanige ander vrae vra wat jy wil.

R: Wat het die landdros nou vir jou verduidelik?

S: Die hof het verduidelik ek het die geleentheid om die klaer vrae te vra waar ek nie met haar saamstem nie.

**4.4.6.3.3 *Procedural explanation 3: Rights at the close of the case for the prosecution***

PO: U het die getuienis teen u gehoor. U weergawe en u ma se weergawe verskil. Wat u sover gedoen het - die vrae wat u gevra het - die verduideliking wat u gegee het was nie onder eed nie. Normaalweg dra dit nie so baie gewig as getuienis onder eed nie. U kry nou kans om te getuig onder eed, getuies te roep en dan kan die aanklaer u onder kruisverhoor neem. Die alternatief is, u getuig nie, u roep nie getuies nie en u sluit u saak. Maar dan moet ons die saak beoordeel volgens die getuienis wat reeds gegee is.

R: Wat het die landdros nou verduidelik?

S: Die landdros het verduidelik wat ek nou gevra het aan die klaer is nie eintlik onder eed afgelê nie. Ek gaan nou geleentheid kry om dit wettig te bevestig en dat die magistraat my gaan ondervra volgens die klag teen my. En dat ek kan getuies roep. En die straf gaan uitgedien word volgens die getuies.

**4.4.6.3.4 Procedural explanation 4: Right to address the court on the merits**

PO: Die aanklaer sê nou ek moet u ma se getuienis aanvaar. U het geluister na sy argument. U kan nou self die hof toespreek en argumente aanvoer waarom ons u getuienis moet aanvaar en nie u ma s'n nie.

R: Wat het die landdros nou gesê?

S: Ek kan die hof "explain" hoekom die hof nou nie my ma moet glo nie.

**4.4.6.3.5 Procedural explanation 5: Pre-sentence rights**

PO: U kry nou kans om getuienis ter versagting aan te voer. U kan onder eed getuig en getuies roep, of die hof net toespreek. Die aanklaer kan aandui as hy die feite betwis.

R: Wat kan jy nou doen?

S: Ek kry 'n kans om vir versagting te pleit. Ek kan getuienis roep of ek kan net die hof toespreek.

**4.4.7      *Sample case 7***

**4.4.7.1    *Personal details of subject***

- (a) Name of accused: Clive Arries
- (b) Sex: Male
- (c) Age: 34 years
- (d) Home language: Afrikaans
- (e) Educational level: Std. 6
- (f) Number offender: Second

**4.4.7.2    *Case details***

- (a) Case number: 30/875/98
- (b) Charge: Theft
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 18 August 1998

#### 4.4.7.3 *Transcription of recording*

##### 4.4.7.3.1 *Procedural explanation 1: Explanation of plea*

PO: Nou goed, as jy wil kan jy 'n verduideliking gee wat sê hoekom jy onskuldig pleit. Jy is nie verplig om dit te doen nie. Verstaan jy dit?

S: Ja.

R: Wat het die landdros nou gesê?

S: Die landdros het gesê dit is nie nodig om ... Hy het gesê ek moet net sê wat het gebeur daai oggend. En ek gaan eerder nou sê: Daai oggend [Researcher stops subject from continuing]

R: En jy sê dit is nie nodig om te sê nie, maar jy kan as jy wil?

S: Ek sal dit so stel, meneer.

##### 4.4.7.3.2 *Procedural explanation 2: Right to cross-examination*

PO: Jy kry nou kans om die getuie onder kruisverhoor te neem. Dit beteken u behoort aan hom vrae te vra waar u nie met hom saamstem nie en dan kan u sodanige ander vrae vra as wat u wil vra.



R: Wat het die landdros nou verduidelik?

S: Die landdros het gesê ek moet enige vrae vra om te kyk of dit ooreenstem.

**4.4.7.3.3 *Procedural explanation 3: Rights at the close of the case for the prosecution***

PO: U het die getuienis teen u gehoor. Wat u sover gedoen het, het u nie voor gesweer nie. U het onskuldig gepleit en 'n pleitverduideliking gegee. Gewoonlik dra so 'n onbeëdigde verklaring nie baie gewig by die hof nie. U kry nou kans om self te getuig en getuies te roep. Die aanklaer kan u dan onder kruisverhoor neem. Die alternatief is, u getuig nie, u roep nie getuies nie en u sluit u saak. Maar dan moet ons die saak beoordeel op die getuienis wat reeds gelewer is.

R: Wat het die landdros nou gesê?

S: Die landdros het gesê ek het nie getuies nie en ek moet myself verdedig...

R: Wat nog?

S: Die landdros het dan so baie goed gesê, ek kan nie onthou nie...

**4.4.7.3.4 *Right to address the court on the merits***

PO: Jy kan nou die hof toespreek oor wie se getuienis ek moet glo, joune of die staatsgetuies en sodanige ander argumente aanvoer.

R: Wat het die landdros nou verduidelik?

S: Hom getuies [points to prosecutor] of my getuies ... maar my getuie is nog in die werk. Ek sê hom nog daai oggend....[Researcher stops subject from continuing.]

**4.4.8 *Sample case 8***

**4.4.8.1     *Personal details of subject***

- (a) Name of accused: Alberto Fernando Strauss
- (b) Sex: Male
- (c) Age: 18 years
- (d) Home language: Afrikaans
- (e) Educational level: Std. 7
- (f) Number offender: Second

**4.4.8.2     *Case details***

- (a) Case number: 30/473/98
- (b) Charge: Robbery
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 18 August 1998

**4.4.8.3     *Transcription of recording***

**4.4.8.3.1 *Procedural explanation 1: Explanation of plea***

PO: Goed, op hierdie stadium weet ek en die twee assessore glad nie waaroor die saak gaan nie. Jy kan as jy wil, u is nie verplig nie, dan kan u kortliks 'n verklaring maak om te sê hoekom u onskuldig pleit.

R: Wat het die landdros nou vir jou verduidelik?

S: Ek moet nou praat oor wat gebeur het...

**4.4.8.3.2 *Procedural explanation 2: Right to cross-examination***

PO: U het nou die getuie se getuienis gehoor. U kry nou kans om die getuie onder kruisverhoor te neem. Dit beteken u behoort aan haar vrae te vra waar u nie met haar saamstem nie, en dan kan u ook sodanige ander vrae vra as wat u wil.

R: Wat het die landdros nou verduidelik?

S: Hy het verduidelik dat ek moet vrae vra waar hy nie met my saamstem nie. Ek wil nou mos sê hoe dit gekom het ...

**4.4.8.3.3 *Procedural explanation 3: Rights at the close of the case for the prosecution***

PO: Jy kry nou kans om self te getuig onder eed en om getuies te roep, dan kan die aanklaer hulle onder kruisverhoor neem. Wat u sover gedoen het was nie onder eed gewees nie. U het onskuldig gepleit en 'n verduideliking gegee. Gewoonlik dra dit nie soveel gewig as getuienis onder eed nie. As jy nie wil getuig nie, dit is u keuse, en nie getuies roep nie, en u saak sluit... maar dan moet die saak beslis op die getuienis wat onder eed gegee is.

R: Wat het die landdros nou verduidelik? [Subject hesitates] Wat het hy gesê kan jy alles nou doen?

S: Ek moet self getuig en as ek enige getuie het moet ek hulle ook roep.

#### **4.4.8.3.4 *Procedural explanation 4: Right to address the court on the merits***

PO: Goed, jy kry nou die laaste kans om argumente aan die hof voor te lê oor die geloofwaardigheid van die getuies ...

R: Wat het die landdros nou vir jou gesê?

S: Ek het nie verstaan nie.

#### **4.4.8.3.5 *Procedural explanation 5: Pre-sentence rights***

PO: Goed, jy kry nou kans om getuienis oor versagting aan te voer. Jy kan getuienis onder eed gee, getuies roep of die hof toespreek.

R: Wat het hy gesê kan jy nou doen?

S: Ek kan kans kry om getuies te roep.

**4.4.9.1      *Personal details***

- (a) Name of accused: Joseph Jones
- (b) Sex: Male
- (c) Age: 38 years
- (d) Home language: Afrikaans
- (e) Number offender: Fourth

**4.4.9.2      *Case details***

- (a) Case number: 29/1048/98
- (b) Charge: Malicious injury to property and assault with intent to do grievous bodily harm
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 15 September 1998

**4.4.9.3      *Transcription of recording***

**4.4.9.3.1 Procedural explanation 1: Explanation of plea**

PO: Ek en die assessore weet niks van die saak af nie. U kan nou as u wil vir ons kortliks vertel wat u verdediging gaan wees. Maar u is nie verplig om dit te doen nie. Ons kan ook vir u vrae vra oor watter feite in geskil is, maar u is nie verplig om te antwoord nie.

R: Wat het die landdros nou vir jou verduidelik?

S: Die landdros het nou verduidelik dat ek nie verplig is om vrae te antwoord nie, as ek dit nie wil beantwoord nie. Maar dat ek onskuldig is...

**4.3.9.3.2 Procedural explanation 2: The right to cross-examination**

PO: Kyk, u het nou die getuienis gehoor. U kry nou kans om die getuie onder kruisverhoor te neem. Dit beteken u behoort aan haar vrae te vra waar u nie met haar saamstem nie. En dan kan u sodanige ander vrae vra as wat u wil.

R: Wat het die landdros nou vir jou verduidelik?

S: Die landdros het verduidelik dat ek kan vrae vra as dit nie so is nie.



**4.3.9.3      *Procedural explanation 3: Rights at the close of the case for the prosecution***

PO: Wat jy sover gedoen het was nie onder eed nie en daarom dra dit ook nie baie gewig nie. Jy het onskuldig gepleit en 'n verduideliking gegee. En jy kry nou kans om te vertel wat gebeur het en dan kan die aanklaer jou vrae vra. Jy kan getuies roep en dan kan hulle ook kruisverhoor word. Die alternatief is, jy roep nie getuies nie, jy getuig nie en jy sluit jou saak, maar dan moet ons die saak beslis volgens die staat se getuienis wat reeds gegee is.

R: Sê vir my wat het die magistraat nou verduidelik?

S: Die magistraat het vir my gevra, of ek wil getuienis roep. Ek het nie getuies nie. Dan sal ek die saak maar afsluit. [The magistrate asked the accused again if he wishes to tell what happened. He then elected to testify.]

**4.3.9.3.4      *Procedural explanation 4: Right to address the court on the merits***

PO: Jy het nou al die getuienis gehoor. Die aanklaer sê nou die staat se getuies is goeie getuies en ons moet u skuldig bevind. Dit is nou u laaste kans om kommentaar te lewer oor die saak.

R: Wat het die landdros nou gesê?

S: Die landdros het gesê ek is skuldig.

**4.3.9.3.4 Procedural explanation 5: Pre-sentence rights**

PO: Jy kry nou kans om getuienis ter versagting aan te voer. Jy kan self weer getuig of getuies roep oor of daar versagtende omstandighede is. Jy kan die hof ook net toespreek.

R: Wat het die hof gesê kan jy nou doen?

S: Ek kan vra vir versagting. Dis al.

**4.4.10 *Sample case 10***

**4.4.10.1 *Personal details***

- (a) Name of accused: Peter Scholtz
- (b) Sex: Male
- (c) Age: 37 years
- (d) Home language: Afrikaans
- (e) Number offender: Second

**4.4.10.2 *Case details***

- (a) Case number: 30/472/98
- (b) Charge: Malicious injury to property and trespassing
- (c) Language of proceedings: Afrikaans
- (d) Date of proceedings: 30 September and 01 October 1998

#### 4.4.10.3 *Transcription of recording*

##### 4.4.10.3.1 *Procedural explanation 1: Explanation of plea*

PO: Ons weet niks van die saak af nie. U kry nou kans as u wil om vir ons kortliks te vertel wat u verdediging gaan wees. Maar u is nie verplig om dit te doen nie. Maar as u vertel, dan weet ek watter feite in geskil is.

R: Wat het die landdros nou vir jou verduidelik?

S: Die landdros het verduidelik dat ek kan vertel, maar dat ek nie hoef nie.

##### 4.3.10.3.2 *Procedural explanation 2: The right to cross-examination*

PO: U het nou gehoor wat die getuie getuig het. U kry nou kans om die getuie onder kruisverhoor te neem. Dit beteken u behoort aan hom vrae te vra waar u nie met hom saamstem nie. En dan kan u sodanige ander vrae vra as wat u wil.

R: Wat het die landdros nou verduidelik?

S: Ek kan die getuie vrae vra... as ek wil. Ek kan hom vra ... as ek hom nie wil vra nie.

**4.3.10.3 Procedural explanation 3: Rights at the close of the case for the prosecution**

PO: Wat jy sover gedoen het was nie onder eed nie, jy het nie gesweer nie. Jy het onskuldig gepleit en 'n verduideliking gegee. Omdat dit nie onder eed was nie, dra dit nie so baie gewig as getuienis onder eed nie.

Jy kry nou die kans om self te getuig en getuies te roep, dan kan die aanklaer hulle onder kruisverhoor neem. Die alternatief is, jy getuig nie, jy roep nie getuies nie en jy sluit jou saak, maar dan moet ons die saak beoordeel op die getuienis wat reeds gegee is.

R: Wat het die landdros nou gesê?

S: Ek kan ... ek hoef nie getuies ... ek kan my eie getuie hê, as ek wil. As ek nie wil nie, dan kan ek self praat onder eed.

**4.3.10.3.4 Procedural explanation 4: Right to address the court on the merits**

PO: Wil jy soos die aanklaer die hof toespreek of jy skuldig of onskuldig is?

Jy kan nou argumente vir die hof aanvoer hoekom jy onskuldig is.

R: Wat het die hof gesê kan jy nou doen?

S: Ek kry nou kans om weer op die hof voor te gaan en te praat. [S indicates in the direction of the witness box.]

#### 4.3.10.3.5 *Procedural explanation 5: Pre-sentence rights*

PO: Jy kry nou kans om getuienis ter versagting aan te voer. U kan getuienis onder eed gee of getuies roep of die hof toespreek.

R: Wat het die hof gesê wat kan jy nou doen?

S: Ek moet getuienis roep, of myself toespreek op die hof.

In the following chapter, a norm to test comprehension and effectiveness of the communicative process will be adopted. In chapter 6 below, the procedural explanations recorded in the field study are broken down into constituent units. The responses of the subjects recorded are then compared with the broken down units of the procedural explanations. The paraphrase performance of the subjects are then evaluated according to an adapted norm accepted in chapter 5.

## CHAPTER 5

### *A norm to test comprehension and effectiveness of the communicative process*

#### 5.1 *Introduction*

In this chapter the following are discussed:

- In 5.2 the Flesch reading ease test as a quantitative norm to test comprehension or intelligibility is set out;
- In 5.3 the psycholinguistic approach developed and applied by the Charrows is set out; and
- In 5.4 an adaptation of the norm employed by the Charrows, that was used in this research, is set out.

#### 5.2 *The Flesch reading ease test*

As was pointed out in paragraph 3.5.3 research on legal language was mostly done with regard to written legal language as encountered in contracts and statutes.

This led to the so-called "plain English" movement. In order to test the intelligibility of legal documents, tests were postulated to determine the level of comprehension.

The first of these tests, introduced in 1948 is the so-called Flesch reading ease test.<sup>1</sup> A basic postulation of this test is that the longer the words and sentences in a text, the harder it will be to read and understand. It consists of four steps. The first step is to count the number of sentences, syllables and words present in the sample to be tested. The second step is to divide the total number of words by the total number of sentences, the quotient thus obtained then being multiplied by 1,015. The third step is to divide the total number of syllables by the total number of words, and the quotient is multiplied by 84,6. The last step consists in subtracting the sum of the second and third steps from 206,835. The result obtained serves as the Flesch score.

Flesch furthermore converted the scores into the equivalents of reading matter suitable for the United States educational scene. The highest possible score (121) and therefore the easiest reading material would be found in a text consisting entirely of one-word sentences and one-syllable words.

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1. Flesch R "A New Readability Yardstick" *Journal of Applied Psychology* (1948) at 221-233. For a discussion of the Flesch reading ease test compare Karlin CJ "Readability Statutes - A Survey And A Proposed Model" *Kansas Law Review* (1980) at 531-552.



The Charrows<sup>2</sup> however correctly point out that this and other readability tests are not apt to test comprehension.

They point out<sup>3</sup> that the following two sentences would score the same on the Flesch test:

- This morning I got up and brushed my teeth and got dressed and ate breakfast and went to work. (19 words)
  
- The boy whom the girl whom the gentleman in the white car hit kissed lives next door to me. (19 words)

This example clearly illustrates that it is the grammatical, semantic and contextual complexity of discourse, and not sentence length, that determines how difficult it will be for people to understand the discourse.

Scott<sup>4</sup> correctly points out that these quantitative measures are subject to devastating criticisms and cannot be employed with success in situations of oral communication such as police cautions.

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2. *Jury Instructions* at 1310.

3. Charrows *Jury Instructions* at 1319.

4. Scott WT "Measures for Intelligibility in Legal Contexts" in *Law and the Conflict of Ideologies* R Kevelson (Editor) (1995) Peter Lang at 243.

A similar argument therefore can be applied in the case of procedural explanations and choices. As these are given orally, quantitative measures such as the Flesch reading ease test would not be apt. This norm for measuring intelligibility will therefore not be applied in this research.

### **5.3 *The psycholinguistic approach applied by the Charrows***

#### **5.3.1 *Background to the research of the Charrows***

The Charrows<sup>5</sup> commenced their research project after the "plain English" movement took off. In 1979, when their work was published, there was already a growing concern regarding the inability of lay persons to understand legal language. Although at the time it was assumed that all legalese is incomprehensible, there was no real data, aside from anecdotes, to support or to elucidate the exact nature of the problem. More particularly, at the time there was no empirical evidence of the extent to which legal language is not understood or those segments of the American population that may not have problems comprehending legalese.

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5. The content of this entire paragraph is taken from Charrows *Jury Instructions* at 1306-1374.

As was pointed out in paragraph 5.2 above, the readability formulas applied prior to the work of the Charrows are not reliable at all to test intelligibility. The work of the Charrows was therefore the first empirical study to validate or falsify the assumption that lay people do not understand legalese.

### **5.3.2 *An overview of the study by the Charrows***

The study by the Charrows was conducted on the intelligibility of standard jury instructions read out to jurors in trials in the United States of America. It had two major goals. First, it sought to ascertain the validity of the following hypotheses about legal language in general, and about standard jury instructions in particular:

- That standard jury instructions - when viewed as discourse - are not well understood by the average juror;
- That certain linguistic constructions are largely responsible for this hypothesised incomprehensibility; and
- That if the problematic linguistic constructions are appropriately altered, comprehension should dramatically improve, notwithstanding the "legal complexity" of any given instruction.

Secondly, their purpose was to develop a reliable and workable methodology, capable of assessing the relative comprehensibility of not only jury instructions, but also of isolating problematic linguistic constructions in legal language.

### 5.3.3 *The two experiments employed by the Charrows*

In order to accomplish these objectives, the Charrows designed and administered two experiments using a paraphrase task. They decided on paraphrase testing, as this method is probably the closest thing to "getting inside the head" of a listener or reader.<sup>6</sup> A paraphrase task entails that a subject either listens to or reads some material and is then required to paraphrase it. The validity of this task as a measure of comprehensibility rests on the premise that a subject will not be able to paraphrase accurately or correctly material that he has not understood. In addition it is said that the subject will be more likely to focus upon concepts that are more comprehensible and those that are more important to the gist of the discourse, and will gloss over or omit less comprehensible or less important concepts.<sup>7</sup>

As is the case with procedural explanations and choices in South Africa, jury instructions in the United States of America are given orally.

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6. Charrows *Jury Instructions* at 1310.

7. Charrows *Jury Instructions* at 1310.

The Charrows thus decided to employ a paraphrase task in which the instructions were presented orally.

Another motivation for employing an oral paraphrase task, rather than a written one, was to reduce the likelihood that the subject's writing skill would confound the results.

They point out<sup>8</sup> that one arguable limitation of the methodology is its apparent inability to distinguish whether an omission is due to lack of comprehension or such more benign factors as the triviality or obviousness of the item to be paraphrased. An examination of the omitted item, however, especially when taken in the context of the subject's performance on the items surrounding the omitted item, can often resolve the problem. They however designed a statistical means for factoring out arguably trivial and self-evident items from the instructions.

In the case of the jury instructions used by the Charrows, another factor limiting the potential of the methodology was the large number of possibly interacting variables in the instructions.<sup>9</sup> The jury instructions they selected contained problematic constructions both in combination and in isolation. Accordingly it was possible for them to make a fair assessment of the amount that each construction contributed to the comprehension difficulty.

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8. Charrows *Jury Instructions* at 1310.

9. Charrows *Jury Instructions* at 1311.

Their study consisted of two major experiments. The subjects of the experiments were people who had been called for jury duty in Prince Georges County, Maryland.

In the first experiment jurors were asked to paraphrase each of fourteen standard civil jury instructions from California. The instructions were recorded on audio cassettes by a male attorney acting the part of a judge. Each instruction was recorded twice, with a five second pause between each recording. The juror and an experimenter sat at a table in a room in the courthouse. There were two tape recorders on the table - one with the master tape, the other with a blank cassette. The experimenter then read an explanation of the tasks to the juror. He then gave the juror a drawing of an automobile accident that could give rise to a lawsuit in which the fourteen jury instructions would be given. The subject was then read a brief context paragraph describing the events in the picture. In addition, subjects were told that they could refer to the picture at any time. The experimenter then played the first practice instruction twice on the master tape recorder. After the subject had heard the instruction for the second time, he orally paraphrased it into the second tape recorder, which was kept on "record" throughout the experiment in order to minimize distractions and reduce self-consciousness on the part of jurors. After paraphrasing each of the three practice instructions, the subject was asked if he had any questions about the task, and then whether he was prepared to continue. After completing the task, the subject filled in a demographic questionnaire.

Each subject's paraphrase cassette was transcribed, along with any comments or remarks made by either the subject or the experimenter.

The paraphrases were then linguistically analysed. The analysis revealed the existence of numerous grammatical constructions, phrases, and words that appear both to typify legal language and to affect jurors' comprehension adversely. The first part of the analysis consisted of a linguistic breakdown. Their strategy was to ascertain whether a subject has paraphrased a given portion of an instruction accurately or inaccurately, or whether he had omitted it. In order to do this, each instruction was broken down into a number of constituent units. The subject's paraphrase of an instruction was then compared to the breakdown of the instruction. For each constituent unit, the subject's response could receive one of the following scores: correct, correct by inference, wrong or omitted.

In measuring the performance of the subjects, they constructed an approximation to each instruction consisting of only the most essential variables necessary for an accurate statement of the law. The reason for this is the fact that some of the jury instructions contained a statement of the law, but also some nonessential "padding". If they were to use the straightforward approach of a full performance measure, a subject who only correctly paraphrased all the trivial features, would score the same as a subject who paraphrased all the essential features of the instruction.

They accordingly included those variables necessary for a statement of the law relating to jurors' duties. They did not for instance include statements of the judge's duties or definitions of terms where the term was then used in the same instructions. The approximation also excluded exceptions to general rules that were stated in the same instruction. In essence the approximation measure is a measure to "getting the gist".<sup>10</sup>

Their data provided some evidence that jury instructions were not adequately understood by the average juror, as only slightly better than half of the subjects correctly paraphrased the tasks after the approximation measures were employed.<sup>11</sup> They however correctly point out<sup>12</sup> that their results should not be interpreted as definitive evidence that jurors or juries do not comprehend jury instructions. The ability of a juror to comprehend a given set of instructions depends on factors in addition to the linguistic construction and vocabulary of the instructions. The context provided by the trial itself may influence comprehensibility.<sup>13</sup>

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10. Charrows *Jury Instruction* at 1316.

11. Charrows *Jury Instructions* at 1316 and Tables 1 and 2 at 1361.

12. Charrows *Jury Instructions* at 1317.

13. Compare paragraph 5.4 below.



In the second experiment, the jury instructions were rewritten to eliminate the apparently problematic items and constructions, and the paraphrase task was repeated with new subjects.<sup>14</sup> From their results, they were able to show overall improvement for the modified instructions, and improvement on an instruction-by-instruction basis.

The mean score before rewriting ranged from a low of 21% to a relative high of 43%, whereas rewriting the instructions produced a range of scores between 25% and 51%.<sup>15</sup> Most significantly, they were able to isolate specific linguistic features of jury instructions - and of legalese in general - that interfere with the lay person's understanding of legal language.

#### **5.3.4 A detailed analysis of the data collected by the Charrows**

The Charrows<sup>16</sup> analysed the jury instructions and the data gathered in detail. The following factors were then firstly considered:

- *Ordering Defects:* They found that the order in which the instructions were presented might affect a subject's performance.

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14. The second experiment is not discussed in detail in this research, as only an adaptation of the first experiment will be employed.

15. *Levi Judicial Process* at 22.

16. *Jury Instructions* at 1317.

- *Conceptual Complexity:* Many lawyers believe that comprehension difficulties are caused by the legal concepts involved and not by the language employed. In their second experiment, the Charrows however found that this proposition is not necessarily true.<sup>17</sup>
  
- *Sentence Length:* Some educators are of the opinion that sentence length adversely affects comprehension.<sup>18</sup> They however found that the length of the instruction as a whole had little effect on its comprehensibility. They are of the opinion that the grammatical, semantic and contextual complexity of discourse, and not sentence length determines how difficult it will be for people to understand discourse.
  
- *Demographic Analysis:* They found that the only factor that consistently and significantly correlated with performance was the amount of education that the subject had had. Comprehension rose as the education level rose.

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17. *Jury Instructions* at 1319.

18. Compare paragraph 5.2 above.

They then considered linguistic constructions that affect comprehension negatively. These constructions were identified because they consistently were associated with either a decrease or an increase in the subject's performance; or the construction had been the subject of prior psycholinguistic research indicating that under certain circumstances it might impede (or enhance) comprehension.<sup>19</sup>

The following are these constructs:

- *Nominalizations*: A nominalization can be defined as a noun that has been constructed from a verb.<sup>20</sup> It is normally created by simply adding the present participle ending "-ing" to the verb stem - as in "the ordering (of)". It may involve the somewhat more complicated process of adding "-tion" or "-al" to the verb - as in "the explanation of" instead of "when the court explained". They point out that linguistic theory indicates that nominalizations are more difficult to process than their equivalent verb forms.
  
- *Prepositional Phrases*: These are phrases starting with "as to". They point out that phrases beginning with "as to" are vague, as the words do not refer to a time, location, or purpose, but rather serve as a somewhat ambiguous link between parts of speech.

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19. Charrows *Jury Instructions* at 1321.

20. Charrows *Jury Instructions* at 1321.

An example would be "your rights as to cross-examination".

It might be possible that the vague preposition "as to" acts as a signal to the listener that what follows is unimportant, whether or not it is.

- *Misplaced Phrases:* In the jury instructions they found phrases (mostly prepositional) inserted into the midst of otherwise normal clauses, or otherwise misplaced, so that they either break up the continuity of the clause or create ambiguity. These phrases negatively impact on comprehension, because they disrupt the continuity of a sentence.
  
- *"Whiz" and Complement Deletion:* These refer to subordinate clauses that are missing relative pronouns, such as "that, which and who" and "copula" verbs such as "was, is, am and are". The "whiz" (short for "which is") deletion refers to the implied missing phrase "which is". While the whiz deletion is normal in English, it appears to add to the listener's processing load. Because some of the grammatical information is missing, the mind has to work harder to reconstruct it.<sup>21</sup>

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21. Charrows *Jury Instructions* at 1323.

- *Lexical Items*: Technical legal terms or infrequently used words or phrases were omitted or incorrectly paraphrased by a large percentage. This the Charrows find the most obvious difference between legal language and ordinary discourse.<sup>22</sup>
  
- *Modals*: They found that a linguistic construction that apparently enhanced jurors' comprehension was the use of modal verbs, specifically "must, should and may". These modal verbs are indeed often used in procedural explanations, for instance "you may put questions to the witness". This linguistic feature accordingly did not have a negative influence upon comprehension.
  
- *Negatives*: Psycholinguistic research regarding negatives has shown that they apparently take longer to process and cause more comprehension errors than similar ideas stated in the positive form. Research on multiple negatives has shown that as the number of negatives in a sentence increases, processing time and error rate similarly increase.<sup>23</sup>

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22. Charrow *Jury Instructions* at 1342.

23. Charrows *Jury Instructions* at 1324.

- *Passives*: They found that one characteristic of legal language was the high proportion of passive sentences. While the type of passive did not appear to affect comprehension significantly, the location of the passive did. They found that there is some evidence that passive constructions, when properly used and not obstructed in subordinate clauses, do not impede comprehension.
  
- *Word Lists*: Legal language often uses three or four words when one will do in an attempt to be precise. As an example, they refer here to the ritual use of the words "give, bequeath and devise" as used in wills.<sup>24</sup> Where a word list contained more than two items, virtually no subject paraphrased all the items. Word lists thus impacted negatively on comprehension.
  
- *Discourse Structure*: Comprehension of discourse can depend on how the individual sentences are organized to each other and on the coherence among sentences; this overall organization is referred to as "discourse structure". They found that poor discourse structure impacted negatively on comprehension.
  
- *Embeddings*: Embeddings refer to numerous subordinate clauses within one sentence. As the number of embeddings increased, comprehension decreased.

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24. Charrows *Jury Instructions* at 1326.

The Charrows conclude that the results of their two experiments support the initial hypotheses postulated.<sup>25</sup> In addition they have also demonstrated that a paraphrase methodology and linguistic analysis were powerful tools not only for testing relative comprehensibility, but also for discovering which aspects of legal discourse were potentially difficult for non-lawyers to understand.

In this research the same psycholinguistic norm is applied to test comprehension of procedural explanations and choices. In the next paragraph the adapted first experiment of the Charrows is set out.

#### **5.4 *An adaptation of the experiment conducted by the Charrows as used in this research***

In this research the same psycholinguistic approach and paraphrase task, as were utilised by the Charrows were applied. Only the first experiment was conducted in this research for the following reasons:

- The aim of this research is to determine the level of comprehension in the case of an actual criminal trial. It was thus not possible to "repeat" the trial employing simplified explanations.

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25. *Jury Instructions* at 1358.

- After the first experiment was conducted, the data collected had to be transcribed and analysed. It was not possible to recall the same subjects for a "laboratory" type second experiment, as the subjects were actual accused persons and not volunteers taking part in an experiment.

The first experiment conducted by the Charrows, however, had to be adapted to suit the needs of this research.<sup>26</sup>

The need for adaptation of the experiment arose as a result of the following differences between this research and that of the Charrows:

- The sample group was different. The Charrows took their subjects from prospective jurors. In this research subjects were actual accused persons charged with crimes in the Port Elizabeth Magistrate's Courts.
- The circumstances under which this research was conducted differed from those under which the Charrows conducted their research. Although conducted in a courthouse, the experiment conducted by the Charrows was conducted under "laboratory" conditions. This research was conducted during an actual criminal trial.

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26. As was mentioned in paragraph 5.3.3 above, the second experiment as conducted by the Charrows was not repeated in this research.



- The subjects in the Charrows' first experiment were afforded the opportunity to listen to the relevant jury instructions twice. In the experiments conducted in this research the magistrate's procedural explanations and choices were explained to them once, unless they indicated that they did not understand.

In this research the first experiment of the Charrows was accordingly adapted as follows:<sup>27</sup>

- The relevant procedural explanation and/or choice was explained to an undefended accused by the presiding officer;
- Immediately thereafter the accused was asked to paraphrase the explanation;
- The same procedure was employed with all other explanations and or choices.

The results obtained have been set out in chapter 4 above and will be analysed in the following chapter.

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27. For a detailed exposition of the field study conducted during this research project, compare chapter 2.

## CHAPTER 6

### *An evaluation of the field study*

#### 6.1 *Introduction*

In this chapter the following are done:

- In 6.2 the transcribed procedural explanations recorded during the field research are broken down into constituent units and each procedural explanation will be evaluated against the requirements for the specific procedural explanation as set out in paragraph 4.3 above;
- In 6.3 the transcribed responses of the subjects recorded during the field research are compared with the broken down units of the procedural explanations, in order to evaluate the paraphrase performance of the subjects;
- In 6.4 conclusions regarding the subjects' performance are drawn.

## 6.2 *The breaking down of the procedural explanations in constituent units*

In line with the methodology followed by the Charrows<sup>1</sup>, the procedural explanations recorded in the sample cases were broken down into constituent units. The principle of approximation<sup>2</sup> is applied, so that only the most essential variables will be taken into account when evaluating the subjects' performance. The fact that one presiding officer afforded the procedural explanations had the effect that the explanations were standardized to a certain extent.<sup>3</sup> Although the presiding officer did not use the exact same words in each case when explaining a particular procedural explanation, the content of a particular explanation remained essentially the same.<sup>4</sup> It was therefore decided to do only one "breaking down" exercise, instead of repeating the same for each and every sample case. The application of the principle of approximation in any event made it unnecessary to break down each individual explanation. In the following sub-paragraphs the different procedural explanations as encountered in the sample cases will be broken down in turn.

- 
1. Compare chapter 5 in this regard.
  2. Compare Charrows *Jury Instructions* at 1315.
  3. Compare chapter 2 in this regard.
  4. Compare paragraph 4.4 in this regard.

### 6.2.1 *Procedural explanation 1: Explanation of plea*

<u>Variable number</u>	<u>Text</u>
001	ek en die assesore weet niks van die saak nie
002	jy kry kans om te vertel wat jou verdediging gaan wees
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)
004	u hoef nie so 'n verklaring te maak nie

Variables 002, 003 and 004 are in line with the content requirements for this procedural explanation as set out in paragraph 4.3.2.2 above. The procedural explanation does not however make mention of the questioning procedure in terms of this section.<sup>5</sup> Variable 001 is not in line with the normal content of the procedural explanation. It is respectfully submitted that this variable indeed encourages undefended accused persons to make a statement in terms of section 115 of the Criminal Procedure Act. As was pointed out in paragraph 4.3.2.2 above, an undefended accused should not be encouraged to tell what had happened, instead of indicating his defence.

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5. Compare paragraph 4.3.2.1 in this regard.

### 6.2.2 Procedural explanation 2: *Right to cross-examination*

<u>Variable number</u>	<u>Text</u>
005	jy kry nou kans om die getuie onder kruisverhoor te neem
006	dit beteken u behoort vrae te vra waar u nie saamstem nie
007	u kan sodanige ander vrae vra

Variables 005 and 006 are in line with the content requirements set out in paragraph 4.3.3.2 above. Variable 007 is with respect confusing as it would not assist an undefended accused person, since it is not clear what "sodanige ander vrae" might be.

The procedural explanation does not include an instruction that the accused should put his version to the state witnesses.<sup>6</sup> It is of the utmost importance that the accused puts his version to the state witnesses so that they may comment thereon.

It is furthermore suggested that this procedural explanation be given before the first state witness testifies, so that the undefended accused may give proper attention to the testimony of the witness, in order to conduct meaningful cross-examination.

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6. Compare paragraph 4.3.3.2 in this regard.

### 6.2.3 Procedural explanation 3: Rights at the close of the case for the prosecution

<u>Variable number</u>	<u>Text</u>
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie
010	u het 'n keuse en is geregtig om stil te bly
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is

All the variables in this procedural explanation are in line with the requirements set out in paragraph 4.3.4.1 above. The procedural explanation does however not contain an instruction regarding the provisions of section 174 of the Criminal Procedure Act.<sup>7</sup>

---

7. Compare paragraph 4.3.4.2 in this regard.

The procedural explanation is very long and contains a lot of information and various procedural choices. It is suggested that the standard form available to magistrate's in Port Elizabeth enhances intelligibility, in that it breaks up the procedural choices with the questions "Do you understand so far?"<sup>8</sup> The explanation furthermore contains difficult legal concepts such as "onbeëdigde verklaring" and weight attached to evidence.

#### **6.2.4 Procedural explanation 4: Right to address the court on the merits**

<u>Variable number</u>	<u>Text</u>
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (kans om die getuienis te ontleed)

As was pointed out in paragraph 4.3.5.2 above, no guidance as to the content of this procedural explanation could be found in the case law and literature. It is submitted that more guidance should be given to an undefended accused regarding this procedural choice.

It is suggested that one cannot expect an undefended accused to present legal argument and an analysis of the evidence.<sup>9</sup>

---

8. Compare paragraph 4.3.4.1 in this regard.

9. Compare paragraph 4.3.5.1 in this regard.

### 6.2.5 *Procedural explanation 5: Pre-sentence rights*

<u>Variable number</u>	<u>Text</u>
015	jy kry nou kans om getuienis ter versagting aan te voer
016	vir daardie doel kan jy getuienis onder eed gee
017	getuies roep
018	of net die hof toespreek

All the above variables are in line with the content of this procedural explanation as set out in paragraph 4.3.6.1 above. The explanation does not however instruct the undefended accused that evidence under oath will carry more weight than mere statements from the dock.<sup>10</sup>

### 6.4 *A comparison and evaluation of the subjects' recorded paraphrasing*

In this paragraph the recorded responses of the subjects in the sample cases will be compared to the variables identified in paragraph 6.3 above. The subjects' responses could receive one of the following scores: correct, correct by inference, wrong, or omitted. The category of "correct by inference" was treated as the equivalent of "correct".<sup>11</sup>

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10. Compare paragraph 4.3.6.2 in this regard.

11. Compare Charrows *Jury Instructions* at 1314.



In the following sub-paragraphs the comparing and evaluation of each individual subject will be undertaken. Firstly, an evaluation of the subject's performance will be given. Thereafter the responses of each subject will follow in table format. In the first column the variable number of the constituent unit of the procedural explanation appears. In the second column the constituent unit appears. In the third column the classification "correct", "correct by inference", "wrong" or "omitted" appears.<sup>12</sup> In the fourth column specific comments by the researcher appear in order to explain a specific classification.

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12. As was pointed out these classifications were done in consultation with two independent researchers, namely Prof. G Stead and Dr. K Müller. Compare footnote 16 in chapter 2 above.

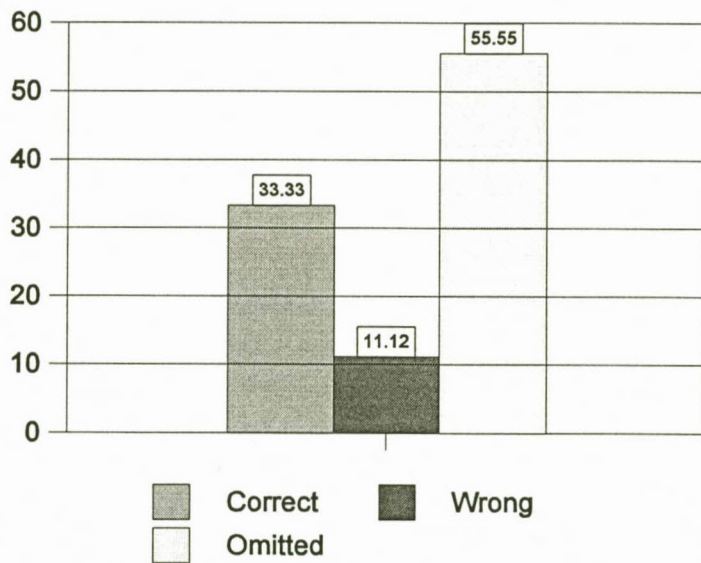
### 6.4.1 Sample case 1

Out of the 18 variables the subject's performance was as follows:

■	Correct or correct by inference	6 (33,33%)
■	Wrong	2 (11,12%)
■	Omitted	10 (55,55%)

Figure 6.1 illustrates the results of the subject's performance.

Figure 6.1: The results of the subject's performance: Sample case 1



The transcribed recording of the responses of this subject appears in paragraph 4.4.1.3. In Table 6.1, the responses of this subject are classified and where applicable commented upon.

Table 6.1: Results of subject's responses: Sample case 1

Variable no	Text	Result	Comments
001	ek en die assesore weet niks van die saak nie	correct	
002	jy kry kans om te vertel wat jou verdediging gaan wees	correct by inference	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	omitted	
004	u hoef nie so 'n verklaring te maak nie	wrong	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	correct by inference	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	omitted	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	correct	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	correct	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	wrong	
015	jy kry nou kans om getuienis ter versagting aan te voer	omitted	
016	vir daardie doel kan jy getuienis onder eed gee	omitted	
017	getuies roep	correct by inference	
018	of net die hof toespreek	omitted	

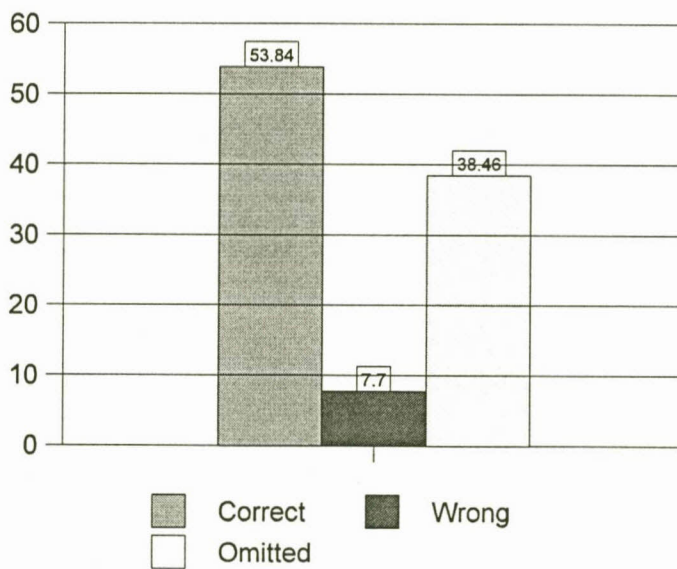
### 6.4.2 Sample case 2

Out of the 13 variables the subject's performance was as follows:

■	Correct or correct by inference	7 (53,84%)
■	Wrong	1 (7,7%)
■	Omitted	5 (38,46%)

Figure 6.2 illustrates the results of the subject's performance.

**Figure 6.2:** The results of the subject's performance: Sample case 2



The transcribed recording of the responses of this subject appears in paragraph 4.4.2.3. In Table 6.2, the responses of this subject is classified and where applicable commented upon.

Table 6.2: Results of subject's responses: Sample case 2

Variable no	Text	Result	Comments
001	ek en die assessore weet niks van die saak nie	omitted	
002	jy kry kans om te vertel wat jou verdediging gaan wees	correct	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	correct by inference	
004	u hoef nie so 'n verklaring te maak nie	wrong	S used the word "moet", which indicated that the making of the statement is compulsory
005	jy kry nou kans om die getuie onder kruisverhoor te neem	correct	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	correct	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	correct by inference	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	correct	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	correct	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	correct by inference	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	N/A	S was not asked to paraphrase, as the court failed to provide R an opportunity to interview S.
015	jy kry nou kans om getuienis ter versagting aan te voer	N/A	
016	vir daardie doel kan jy getuienis onder eed gee	N/A	
017	getuies roep	N/A	
018	of net die hof toespreek	N/A	

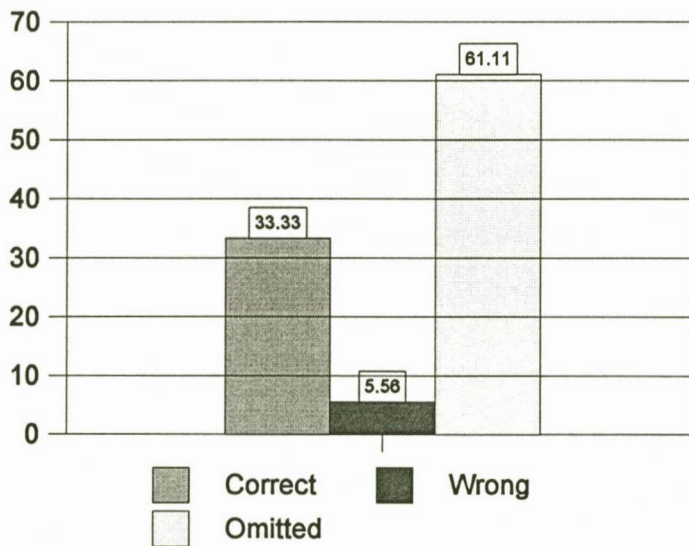
### 6.4.3 Sample case 3

Out of the 18 variables the subject's performance was as follows:

■	Correct or correct by inference	6 (33,33%)
■	Wrong	1 (5,56%)
■	Omitted	11 (61,11%)

Figure 6.3 illustrates the results of the subject's performance.

**Figure 6.3: The results of the subject's performance: Sample case 3**



The transcribed recording of the responses of this subject appears in paragraph 4.4.3.3. In Table 6.3, the responses of this subject are classified and where applicable commented upon.

Table 6.3 Results of the subject's responses: Sample case 3

Variable no	Text	Result	Comments
001	ek en die assesore weet niks van die saak nie	omitted	
002	jy kry kans om te vertel wat jou verdediging gaan wees	omitted	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	omitted	
004	u hoef nie so 'n verklaring te maak nie	correct by inference	In the sense that S repeated that he was asked whether he wished to make a statement
005	jy kry nou kans om die getuie onder kruisverhoor te neem	correct	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	correct	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	correct	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	correct	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	omitted	With "getuies" S meant to testify himself as he did not call any witnesses
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	wrong	From the reply of S it is clear he did not understand the procedural explanation at all
015	jy kry nou kans om getuienis ter versagting aan te voer	correct	
016	vir daardie doel kan jy getuienis onder eed gee	omitted	
017	getuies roep	omitted	
018	of net die hof toespreek	omitted	

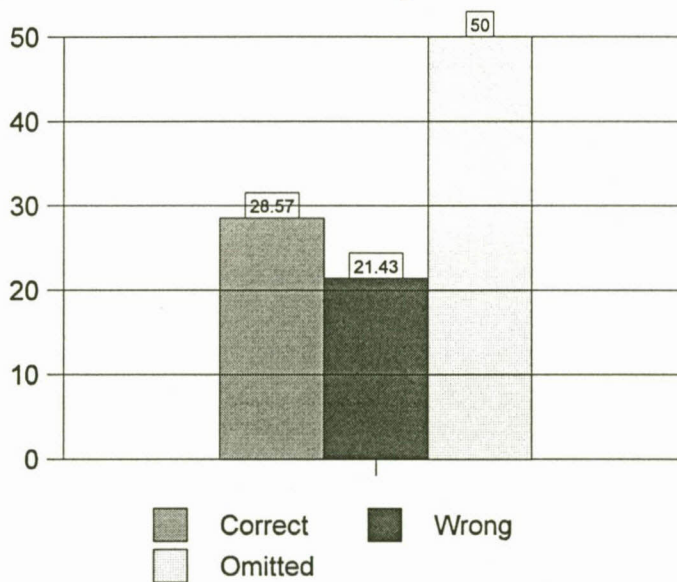
#### 6.4.4 Sample case 4

Out of the 14 variables the subject's performance was as follows:

■	Correct or correct by inference	4 (28,57%)
■	Wrong	3 (21,43%)
■	Omitted	7 (50%)

Figure 6.4 illustrates the results of the subject's performance.

Figure 6.4: The results of the subject's performance: Sample case 4



The transcribed recording of the responses of this subject appears in paragraph 4.4.4.3. In Table 6.4, the responses of this subject are classified and where applicable commented upon.



Table 6.4: Results of the responses of the subject: Case 4

Variable no	Text	Result	Comments
001	ek en die assessore weet niks van die saak nie	N/A	The court did not ask S for an explanation of plea, as the accused from the outset denied any knowledge of the charge
002	jy kry kans om te vertel wat jou verdediging gaan wees	N/A	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	N/A	
004	u hoef nie so 'n verklaring te maak nie	N/A	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	correct by inference	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	correct	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleit-verduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	wrong	The words used by S were "moet nie getuig nie".
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	omitted	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	omitted	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	correct	
015	jy kry nou kans om getuienis ter versagting aan te voer	wrong	From S's answers it is clear that he did not understand the pre-sentence process.
016	vir daardie doel kan jy getuienis onder eed gee	correct	If S meant to testify i.r.o. sentence
017	getuies roep	wrong	
018	of net die hof toespreek	omitted	

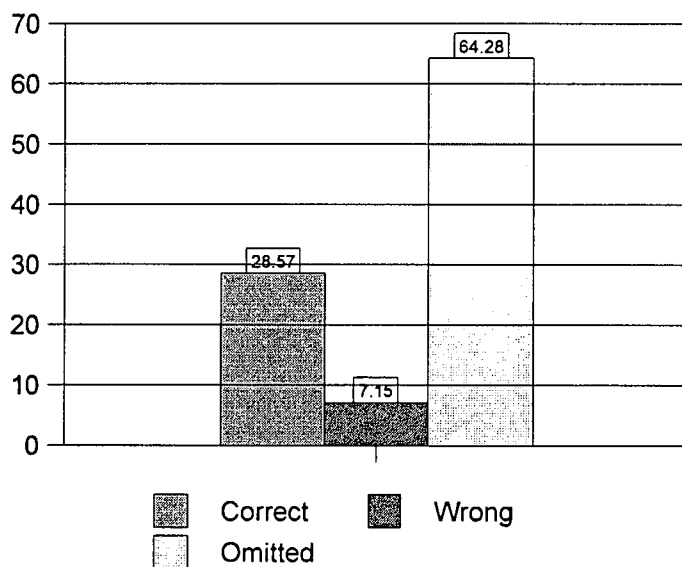
### 6.4.5 Sample case 5

Out of the 14 variables the subject's performance was as follows:

■	Correct or correct by inference	4 (28,57%)
■	Wrong	1 (7,15%)
■	Omitted	9 (64,28%)

Figure 6.5 illustrates the results of the subject's performance.

**Figure 6.5: The results fo the subject's performance: Sample case 5**



The transcribed recording of the responses of this subject appears in paragraph 4.4.5.3. In Table 6.5, the responses of this subject are classified and where applicable commented upon.

Table 6.5: Results of the subject's responses: Sample case 5

Variable no	Text	Result	Comments
001	ek en die assesore weet niks van die saak nie	correct	
002	jy kry kans om te vertel wat jou verdediging gaan wees	omitted	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	omitted	
004	u hoef nie so 'n verklaring te maak nie	omitted	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	correct	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	correct	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	correct	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	omitted	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	wrong	
015	jy kry nou kans om getuienis ter versagting aan te voer	N/A	
016	vir daardie doel kan jy getuienis onder eed gee	N/A	
017	getuies roep	N/A	
018	of net die hof toespreek	N/A	

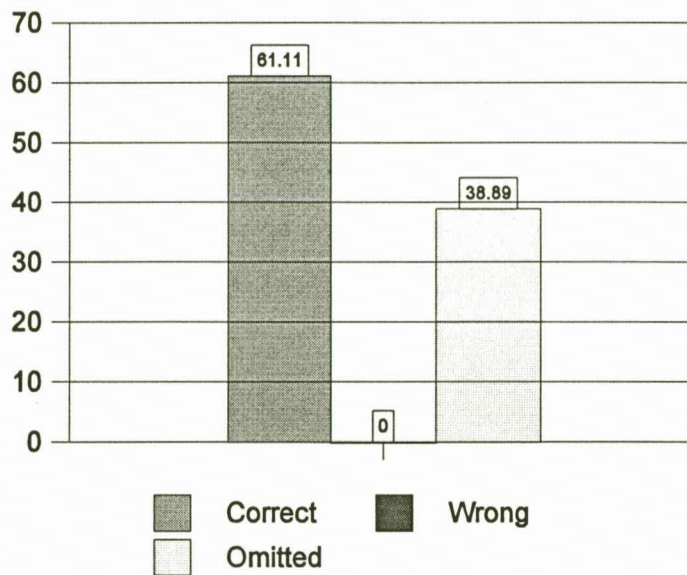
### 6.4.6 Sample case 6

Out of the 18 variables the subject's performance was as follows:

■	Correct or correct by inference	11 (61,11%)
■	Wrong	0
■	Omitted	7 (38,89%)

Figure 6.6 illustrates the results of the subject's performance.

Figure 6.6: The results of the subject's performance: Sample case 6



The transcribed recording of the responses of this subject appears in paragraph 4.4.6.3. In Table 6.6, the responses of this subject are classified and where applicable commented upon.

Table 6.6: Results of the subject's responses: Sample case 6

Variable no	Text	Result	Comments
001	ek en die assessore weet niks van die saak nie	omitted	
002	jy kry kans om te vertel wat jou verdediging gaan wees	correct by inference	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	omitted	
004	u hoef nie so 'n verklaring te maak nie	correct	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	correct by inference	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	omitted	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	correct	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	correct by inference	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	correct	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	correct by inference	
015	jy kry nou kans om getuienis ter versagting aan te voer	correct	
016	vir daardie doel kan jy getuienis onder eed gee	omitted	
017	getuies roep	correct	
018	of net die hof toespreek	correct	

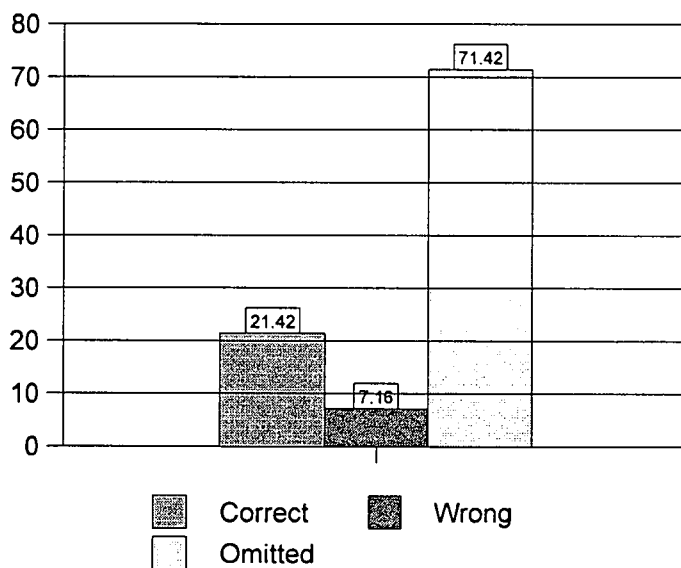
### 6.4.7 Sample case 7

Out of the 14 variables the subject's performance was as follows:

■	Correct or correct by inference	3 (21,42%)
■	Wrong	1 (7,16%)
■	Omitted	10 (71,42%)

Figure 6.7 illustrates the results of the subject's performance.

**Figure 6.7: The results of the subject's performance: Sample case 7**



The transcribed recording of the responses of this subject appears in paragraph 4.4.7.3. In Table 6.7, the responses of this subject are classified and where applicable commented upon.

Table 6.7: Results of the subject's responses: Sample case 7

Variable no	Text	Result	Comments
001	ek en die assesore weet niks van die saak nie	omitted	
002	jy kry kans om te vertel wat jou verdediging gaan wees	correct by inference	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	omitted	
004	u hoef nie so 'n verklaring te maak nie	correct	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	omitted	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	correct	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	omitted	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	omitted	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	wrong	
015	jy kry nou kans om getuienis ter versagting aan te voer	N/A	
016	vir daardie doel kan jy getuienis onder eed gee	N/A	
017	getuies roep	N/A	
018	of net die hof toespreek	N/A	

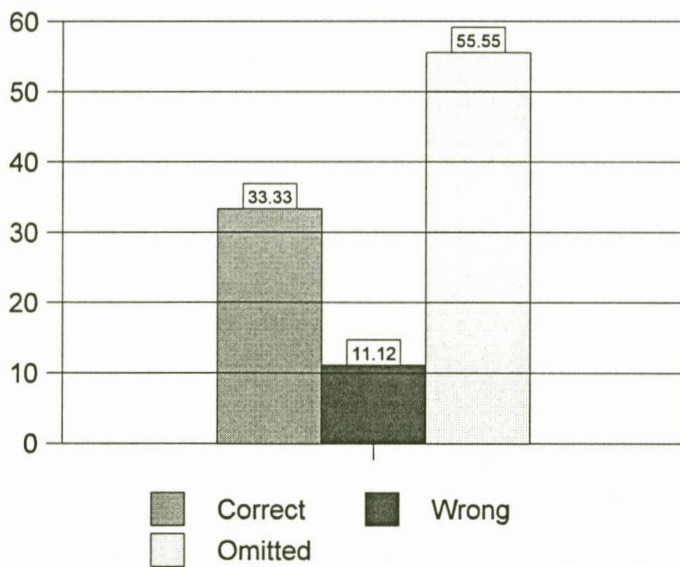
### 6.4.8 Sample case 8

Out of the 18 variables the subject's performance was as follows:

■	Correct or correct by inference	6 (33,33%)
■	Wrong	1 (11,12%)
■	Omitted	10 (55,55%)

Figure 6.8 illustrates the results of the subject's performance.

**Figure 6.8: The results of the subject's performance: Sample case 8**



The transcribed recording of the responses of this subject appears in paragraph 4.4.8.3. In Table 6.8, the responses of this subject are classified and where applicable commented upon.



**Table 6.8: Results of the subject's responses: Sample case 8**

Variable no	Text	Result	Comments
001	ek en die assesore weet niks van die saak nie	omitted	
002	jy kry kans om te vertel wat jou verdediging gaan wees	omitted	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	correct by inference	
004	u hoef nie so 'n verklaring te maak nie	wrong	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	omitted	
006	dit beteken u behoort vrae te vra waarin u nie saamstem nie	correct	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	correct by inference	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	correct by inference	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	wrong	
015	jy kry nou kans om getuienis ter versagting aan te voer	omitted	
016	vir daardie doel kan jy getuienis onder eed gee	omitted	
017	getuies roep	correct	
018	of net die hof toespreek	omitted	

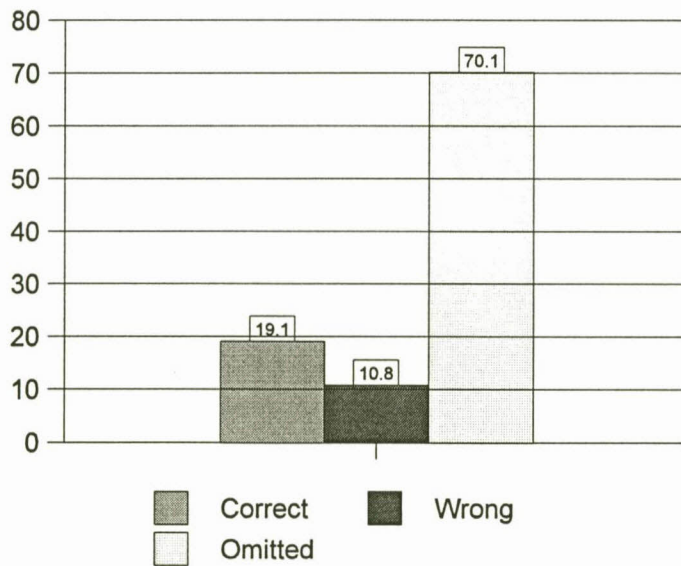
### 6.4.9 Sample case 9

Out of the 18 variables the subject's performance was as follows:

■	Correct or correct by inference	4 (19.1%)
■	Wrong	1 (10,8 %)
■	Omitted	13 (70,1 %)

Figure 6.9 illustrates the results of the subject's performance.

**Figure 6.9: The results of the subject's performance: Sample case 9**



The transcribed recording of the responses of this subject appears in paragraph 4.4.9.3. In Table 6.9, the responses of this subject are classified and where applicable commented upon.

Table 6.9: Results of the subject's responses: Sample case 9

Variable no	Text	Result	Comments
001	ek en die assesore weet niks van die saak nie	omitted	
002	jy kry kans om te vertel wat jou verdediging gaan wees	omitted	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	omitted	
004	u hoef nie so 'n verklaring te maak nie	correct	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	omitted	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	correct	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	omitted	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	correct	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	wrong	
015	jy kry nou kans om getuienis ter versagting aan te voer	correct by inference	
016	vir daardie doel kan jy getuienis onder eed gee	omitted	
017	getuies roep	omitted	
018	of net die hof toespreek	omitted	

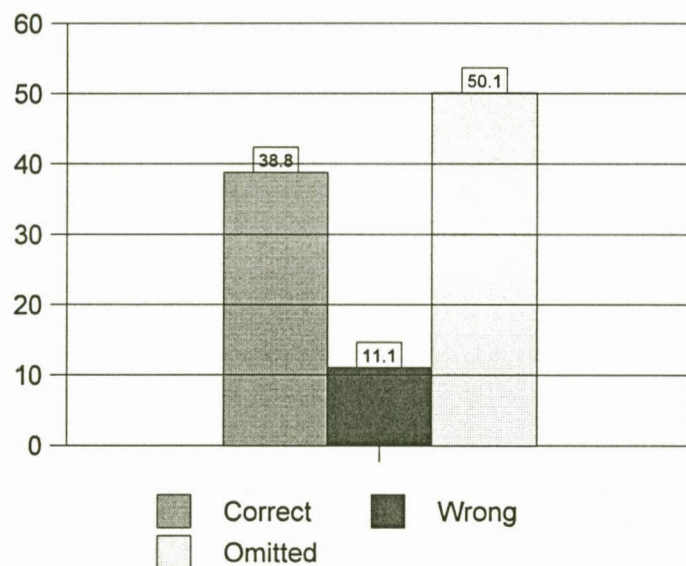
### 6.4.10 Sample case 10

Out of the 18 variables the subject's performance was as follows:

■	Correct or correct by inference	7 (38,8%)
■	Wrong	2 (11,1%)
■	Omitted	9 (50,1%)

Figure 6.10 illustrates the results of the subject's performance.

**Figure 6.10:** The results of the subject's performance: Sample case 10



The transcribed recording of the responses of this subject appears in paragraph 4.4.10.3. In Table 6.10, the responses of this subject are classified and where applicable commented upon.

Table 6.10: Results of the subject's responses: Sample case 10

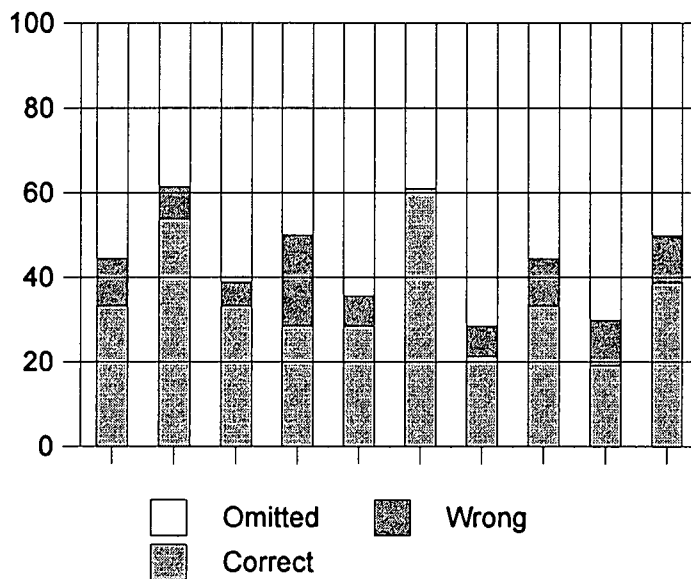
Variable no	Text	Result	Comments
001	ek en die assessore weet niks van die saak nie	omitted	
002	jy kry kans om te vertel wat jou verdediging gaan wees	correct	
003	en aan te dui watter bewerings in geskil geplaas word (of nie in geskil geplaas word nie)	omitted	
004	u hoef nie so 'n verklaring te maak nie	correct	
005	jy kry nou kans om die getuie onder kruisverhoor te neem	correct	
006	dit beteken u behoort vrae te vra waar u nie saamstem nie	omitted	
007	u kan sodanige ander vrae vra	omitted	
008	wat u sover gedoen het was 'n onbeëdigde verklaring, 'n pleitverduideliking en vrae wat u aan getuies gestel het	omitted	
009	omdat dit nie onder eed was nie, dra dit gewoonlik nie soveel gewig as getuienis onder eed nie	omitted	
010	u het 'n keuse en is geregtig om stil te bly	omitted	
011	of u kan getuienis onder eed kom gee, in welke geval die aanklaer jou onder kruisverhoor kan neem	correct by inference	
012	u kan getuies roep en dan kan die aanklaer hulle ook onder kruisverhoor neem	omitted	
013	as u u saak sluit moet die saak beoordeel word volgens die getuienis wat reeds gegee is	omitted	
014	jy kry nou die kans om argumente aan die hof voor te lê hoekom jy skuldig of onskuldig is (of kans om die getuienis te ontleed)	wrong	
015	jy kry nou kans om getuienis ter versagting aan te voer	wrong	
016	vir daardie doel kan jy getuienis onder eed gee	correct by inference	
017	getuies roep	correct - by inference	
018	of net die hof toespreek	correct	

### 6.4.11 *Combined results of all the sample cases*

In Figure 6.11 the combined results of all the sample cases are given. The columns in the graph indicate the results of the individual sample cases. The first column on the left hand side indicates the results of the first sample case.

Figure 6.11 illustrates the combination of all sample cases

**Figure 6.11:** Combined results of all the sample cases



### 6.5 *Conclusions regarding the subjects' performance*

From the preceding paragraphs the following conclusions regarding the paraphrase exercise can be drawn:

- On average<sup>13</sup> the subjects were only able to correctly paraphrase 37% of the variables;
- This in turn means that the subjects either wrongly paraphrased or omitted 63% of the variables explained to them.

The subject in sample case 6 obtained 61,11%, the highest "correct" score. The lowest "correct" score is 21,42% in the case of sample case 7. If the variables are grouped together in their respective procedural explanations,<sup>14</sup> the following conclusions can be drawn:<sup>15</sup>

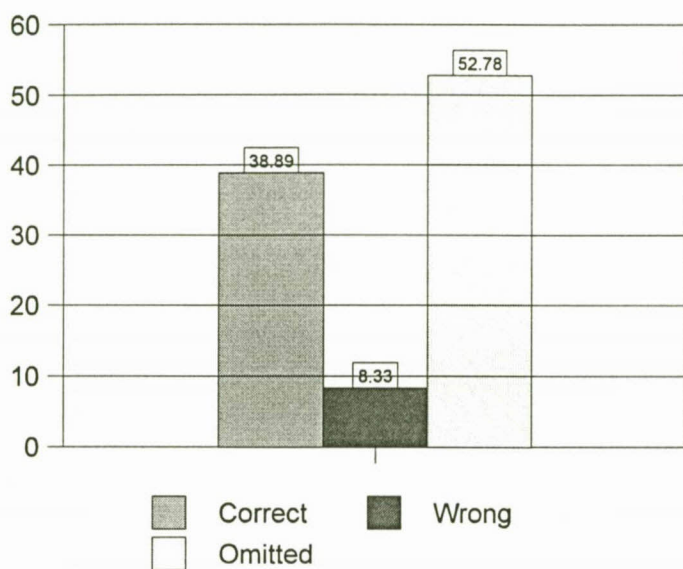
■ *Procedural explanation 1: Explanation of plea*

■ Correct / correct by inference	38,89%
■ Wrong	8,33%
■ Omitted	52,78%

Figure 6.12 illustrates the results of procedural explanation 1.

- 
13. Only the 6 sample cases where all the 18 variables were explained to the subjects were used to compute these average figures.
  14. The grouping is as follows: procedural explanation 1 (variables 001 - 004), procedural explanation 2 (variables 005 - 007), procedural explanation 3 (variables 008 - 013), procedural explanation 4 (variable 014) and procedural explanation 5 (variables 015 - 018).
  15. The percentages were computed as follows: The number of instances of "correct" and "correct by inference" (one category), "wrong" and "omitted" were multiplied by 100 and divided the number of variables in the particular procedural explanation multiplied by the number of subjects who paraphrased the particular procedural explanation.

**Figure 6.12: Results of procedural explanation 1: Explanation of plea**



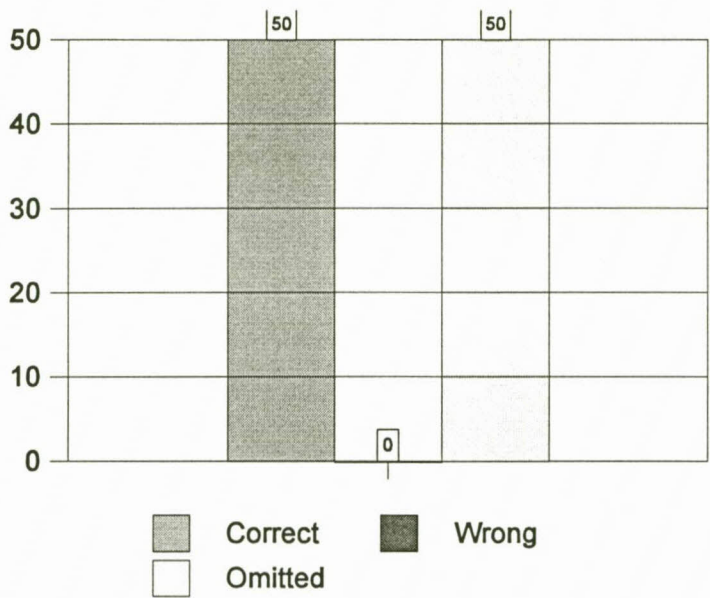
■ *Procedural explanation 2: Right to cross-examination*

■ Correct / correct by inference	50%
■ Wrong	0%
■ Omitted	50%

Figure 6.13 outlines the results of procedural explanation 2.



**Figure 6.13: Results of procedural explanation 2: Right to cross-examination**

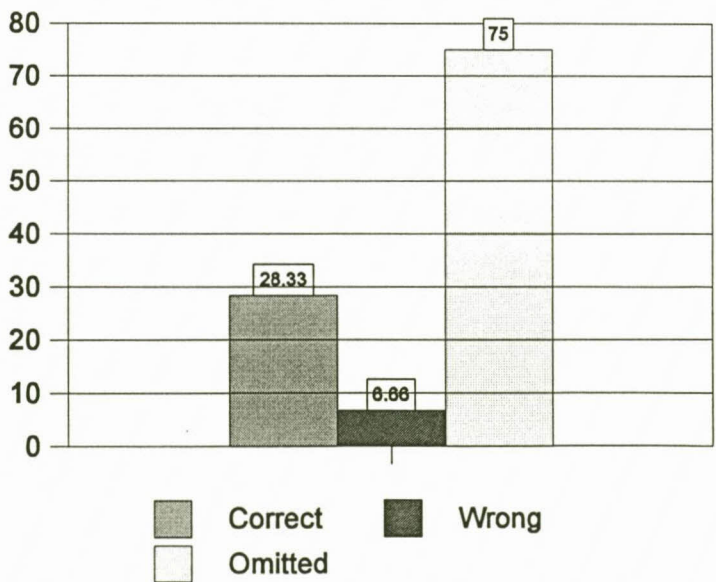


■ *Procedural explanation 3: Rights at the close of the case for the prosecution*

- Correct / correct by inference 28,33%
- Wrong 6,66%
- Omitted 75%

Figure 6.14 outlines the results of procedural explanation 3.

**Figure 6.14: Results of procedural explanation 3: Rights at the close of the case for the prosecution**

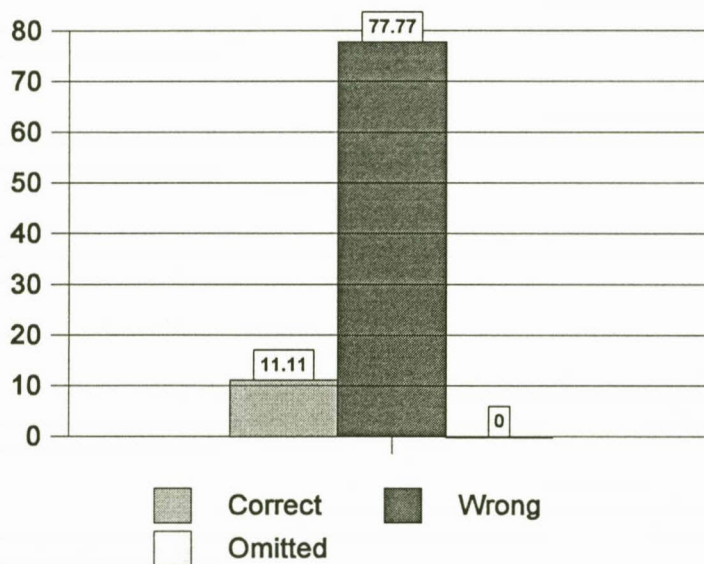


■ *Procedural explanation 4: Right to address the court on the merits*

■ Correct / correct by inference	11,11%
■ Wrong	77,77%
■ Omitted	0%

Figure 6.15 outlines the results of procedural explanation 4.

**Figure 6.15:** Results of procedural explanation 4: Right to address the court on the merits

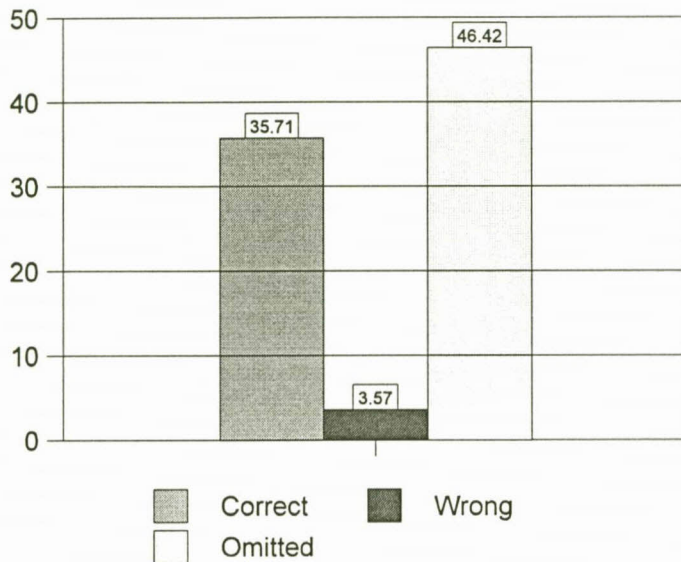


■ *Procedural explanation 5: Pre-sentence rights*

■ Correct / correct by inference	35,71%
■ Wrong	3,57%
■ Omitted	46,42%

Figure 6.16 outlines the results of procedural explanation 5.

**Figure 6.16: Results of procedural explanation 5: Pre-sentence rights**



From the preceding figures, it is clear that the procedural explanation where the most variables were omitted, is procedural explanation 3. In the case of procedural explanation 4 the highest incidence of "wrong" responses was received. The procedural explanation where the highest "correct" score was achieved is procedural explanation 2.

From these figures it is accordingly clear that the undefended accused persons who were interviewed in this research project have a very low level of comprehension of the procedural explanations afforded to them. On average they comprehend less than 40% of the explanations.

Both the interim Constitution and the Constitution afford every accused person the right to a fair trial.<sup>16</sup> The concept of a "fair trial" does not only imply a fair trial in the minds of the professional actors.<sup>17</sup> The undefended accused, who is the bearer of this right, must at least perceive his trial to be a fair one. Other lay actors, such as members of the community and family of the victim, need to share this perception as well.

A constitutionally guaranteed right implies that the bearer of the right must be aware of and appreciate the content of that right. In practice a right will be meaningless if its bearer either does not know of its existence, or did not understand the implication thereof, when it was explained to him.

In the case of an undefended accused, a "fair trial" will accordingly only take place when he meaningfully participates in the process. Meaningful participation implies that he understands what is being explained to him so that he can make informed choices.<sup>18</sup> From the exploratory study conducted in this research project it may be inferred that the majority of subjects who took part in this study did not sufficiently understand the procedural explanations afforded to them. This fact might in turn impact on the fairness of their trials.

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16. Compare paragraph 3.4 above.

17. Compare paragraph 3.2.2 above.

18. Compare paragraph 3.3.2 above.

It is therefore clear that remedial action should be taken to improve the level of comprehension or intelligibility of the procedural explanations. As was pointed out in paragraph 3.2.2 above, an undefended accused must understand the criminal trial process in order to receive a fair trial. In the next chapter instances of suggested remedial action are proposed.

## CHAPTER 7

### *Specific instances of suggested remedial action*

#### **7.1 Introduction**

In this chapter the following is discussed:

- In 7.2 specific instances of suggested remedial action aimed at ensuring that undefended accused persons receive a fair trial, as well as suggestions towards the implementation thereof will be advanced.

#### **7.2 *Specific instances of remedial action aimed at improving communication during the criminal trial process***

By means of the field study conducted during this research project<sup>1</sup>, it was established that the undefended accused persons, who acted as subjects in the field study, understood on average 37% of procedural explanations afforded to them by the presiding officer in question.

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1. Compare chapters 2 and 6 above.

This figure is indeed alarming, as the low level of intelligibility of procedural explanations may have the result that most undefended accused persons will not receive a fair trial.<sup>2</sup>

In what follows some suggested instances of possible remedial action will be advanced:

#### **7.2.1 *The provision of legal aid on a larger scale***

Steytler<sup>3</sup> suggested that the plight of the undefended accused could be ameliorated by the provision of legal aid by the state.

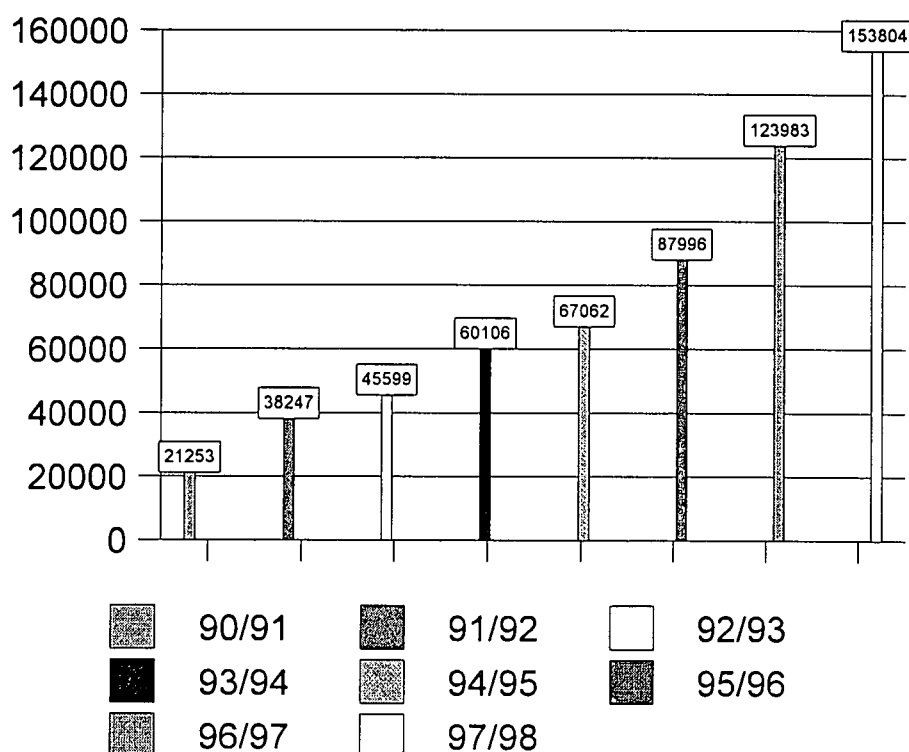
Since the publication of his work, the situation regarding legal aid by the Legal Aid Board has changed dramatically and legal aid is provided on a much larger scale. Figure 7.1 illustrates the number of legal aid applications approved by the Legal Aid Board for the period 1990 -1998.

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2. Compare paragraph 3.2.2 in this regard.

3. *op cit* at 1-2.

Figure 7.1: The number of legal aid applications approved by the Legal Aid Board for the period 1990 -1998



From Figure 7.1 it is clear that the number of legal aid applications approved by the Legal Aid board increased substantially during the period 1990-1998. It is clear however that the majority of accused persons still appear in courts without legal representation.<sup>4</sup>

4. Compare paragraph 1.1 in this regard.



In terms of both the interim Constitution and the Constitution, an accused person has the right to be provided with legal representation where "substantial injustice" would otherwise result.<sup>5</sup> It is respectfully submitted that the fact that an undefended accused does not understand the proceedings amounts to "substantial injustice".

The Department of Justice thus urgently must re-address the situation of the undefended accused and put mechanisms in place to provide legal aid on a larger scale. Possible mechanisms are *inter alia* the following:

- *A speedy implementation of the proposed community service period for law students proposed by the Justice Ministry:* Recently the idea was mooted to introduce a period of community service for law students, similar to the service rendered by medical students, at the completion of their studies. At the time of the completion of this research project very little information regarding this project was available. Should this proposal be implemented a large number of such "interns" will be available to represent undefended accused persons.

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5. Compare paragraph 3.4 above in this regard.

- *The training of paralegals to represent undefended accused charged with less serious offences:* This option, as well as the previous one should be carefully researched and considered before implementation.<sup>6</sup> Too often criminal trials are regarded as "easy" or "less important" than civil cases by practitioners and left to junior partners or even candidate attorneys. It is however submitted that criminal trials are not easy and indeed very important to the accused person. In the case of civil trial a litigant stands to lose money, but in the case of a criminal trial an accused stands to lose his liberty. Care should be taken not to provide "second grade" or sub-standard legal representation. The accused should perceive his trial as a fair one, as was pointed out in paragraph 6.4 above.
  
- *The implementation of a single bar system or the abolition of the referral rule applicable to advocates:* This option will have the effect that advocates could accept instructions in criminal matters directly from clients, without the intervention of an attorney.<sup>7</sup>

- 
6. The prior research of this option should consider the question whether there is a need for the entry of more and less qualified persons into the profession. The question should be considered whether the current output of students by law schools is not sufficient to meet the demand.
  7. At present members of the bar and the Association of Independent Advocates of South Africa receive direct instructions from the Legal Aid Board, without the intervention of an attorney.

The implementation of this option could have the effect that advocates charge a cheaper fee and make their services accordingly more affordable.

At present members of the Independent Bar Association of South Africa practise without upholding the referral rule. In *Society of Advocates of Natal v De Freitas and Another (Natal Law Society Intervening)*<sup>8</sup> the court held that disobedience to the referral rule could lead to irregularities and abuses. It was accordingly in the interests of the profession and the public that disobedience to the rule should be treated as unprofessional conduct which justifies the exercise by the Court of its disciplinary powers regarding advocates. *In casu* the first respondent was suspended from the practice of an advocate for a period of six months. The respondents in this matter then lodged an appeal to the Constitutional Court.<sup>9</sup> The issue regarding the referral rule was addressed, but not decided by the Constitutional Court. The court held that the Supreme Court of Appeal had jurisdiction to decide the matter.<sup>10</sup>

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8. 1997 (4) SA 1134 (N) at 1172G-H.

9. This matter is reported as 1998 (11) BCLR 1345 (CC).

10. At 1354E-F.

- *A retention of the "Judicare" system of legal aid provision, with the condition that firms accepting instructions should employ candidate attorneys and train them in criminal litigation:* This option, it is submitted, is more practical and economical than the first option. Firms which accept legal aid instructions in criminal matters should be required to supply articles to law students on a pro-rata basis of the number of instructions received. In this manner articles will be provided for law students and they will be trained in criminal litigation. The problem the researcher experiences with the first option is that it will place even more constraints on the depleted state budget and that it will leave students "destitute" after completion of their community service. This option at least leaves the possibility that a firm might offer continued employment to a candidate attorney after completion of his studies. By serving articles, the student will be exposed to more facets of the profession than only criminal work.

The most important step that needs to be taken, is that the Justice Ministry sets up a representative task team to evaluate the options set out above. Only after proper and in-depth investigation and research should decisions be made.

Too often, it seems, decisions are taken by government departments without proper consultation of all stakeholders, investigation and research.<sup>11</sup>

It must however be kept in mind that an accused person has the right **not** to appoint a legal representative and accordingly conduct his own defence.<sup>12</sup>

The Legal Aid Board also does not provide legal aid for certain types of offences, such as reckless or negligent driving and the driving of a motor vehicle without the owner's consent.<sup>13</sup> Legal Aid will also be refused if an accused refuses the services of a practitioner appointed by the Legal Aid Board, and demands the services of a practitioner of his choice.<sup>14</sup>

The researcher was furthermore telephonically informed by Mrs Lubbe of the Legal Aid Board in Pretoria that approximately 50% of all applications for legal aid are turned down.<sup>15</sup>

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11. Examples are for instance the introduction of community service for medical students by the Department of Health. Compare as well in this regard the editorial comments in *De Rebus* April 1998 at 5 "Legal Aid again: The profession should not be sidelined."
  12. In court 30 at Gelvandale on the days that the researcher waited for suitable sample cases, a substantial number of accused persons indicated that they wished to conduct their own defence when the magistrate explained their right to legal representation to them. Specific statistics were however not available.
  13. These crimes are, according to Mrs. Van Hall of the Port Elizabeth Legal Aid Board, the only crimes for which legal aid is currently not provided.
  14. Compare section 25(3)(e) of the interim Constitution and section 35(3)(g) of the Constitution.
  15. Compare Figure 7.1 in this regard. The reasons why 50% of applications are turned down could not be supplied to the researcher. The most obvious reason is that the applicants do not pass the means test set by the Legal Aid Board.

The instances listed in the previous paragraph, have the effect that there will always be undefended accused persons. The provision of legal aid would therefore not eliminate the problems experienced with undefended accused persons. In the following paragraphs additional instances of remedial action are advanced. These suggested instances of remedial action will only realise and be effective once the number of undefended accused persons are decreased dramatically.

***7.2.2 An appreciation in general of the fact that the criminal trial process is in essence a communicative process***

In this research it is advocated that the criminal trial process is in essence a communicative process.<sup>16</sup> It is submitted that this fact was until now either not appreciated, or not given sufficient recognition.

It is submitted that if all role players, and especially the professional actors<sup>17</sup>, appreciate this fact, a suitable "climate" will be created to implement suggested remedial action.

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16. Compare paragraph 3.5 above.

17. Compare paragraph 3.2.3 above.

A positive step towards the creation of this climate is the concerted efforts by the current Minister of Justice to make the legal system more accessible to the lay persons.<sup>18</sup>

It is enlightening to note as well that legislation is now drafted in more intelligible and simple language.<sup>19</sup> It is furthermore submitted that, apart from this broader appreciation of the criminal trial process as a communicative process, the following instances of more specific appreciation are necessary:

**7.2.1.1     *An appreciation specifically by serving magistrates and prosecutors of the fact that the criminal trial process is in essence a communicative process***

It is submitted that serving magistrates and prosecutors should through seminars or other instructional devices be made aware of the communicative nature of the criminal trial process. During these seminars the communicative processes that take place during the criminal trial process can be explained to delegates.

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18. Compare chapter 1 footnote 3 above.

19. An excellent example of such a piece of legislation is the Constitution, if compared to the interim Constitution.

Measures resulting in more effective communication can be discussed with delegates for implementation in practice. The reason why it is suggested that specific focus on serving magistrates and prosecutors is called for, is the fact that these court officials, with respect, might have become "set in their ways".<sup>20</sup>

Specific remedial action is called for to bring about the paradigm shift. The state of overcrowding of court rolls is another factor impacting negatively on the improvement of the communicative process in criminal trials. Although most presiding officers are quite patient, most normal persons, and especially overworked and underpaid magistrates, run out of patience sooner or later. The overloaded court rolls have the effect that presiding officers cannot spend indefinite periods explaining the procedural rights to a single accused person.

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20. The magistrate who took part in this research project had 35 years experience as a magistrate. It was however pointed out in paragraph 6.2 above, that his procedural explanations, with respect, do not include all the required information. The subjects did not understand them as well.



**7.2.1.2     *An appreciation specifically by lecturers at Justice College and other institutions training magistrates and prosecutors of the fact that the criminal trial process is in essence a communicative process***

At present concerted efforts are being made by the Justice Ministry to make the composition of the bench and prosecutors' corps more representative of the population at large. The effect of this policy is that large numbers of newly appointed magistrates and prosecutors join the Department of Justice.

It is suggested that these newly appointed court officials should undergo training, which includes training in the criminal trial process as a communicative process. Emphasis could also during such training be placed on skills training that would facilitate better courtroom communication.

**7.2.1.3     *An appreciation specifically by lecturers at universities and other institutions training law students of the fact that the criminal trial process is in essence a communicative process***

As was pointed out in paragraph 3.5.3 above, law students tend to assume that they must write and talk in legalese. It is suggested that law students should be subjected to courses where emphasis is placed on communication in the profession and the importance of making the law accessible to lay persons.

This communication training should not only take place in courtroom communication, but also in the field of legal drafting and communication with clients.

### ***7.2.3 The provision of uniform standard procedural explanations***

As was pointed out in paragraph 7.2.1.2 above, a substantial number of new appointments to the magistracy are being made at present. As a result of affirmative action policies, aimed at making the magistracy representative of the population at large, it can be assumed that some of the new appointees will not "come through the ranks" from prosecutor to magistrate. These appointees will in general not have years of experience and in-house training. Due to severance packages and early retirement many experienced judicial officers have left the Department of Justice.

In order therefore to "guide" newly appointed magistrates with less experience, it is suggested that a set of standard procedural explanations be made available to magistrates throughout the country. These standard forms could be drafted by persons with experience, after consultation with communication and other relevant experts.

It is submitted that a follow-up research project, similar to this research project be undertaken to test the intelligibility of suggested drafts of standard procedural explanations in all 11 official languages.<sup>21</sup>

It is however not suggested that the use of these forms should be made compulsory, but that they should merely serve as an aid or guideline. Especially in remote areas where there may not be senior colleagues to consult, the standard forms can play a valuable role.

#### **7.2.4 *A more active judicial officer***

It was pointed out in chapter 1 that Steytler<sup>22</sup> in his pioneering research regarding the undefended accused, suggested that judicial officers should play a more active role during the trials of undefended accused persons. This view is endorsed. It is once again suggested that magistrates should specifically be trained on how to assist undefended accused persons during trials.

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21. Compare paragraph 8.4 in this regard.

22. Compare paragraph 1.5 above.

During the field research conducted as part of this research project<sup>23</sup> the researcher noted that some subjects indicated that they wished not to testify after the close of the case for the prosecution. The presiding officer however again asked the subject whether he wished to "tell what happened that day". Only then did the subject decide to testify. In a particular sample case under discussion, the subject had to testify, as there was a *prima facie* against him.

It is submitted that a more active judicial officer will not run contrary to the accusatory system of our criminal procedure. As was pointed out in paragraph 3.3 above, there are already inquisitorial elements in our law of criminal procedure.

#### ***7.2.5 The implementation of an interdisciplinary approach in solving problem areas in the criminal trial process***

In paragraph 7.2.1 it was suggested that the criminal trial process should be appreciated as a communicative process. It was also pointed out that communication theories could aid in solving problems experienced in the criminal trial process.<sup>24</sup>

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23. Compare chapter 2 in this regard.

24. Compare paragraph 3.5 in this regard.

It is suggested that other disciplines, such as linguistics, sociology, psychology, ethnology and criminology could assist in finding solutions for problems experienced in the criminal trial process. Too often lawyers tend to suffer from "tunnel vision" and regard other disciplines as irrelevant or even inferior.

It is suggested that an interdisciplinary approach to solving problems experienced with the criminal trial process, would be beneficial.<sup>25</sup> A good example of the employment of other disciplines in the criminal trial process is the Stepping Stones "One Stop" juvenile justice centre in Port Elizabeth.<sup>26</sup> Here social workers, psychologists and lawyers collectively attempt to make the criminal trial system more accessible to juveniles.

#### **7.2.6 *The employment of technology***

The researcher proposed at a national conference on "Access to Justice" in 1995<sup>27</sup> that technology, in the form of instructional video tapes should be employed to inform arrested persons of their rights before their first appearance in court.

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25. Compare for instance the provisions of section 170A of the Criminal Procedure Act, where intermediaries are used to convey the evidence of child victims. Here a legal problem is solved by employing experts from another discipline.

26. Compare paragraph 2.2 above.

27. Compare chapter 1 above and annexures A and B.

This same concept could be employed to explain the criminal trial process to undefended accused persons prior to their trial. It is not submitted that the videos should replace the actual explanations afforded in court.

It is merely suggested that undefended accused persons who had the opportunity to see such a video would be more at ease during their court appearance, as the process will not be totally unfamiliar to them. In the preceding paragraphs suggested instances of remedial action were set out. It is submitted that the opportune time to implement these suggestions is in fact the present. Our entire country is in a state of transformation and this is the perfect time to implement novel ideas.

The appointment of a multi-disciplinary and representative task team, funded by government, is the first step in this transformation process.

In the next and final chapter the entire research project will be summarised and conclusions will be drawn. Proposals for further research projects will be advanced as well.

## CHAPTER 8

### *Summary and conclusions*

#### 8.1 *Introduction*

In this chapter the following are discussed:

- In 8.2 a summary of the research project as a whole will be provided;
- In 8.3 the shortcomings of the research project will be set out;
- In 8.4 further research proposals will be set out; and
- In 8.3 the main conclusions drawn from the research project will be set out.

## 8.2 *A summary of the research project*

In chapter 1 the objectives of this research project were listed as the testing of the validity of the following two hypotheses:

- The criminal trial process is a communicative process in essence which aims at ensuring a fair trial for undefended accused persons; and
  
- Ineffective communication takes place during the criminal trial process.

In chapter 3 the concept of a fair trial was accordingly discussed within a jurisprudential and communicative framework. It was concluded that in order for the criminal trial process to comply with the constitutional requirement of a fair trial the process itself has to be fair. The aim of the criminal trial process is thus to ensure a fair trial. However, in order to be fair, the process must be intelligible and accessible to all persons partaking therein, especially the undefended accused.



It was furthermore pointed out in chapter 3 that the criminal trial process is indeed a communicative process and that various factors impact negatively on communication. "Distorted" communication is indeed one of the factors leading to an undefended accused not receiving a fair trial.

In chapter 4 the criminal trial process was identified as a primarily oral process. Procedural explanations given to accused persons during the process were identified and the content of these procedural explanations were ascertained within the framework of case law and legal literature.

These procedural explanations are indeed instances of communication between the presiding officer and the undefended accused. It is accordingly submitted that the first hypothesis is supported by both the positive law and communication theories.

In order to test the validity of the second hypothesis, a field study was undertaken. The research methodology and the milieu wherein the field research was conducted, was set out in chapter 2. The information gathered by means of the field study, was set out in the last part of chapter 4. In order to evaluate the information gathered during the field research, a norm to test the intelligibility of the procedural explanations had to be adopted. In chapter 5 two such norms were set out and the psycholinguistic approach of the Charrows<sup>1</sup> was adopted.

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1. Compare chapter 5 above.

In chapter 6 the performance of the subjects who took part in the field study was evaluated. It became evident that the subjects who took part in the field study, on average, understood only 37% of the procedural explanations afforded to them by the presiding officer. It is accordingly submitted that highly ineffective communication took place during the field research and the second hypothesis was supported by the results of the field study.

The low level of intelligibility of the procedural explanations may have the result that on average, the undefended accused persons who took part in the research project did not receive a fair trial.<sup>2</sup>

In chapter 7 suggested instances of remedial action were advanced. It was suggested *inter alia* that legal aid should be afforded to undefended accused persons on a much larger scale and that a multi-disciplinary task team be appointed to re-address the position of the undefended accused.

### **8.3 Shortcomings of the research project**

The researcher concedes that this research project has the following shortcomings that may invite criticism to be levelled against it:

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2. Compare paragraph 3.2.2 in this regard.

■ *The sample employed was small:* The sample of 10 cases was small, but as this is a qualitative study, the size of the sample is not a deciding factor. Due to the fact that the researcher worked alone and without any financial aid to employ assistants, the identifying of 10 sample cases was an arduous task in itself.<sup>3</sup> It took the researcher almost 5 months to identify and attend the 10 sample cases. It is therefore submitted that the suggested task team could employ various researchers at different courts to make the sample more representative of the general population.<sup>4</sup> Specific courts could be identified where the research could be conducted. The court personnel in these courts could then fully be briefed about the research project. It would also be possible to repeat the experiment with the same subjects, as assistants could aid the researchers with follow up research projects.

■ *The second leg of the experiment of the Charrows could have been conducted:*<sup>5</sup> It is submitted that this research project supported the hypothesis that undefended accused persons do not understand procedural explanations afforded to them. In their experiment, the Charrows conducted a "follow up" experiment.

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3. Compare paragraph 2.1 above.

4. It is suggested that the task team would be more "official" and would therefore receive more co-operation than the researcher who acted in a private capacity.

5. Compare paragraph 5.3.3 above.

In the second experiment the jury instructions were rewritten to eliminate the apparently problematic items and constructions, and the paraphrase task was repeated with new subjects.<sup>6</sup> The reasons why the same was not done in this research project are twofold:

- In this research project actual undefended accused persons were used as subjects and the experiment was accordingly not conducted under laboratory conditions. It was thus not possible to rewrite the procedural explanations and request the magistrate in question to afford same to new subjects.
- The researcher is not a psycholinguist and was not in a position to rewrite the procedural explanations himself. Should a suggested task team be appointed, the expertise of such practitioners could be incorporated into the team.

It is however advanced that despite its shortcomings, this research project once again highlighted the plight of the undefended accused and supports, for the first time in South Africa by means of empirical research, the "general consensus"<sup>7</sup> that the criminal trial process is unintelligible to undefended accused persons.

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6. Compare paragraph 5.3.3 in this regard.

7. Compare paragraph 1.2 above.

#### 8.4 *Further research proposals*

Apart from an increase in the provision of legal aid, it was suggested that a multi-disciplinary task team should be appointed to re-address and investigate the situation of the undefended accused.

As this research project took the form of an exploratory or pilot project, it is suggested that the task team, or other researchers conduct similar research on a larger scale regarding the following aspects of the criminal trial process:

- *The effectiveness of communication during arrest when the rights of an arrested person are explained to him for the first time:* The rights of an arrested person are explained to him after his arrest. At this stage it is of the utmost importance that the arrested person understands his rights, so as to make informed choices.<sup>8</sup> Should a task team be appointed, researchers could test the intelligibility of these procedural explanations immediately after same were explained to arrested persons. Once again improved procedural explanations could be provided.

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8. Compare annexures "A" and "B" in this regard.

- *The intelligibility of the procedural explanation to legal representation:*  
In this research project all the sample cases attended were already placed on the roll for trial. The procedural explanation regarding the right to legal representation was explained to the subjects at a prior court appearance. This procedural explanation is of the utmost importance, because the procedural choice made here by an accused person might have serious consequences for his trial.<sup>9</sup>
  
- *The intelligibility and accuracy of procedural explanations afforded by interpreters:* In our courts on a daily basis use is made of interpreters. Procedural explanations are afforded by the presiding officer and the interpreter interprets same to the accused person. Empirical research is necessary to establish the intelligibility and accuracy of such interpreted procedural explanations. The suggested task team could conduct this research with the aid of assistants who are able to speak the relevant language.
  
- *The intelligibility of other court proceedings where persons often appear in person, such as maintenance enquiries and divorce proceedings:* It should be kept in mind that "unrepresented lay persons" appear in courts other than criminal courts on a daily basis. These proceedings as well should be intelligible to such lay persons.

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9. Compare annexure C in this regard.

The procedures of civil law are often difficult and efforts need to be made to make civil law proceedings accessible as well.

### **8.5 *Main conclusions***

The field study conducted was of a qualitative nature and the sample was not very large. The results obtained during the field study could therefore not be made applicable to the general population, and no suggestions or attempts in this regard are advocated by the researcher.

It can therefore not be concluded that all undefended, or even the majority of persons in this group, do not receive fair trials. It can however be concluded that the majority of subjects who took part in the field study may not have received a fair trial.

The results of this particular field study raise serious causes for concern. Each and every accused person is afforded the right to a fair trial in terms of the Constitution.<sup>10</sup> It is therefore of paramount importance and urgency that government appoints a multi-disciplinary task team to investigate and re-address the situation of the undefended accused. In paragraph 8.4 further research proposals are set out. It is advanced that these research proposals could be of aid to such a task team.

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10. Compare chapter 3 above.

By improving intelligibility of and communication during the criminal trial process progress towards attainment of the constitutional right to a fair trial will be made.

However, in the interim concerted efforts should be made to increase the number of legal aid appointed legal representatives. By affording more accused persons legal representation, the risk of accused persons not receiving fair trials will be minimized.

The words of Didcott J in *S v Vermaas; S v Du Plessis*<sup>11</sup> are apt to conclude this research project:

"One can safely assume that, in spite of section 25(3)(e), the situation still prevails where during every month countless thousands of South Africans are criminally tried without legal representation because they are too poor to pay for it. They are presumably informed at the beginning, as the section requires them peremptorily to be, of their right to obtain that free of charge in the circumstances which it defines. Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it is not backed by mechanisms that are adequate for the enforcement of the right."

Mechanisms that are adequate for the enforcement of the right to a fair trial should be put into place as soon as possible.

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11. *Supra.*



## **ANNEXURE A**

### ***AN ACCESSIBLE AND INTELLIGIBLE CRIMINAL PROCEDURE: TECHNOLOGY TO THE RESCUE<sup>1</sup>***

#### **1. INTRODUCTION**

The term 'access' is defined in the Concise Oxford Dictionary as "the right or opportunity to reach, use or visit, or the condition of being readily approached." For a criminal justice system to be accessible, persons drawn into the criminal justice system, must be in a position to readily approach and gain access to the system.

On a daily basis vast numbers of accused persons appear in our courts. For the majority of these accused persons, it is their first encounter with the criminal justice system. Some accused persons might have appeared in court before, but they are still confronted with the highly technical and formal procedures and setting of the courtroom. What makes this situation more alarming, is the fact that the vast majority of accused persons do not have legal representation.<sup>2</sup>

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1. A paper delivered by the researcher at a national conference on "Access to Justice" held in Durban from 17-19 November 1995.

2. See paragraph 4 below.

## 2. ***RECONSTRUCTING REALITY IN THE COURTROOM***

Bennett and Feldman, two American researchers, in a leading work rightly describe court procedure as an effort to reconstruct reality.<sup>3</sup>

The court in effect reconstructs, through evidence, that which took place at the scene of a crime.

The witnesses, including the accused, can thus be viewed as actors reconstructing, through their testimony, what took place at the scene of the crime.

The accused and witnesses may be referred to as 'lay actors'. We must distinguish between lay and 'professional actors', because the said reconstruction takes place according to laid down rules. These rules are the so-called procedural rules, and are contained mostly in the law of criminal procedure, the law of evidence and criminal law.

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3. Bennett WL and Feldman MS *Reconstructing reality in the courtroom : Justice Judgement American Culture* (1981) Rutgers University Press.

The 'professional actors' include the presiding officer, the prosecutor, investigating officer and the defence attorney or advocate.<sup>4</sup> All of the professional actors have received formal training in the 'rules of the game' and apply these rules daily. They are thus familiar and at ease with the procedure.

A distinguishing feature of court procedure specifically, is that the reconstruction takes place through language. **The criminal trial is in essence a process of communication.**<sup>5</sup> Right from its inception, when an accused is arrested, he is informed (orally) of the reason for his arrest. Throughout the trial, the procedure is explained to the lay actors orally - through the medium of language.

### 3. ***PROPOSING A NEW PARADIGM FOR THE PROFESSIONAL ACTORS***

It is submitted that the professional actors should keep the following regarding the criminal justice system in mind:<sup>6</sup>

- 
4. Some witnesses such as expert witnesses may qualify as professional actors.
  5. The idea to view the criminal trial as a communication process, is expressed in my doctoral thesis. The title of the dissertation is *Simplification of the South African Criminal Trial Process: A Psycholinguistic Approach* (University of the Orange Free State).
  6. If some professional actors realised these factors, very little was done to implement them.

- *A criminal trial is a process of communication;*
  
- *Accused persons and witnesses are lay actors in the reconstructive process;*
  
- *The entire criminal justice system is complicated, mostly unknown and intimidating to the lay actors;*
  
- *The concept of a 'fair trial' must be accommodative enough to include the perceptions of the lay actors, as to what constitutes a fair trial.*

#### 4. **THE STARK REALITIES**

One possible solution aimed at eliminating the difficulties encountered by the lay actors, would be for the state to afford legal representation to all accused persons. It is however a known fact that the above-mentioned situation is currently not possible. The official statistics<sup>7</sup>, speak for themselves. Table 1 indicates the number of unrepresented accused that have appeared in our lower courts during the period 1990 to 1993:

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7. These statistics were supplied by the Department of Justice.

**TABLE 1: THE NUMBER OF UNREPRESENTED ACCUSED PERSONS**

	1990	1991	1992	1993
Total number of accused appearing in lower courts	587 332	776 082	788 749	754 403
Number of accused without legal representation	517 242	683 641	684 246	644 207

On average more than 80% of all accused persons appear in our lower courts without legal representation.

##### 5. ***THE FUNDAMENTAL RIGHT TO A FAIR TRIAL***

Our interim Constitution affords every accused person the right to a fair trial.<sup>8</sup>

The concept 'fair trial' does not only imply a fair trial in the minds of the professional actors. The accused, who is afforded this right, must at least **perceive** his trial to be a fair one. Other lay actors must also share this perception.<sup>9</sup>

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8. See section 25 of Act 200 of 1993.

9. The other lay actors include members of the public, the family of the accused and the family of the victim.

A right, guaranteed in the Constitution, implies that the person afforded the right, must be aware of and appreciate the content of that right. A right does not mean anything in practice, if the bearer thereof does not know about it, or did not understand the implication thereof, when it was explained to him. We can argue that we uphold a "rights culture" only when all bearers of rights are aware of and appreciate the content of these rights.

## 6. *THE FAIR TRIAL AND COMMUNICATION*

It is of the utmost importance that the fundamental rights of an accused and the import of court procedure are communicated to the lay actors **effectively**. It is submitted that the conditions under which this communication takes place currently are not conducive to effective communication.

A few possible reasons for the 'distorted' communication include the following:

- *The complicated and intimidating features of the criminal justice system:*  
As explained, the procedures employed in the criminal justice system are complicated and were designed by professionals for professionals.

It is not difficult to imagine the fear installed in a person entering a court session for the first time.

- *The poor conditions under which especially law enforcement officers have to communicate with arrested persons:* Most busy police charge offices remind one of emergency wards in hospitals. How can we expect the arresting or interviewing officer to fully inform an accused of his rights and expect from the accused to understand what his rights are under such circumstances?
  
- *The language and cultural barriers:* Envisage the situation where an Afrikaans speaking police officer has to explain to a Xhosa speaking accused his rights, with the aid of a Xhosa speaking colleague, especially when the latter's knowledge of Afrikaans is not that good.
  
- *The work overload experienced by the criminal justice system:* Although the presiding officers in most courts are quite patient, most normal persons, and especially overworked and underpaid magistrates, run out of patience sooner or later. The overloaded court rolls have the effect that magistrates cannot spend an indefinite period explaining the procedural rights to a single accused person.

## 7. **TECHNOLOGY TO THE RESCUE**

One possible solution to cure the communication problems would be to supply lay actors with booklets or brochures, informing them about their rights or the relevant procedures.

The Department of Justice must be complimented on their recent booklet explaining the criminal justice system to witnesses.

In the South African context, this publication is a step in the right direction, but not the ultimate solution. This submission is based on the fact that a vast section of our population is illiterate.<sup>10</sup> It is furthermore a known fact that the average person is lazy to read.

It is suggested in this paper<sup>11</sup> that the utilization of electronic media is the appropriate means to alleviate the problems encountered in the communication process. To prove the viability of this submission a mandate was given to *Skills Facilitating Academy CC* to produce a short video film. In this video the fundamental rights and the first court appearance of arrested and accused persons are explained and illustrated.<sup>12</sup>

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10. The literacy rate (persons over 13 years with Standard 5 and lower) is 61%. There are thus 39% of persons that are illiterate.

11. These are some of the suggestions expressed in the above-mentioned doctoral thesis.

12. The close corporation has also been mandated to produce a video film explaining the court procedures to witnesses and the entire trial process to unrepresented accused persons.



This video film should be shown to the arrested or accused persons after their arrest, and after the police have done their initial procedural tasks in connection with the accused, such as the taking of fingerprints and blood samples and after the relevant officer has given the accused the normal police warnings.

The following are some of the major advantages of the video film as communication channel:

- The accused can watch the video in a more relaxed atmosphere, than a charge office or the investigating officer's office. It is suggested that special video rooms should be established at the relevant centres.
- The video can readily be made available in all the eleven official languages.
- The cost factor in implementing the concept is small, compared to the envisaged effectiveness of the concept. It is suggested that all police stations and prisons, where awaiting trial prisoners are held, be equipped with television monitors, video playback machines and copies of the video films.

- The accused person will know in advance what to expect at his first appearance in court. This will to a large extent eliminate the fear and intimidation associated with the unknown. The accused will in addition have a basic knowledge of his rights. As is shown in the video film, the right to legal representation and the role of the Legal Aid Board will be emphasised.
  
- This concept will ensure that accused or detained persons are informed about their rights. This concept might in addition assure that law enforcement officers do not abuse the rights of persons in their custody.
  
- The video film is short and concise and should capture the attention of the viewer. People are inclined to look before they listen.

There are numerous other advantages to the concept, which I wish the commission to discuss. Please join me, in watching a prototype of the first video in the series. My appreciation to Vista University for their financial assistance with the research project, and to *Skills Facilitating Academy CC* for completing the video film on very short notice.

## ANNEXURE B

*"Do you understand so far? " : A psycholinguistic evaluation of the standard explanation of an accused person's rights at the close of the case for the prosecution<sup>1</sup>*

### 1. *Introduction*

It is settled practice that the rights of an undefended accused person are explained to him or her at the close of the case of the prosecution. The task of informing the undefended accused of these rights rests on the shoulders of the presiding officer. The medium of this informative communication is language or the spoken word, be it in the accused's mother tongue, or through an interpreter.

As will be pointed out, the various rights involve procedural choices which the undefended accused must make. These choices will have vital influences on the eventual outcome of the trial. It is thus imperative that undefended accused persons **understand** these procedural rights and/or choices.

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1. A paper delivered by the researcher at an international colloquium on "Language in Court" held at Vista University, Port Elizabeth, from 22-24 August 1996.

In this paper a "standard" explanation of these rights will be analysed and its intelligibility will be determined on the psycholinguistic guidelines formulated by the Charrows.<sup>2</sup>

**2. *The legal foundations of the right of the undefended accused to be informed of his or her rights***

In terms of Section 25 of the Constitution of the Republic of South Africa Act<sup>3</sup> every accused person shall have the right to a fair trial. Included in this right are *inter alia* the following procedural rights:

- (a) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;<sup>4</sup>
- (b) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;<sup>5</sup> and
- (c) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her.<sup>6</sup>

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2. Charrow PR and Charrow VR "Making legal language understandable: A psycholinguistic study of jury instructions" *Columbia Law Review* (1979) at 1306.

3. Act 200 of 1993.

4. Section 25(3)(c).

5. Section 25(3)(d).

6. Section 25(3)(i).

These rights were afforded an accused person even before the implementation of the interim Constitution. According to Section 151 of the Criminal Procedure Act<sup>7</sup>, an accused person has the following rights at the end of the state's case:

- (a) to address the court for the purpose of indicating to the court, without comment, what evidence he or she intends adducing on behalf of the defence<sup>8</sup>;
- (b) to testify in his or her defence<sup>9</sup>; and
- (b) to call witnesses in his or her defence<sup>10</sup>.

These rights were afforded accused persons under the 1917<sup>11</sup> and the 1955<sup>12</sup> Criminal Procedure Acts as well.

From case law it is clear that an established practise evolved that presiding officers must inform accused persons of the above-mentioned procedural rights.

Below are the reported cases on the issue:

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- 7. Act 51 of 1977.
  - 8. Section 151(1).
  - 9. Section 151(1)(b).
  - 10. Section 151(2)(a).
  - 11. Compare section 221(4) of Act 31 of 1917.
  - 12. Compare section 157(4) of Act 56 of 1955.

In *R v Sibia*<sup>13</sup> Schreiner JA stated the following:

"... the accused must have his mind directed separately to the questions whether he wishes to give evidence himself and whether he wishes to lead the evidence of other persons. But consideration of the fact that the accused may well be an ignorant person unacquainted with court procedure has led those courts before which the question has been raised to interpret the provision strictly against the Crown. On this view the portion of the sub-section with which we are concerned should be interpreted so as to require the accused be asked both whether he wishes to give evidence himself and, separately, whether he wishes to call any other witnesses."<sup>14</sup>

The court referred to the case of *R v Read*<sup>15</sup>, where Tindall, J, stated the following:

"(it was) desirable for magistrates in every case to ask the accused expressly whether he desires to give evidence himself under oath or to call witnesses".

The court held that it had become established practice to explain these rights and is should be maintain without relaxation.<sup>16</sup>

In *R v Nqubuka*<sup>17</sup> Dowling J set out the position as follows:

"The magistrate noted on the record:

'Accused gives no evidence but states: 'I think I said what happened. Complainant and I fought and the bottle got broken. In struggle the bottle cut her head. Complainant is a very quarrelsome type. That is all'.

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13. 1947 (2) SA 50 (A).

14. At 54.

15. 1924 TPD 718.

16. At 55.

17. 1950 (2) SA 363 (T).

There is no note in the record that the magistrate warned or informed the appellant of the courses which were open to him at the close of the Crown case in regard to the question of whether he should give evidence on oath or merely make a statement from the dock not subject to cross-examination.

The Court, in the case of *Frans Mtebele v Rex*, decided on the 10th June, 1947, not reported, laid down a rule (when I say 'laid down a rule' I mean 're-affirmed a rule') that it is the duty of a magistrate to give such explanation to an accused person of his position, and that it is desirable that the fact that such explanation had been given should be noted on record ... The Appellant states, on oath, that he was not aware of the position in regard to the desirability of giving evidence on oath. He says that he has never been in a court of law before in his life, and he denies that it was explained to him that an unsworn statement is practically valueless. He states that, had he known that, he would have given certain evidence on oath and been subjected to cross-examination."<sup>18</sup>

The magistrate's reasons for judgement are quoted as follows:

"The accused called no witnesses and gave no evidence. It is generally explained to all undefended natives through the interpreter about calling witnesses and giving evidence under oath, the value of which compared to unsworn statements, is explained."<sup>19</sup>

The court however found the reasons of the magistrate unacceptable and set the proceedings aside and ordered that it be re-tried before a different magistrate.<sup>20</sup>

In the case of *S v Vezj*<sup>21</sup> the court referred to *Sibia's* case and commented as follows:

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18. At 364.

19. At 365.

20. At 365.

21. 1963 (1) SA 9 (N).

"Apart from the statutory requirement to which I have referred, practice requires that an accused who is unrepresented at his trial should be afforded an explanation of the courses open to him, at the close of the prosecution, namely that he may give evidence on oath or make an unsworn statement from the dock, that if he decided upon the latter course he may not be cross-examined nor questioned by the court, but that generally evidence on oath carries more weight... To the explanation of these two courses I consider there should be added information that a third course is available him, namely to remain silent if he so wishes."<sup>22</sup>

Regarding the facts of the case the court stated:

"This is not a case of a mere omission to the record that the accused's rights were explained to her; that it is not a case of omission is clear from the response of the magistrate who convicted her - he was at a loss to know what legal rights she had at that stage. Presumably his apparent view that she had no legal rights to be explained to her arose from the fact that she had pleaded guilty, but I consider that to be an ill-founded view."<sup>23</sup>

This final reported case where this issue was discussed, is the case of *S v Motaung*<sup>24</sup> where it was stated:

"It should be unequivocally stated that it is imperative that an accused's rights in terms of s 151 of Act 51 of 1977, in respect of the adducing of evidence on behalf of the defence, be explained by the magistrate ...

Not only should this be done but the magistrate should see to it that the fact is properly recorded. This is a material part of the proceedings and cannot be omitted from the record..."<sup>25</sup>

As pointed out above, it is now an established practice, and indeed imperative in terms of the interim Constitution that presiding officers inform accused persons of their rights at the close of the case for the prosecution.

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22. At 11.

23. At 11.

24. 1980 (4) SA 131 (T).

25. At 133.



### 3. *The criminal trial as a communication process*

In essence a criminal trial is a process of communication. Language in both the spoken and written form is employed as the medium of communication. Unlike the civil trial process, the criminal trial is conducted mainly through the medium of the spoken word.

The explanation of an undefended accused person's rights at the close of the case for the prosecution is indeed done orally by the presiding officer.

It is therefore, in the light of the requirements for a fair trial, imperative that undefended accused persons **understand** firstly **what** their rights entail, and secondly **to make an informed choice** on which of the avenues open to him or her should be followed.

It is of the utmost importance that this explanation should be communicated to the undefended accused in the best possible way.

### 4. *The "standard" explanation available in Port Elizabeth*

In the magistrate's courts in Port Elizabeth, a Xeroxed form containing a "standard explanation", which magistrates may use as an aid to explain these rights to an accused person, is in circulation in courts. The form looks like this:

PAGE NO.: \_\_\_\_\_

CASE NO.: \_\_\_\_\_

RIGHTS OF THE ACCUSED:

The State has now closed its case. You now have the opportunity to place your version of the case before the Court. You can do this by testifying yourself and also by calling witnesses to testify on your behalf. If you testify, (your co-accused and)\* the State Prosecutor may cross-examine you and the Court may put questions to you. If you elect to call witnesses they may also be cross-examined in the same fashion that has just been explained to you.

You may also elect to remain silent. If you elect to remain silent you nevertheless retain the right to call witnesses. If you remain silent you may not be cross-examined by the State Prosecutor and the Court may not put questions to you.

Q. : Do you understand so far?

A. : \_\_\_\_\_

\* The statement(s) you made at the beginning of the proceedings in terms of Section 115 Act 51 of 1977 and the statement(s) made by you during cross-examination is/are not evidence in your favour unless you repeat it in evidence or call witnesses to confirm those statements on your behalf.

\* Admissions you made at the beginning of the proceedings in terms of 112(1)(b) stand as proof of those facts but the exculpatory statement(s) that you have made up to now as well as the statement(s) made by you during cross-examination is/are not evidence in your favour unless you repeat it in evidence or call witnesses to confirm those statements on your behalf.

Q. : Do you understand this explanation?

A. : \_\_\_\_\_

Q. : Do you understand that you have as yet not given evidence?

A. : \_\_\_\_\_

Q. : Do you wish to testify?

A. : \_\_\_\_\_

Q. : Do you wish to call witnesses?

A. : \_\_\_\_\_

See further page \_\_\_\_ of record.

(\* Delete which is not applicable.)

This explanation in fact conveys more information than the rights of an undefended accused person at the close of the case for the prosecution. The following procedural options and/or consequences are conveyed to the undefended accused person:

- (a) that he/she has the opportunity to place his/her version before the court;
- (b) the opportunity in (a) above may be exercised in two ways - by testifying in person and/or by calling witnesses;
- (c) if the election is made to testify and/or to call witnesses, the testimony will be subjected to cross-examination by the prosecutor;
- (d) that he/she may remain silent;
- (e) if option (d) is chosen, witnesses may still be called;
- (f) if option (d) is chosen, no cross-examination or questioning by the court will follow;
- (g) if option (d) is chosen and no witnesses are called, the only evidence before the court will be that of the state (and if accepted this may lead to a conviction);
- (h) the statement (if any) in terms of section 115 of the Criminal Procedure Act, as well as statement(s) made during cross-examination is/are not evidence in his/her favour, unless repeated in evidence under oath or confirmed by witnesses under oath;

- (i) admissions made in terms of proceedings in terms of section 112(1)(b) of the Criminal Procedure Act stand as proof of those facts, but the exculpatory statements that have been made up to now, as well as statement(s) made during cross-examination is/are not evidence in favour of the undefended accused person, unless repeated as in (h) above.

### 5. *An analysis of the text*

The micro text structure is the linguistic component of the text. This aspect includes the lexicon appearing in the text, as well as sentence structure employed. The term macro text structure refers to the typographical component of the text and the placing in the text of determined information units.

The level of communicative success achieved by a text can be determined by means of objective criteria. In this paper the psycholinguistic test devised by the Charrows will be employed to test the intelligibility of the standard explanation.<sup>26</sup>

In their research the Charrows found that the following general factors could affect the comprehensibility of a text:

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26. Charrow *op cit* at 1317-1327.

- (a) *Ordering defects*: The order in which data is given to the reader should be well structured, in order to enhance intelligibility. In the standard explanation the references to sections 115 and 112 of the Criminal Procedure Act are clearly out of order. These explanations should appear at the beginning of the form. These references are not logically structured, with reference to the entire explanation.
- (b) *Conceptual complexity*: Certain legal concepts are difficult to understand. The Charrows conclude that linguistic modification of such complex concepts should not affect the comprehensibility. The explanation is unavoidably rife with legal concepts, such as "closed its case", "testifying", "calling witnesses", "cross-examination", "State Prosecutor", "the Court", "proof of" and "exculpatory statements".
- (c) *Sentence length*: Certain educators<sup>27</sup> hold the view that comprehension is dramatically affected by sentence length, and that shorter sentences make discourse more comprehensible. It is submitted that the Charrows correctly conclude that the length of a sentence does not significantly affect its comprehensibility. In the standard explanation some sentences are rather long. The average number of words per sentence is 10 and the longest sentence contains 74 words.

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27. Compare Van den Bergh NJC *Leesbare en verstaanbare verbruikerskontrakte* (1985) University of Zululand Publicaton B. No. 52.

- (d) *Demographic Analysis*: A demographical analysis of the subjects used in their experiment revealed that the most significant factor enhancing comprehensibility was the level of education of the subjects. They found that the level of comprehension rose as the education level rose. In this research no actual empirical studies were undertaken.

The following linguistic constructions were found to affect the comprehensibility of a text:

- (a) *Nominalizations*: A nominalization is a noun that has been constructed from a verb. Linguistic theory indicates that nominalizations are for various reasons more difficult to process than their equivalent verb forms. In the standard explanation nominalizations such as "testifying" and "calling" appear. (Gerunds and participles are regarded as being nominalizations.)
- (b) *Prepositional Phrases*: These are phrases introduced by "as to". These phrases are vague, for they do not refer to a time, location, or purpose, but rather serve as a somewhat ambiguous link between parts of speech. No prepositional phrases appear in the standard explanation.

- (c) *Misplaced Phrases*: These include instances of phrases (mostly prepositional) inserted into the midst of otherwise normal clauses, or otherwise misplaced, so that they either break up the continuity of the clause or create ambiguity.
- (d) *"Whiz" and Complement Deletion*: These refer to subordinate clauses without relative pronouns (that, which, who, etc.) and 'copula' verbs ("Be" verbs, such as "was", "is", "am", "are". etc.). The following "whiz" deletions are present in the standard explanation: "admissions you made" (should read "admissions that you have made") and "the statement(s) you have made" (should read "the statement(s) that you have made").
- (e) *Lexical Items*: The most obvious difference between legal language and ordinary discourse is the technical vocabulary of the law. Included in this category are 'legal terms', unfamiliar expressions and uncommon words. In the discussion of "conceptual complexity" the 'legal terms' employed in the explanation were highlighted. These terms have a specific legal meaning, and will be difficult for the layman to comprehend.
- (f) *Modals*: Modals are a class of verbs, including "must", "may", "might", "should", "can", and "could", that are used as auxiliaries to other verbs and that carry meanings relating to ability, obligation, and permission.

In the standard explanation the occurrence of modals are rife, in view of the fact that the accused has various procedural choices. The modals which appear are: "can" and "may".

- (g) *Negatives*: Psycholinguistic research regarding negatives of various kinds has shown that negatives apparently take longer to process and cause more comprehension errors than similar ideas stated in positive form. In the standard explanation some aspects are expressed in the negative, for instance "you may not be cross-examined", "and not call any witnesses", "unless you repeat" and "are not evidence in your favour".
- (h) *Passives*: The Charrows found a high proportion of passive sentences in legal language. They doubt however whether passives impede comprehension. Some forms of passives appear in the standard explanation, for instance "the State Prosecutor may cross-examine you".
- (i) *Word Lists*: In search of precision, legal language often uses three or four words where one will do. The example they mention is the ritual use of the words "give, bequeath, and devise". In criminal trials for instance the oath administered to witnesses reads: "Do you swear to tell the truth, the whole truth and nothing but the truth?". In the standard explanation there are no examples of such word lists.



- (j) *Discourse structure*: Comprehension of discourse can depend on how the individual sentences are organized in relation to one another and on the coherence among sentences; this overall organization is referred to as "discourse structure".

As was pointed out during the discussion of "ordering defects", there are some instances of illogical ordering in the explanation.

- (k) *Embeddings*: Structural embeddings refer to the use of numerous subordinate clauses within one sentence. The Charrows found that as the number of embeddings within a text increased, comprehension decreased. In the standard explanation the sentence dealing with the section 115 statement, contains embeddings.

## 6. *Conclusion*

The standard explanation is an effort to inform an undefended accused person, in a simplified way, of his or her rights at the close of the case for the prosecution. As was pointed out in paragraph 5 *supra*, this explanation still contains linguistic and structural phenomena which affect comprehensibility negatively.

By employing the guidelines of the Charrows, this explanation can be made more comprehensible.

## **ANNEXURE C**

### **'WHAT DO YOU WISH TO DO?': PROCEDURAL CHOICES AND THE RIGHT TO A FAIR TRIAL<sup>1</sup>**

#### **1. INTRODUCTION**

The advent of South Africa's first democratic order in 1994 saw the implementation of the Constitution of the Republic of South Africa Act.<sup>2</sup> The interim Constitution was in force until 04 April 1997, and was succeeded by The Constitution of the Republic of South Africa Act.<sup>3</sup> Both the interim Constitution and Constitution entrenched the right of accused persons to a fair trial.<sup>4</sup>

The right to a fair trial includes the right to legal representation, and the right to be informed about such right.<sup>5</sup> Although this right exists on paper, the situation in practise differs materially.

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1. A paper delivered by the researcher at the Socio-Legal Studies Association Annual Conference held at Cardiff, Wales from 2-4 April 1997.
  2. Act 200 of 1993. Hereinafter referred to as "the interim Constitution".
  3. Act 108 of 1996. Hereinafter referred to as "the Constitution".
  4. Compare section 25 of the interim Constitution and section 35 of the Constitution.
  5. Compare section 25 of the interim Constitution and section 35 of the Constitution.

More than 80 percent of accused persons appearing in South African Magistrates' Courts<sup>6</sup> are not legally represented.<sup>7</sup>

As in the United Kingdom, an adversarial or accusatory system of criminal procedure is followed in South Africa. The public prosecutor and the accused are opponents and the trial generally follows a pattern of confrontation.<sup>8</sup>

It would be an exercise in self-delusion to think that at the end of the trial of an unrepresented accused justice has been done and that a trained prosecutor and an undefended layman are equal opponents.<sup>9</sup>

- 
6. Magistrates' courts are the lowest courts in the criminal court structure. These courts however hear the majority of criminal cases in South Africa.
  7. Consult Table 1 in this regard.
  8. See Van Wyk D (Editor) *Rights and Constitutionalism - The New South African Legal Order* (1994) Juta at 402 *et seq* as to general the nature of the South African criminal procedure.
  9. Chaskalson A "The Unrepresented Accused" *Consultus* October (1990). Chaskalson is now the President of South Africa's first Constitutional Court.

## 2. **PROCEDURAL CHOICES, THE RIGHT TO A FAIR TRIAL AND COMMUNICATION**

Every accused person has the right to a fair trial. To facilitate this right, the interim Constitution<sup>10</sup> and the Constitution<sup>11</sup> provide that a person must be informed upon his or her arrest of the right to legal representation. The explanation of the right to legal representation in this instance is given by the arresting officer, who will normally be a police officer.

As a result of the vast number of undefended accused persons appearing in South African courts, it has become settled practice that Magistrates explain the various procedural choices to undefended accused persons<sup>12</sup>, which includes the choice to legal representation.

In essence a criminal trial is a process of communication.<sup>13</sup> Language in both the spoken and written form is employed as the medium of communication.

---

10. Section 25(1)(c).

11. Section 35(2)(b) and (c).

12. These choices include *inter alia* the choices to: legal representation; to plead guilty or not guilty; to make an explanation of the plea of not guilty; to testify in own defence; to call witnesses and to cross-examine.

13. This idea to view the criminal trial process as a process of communication is expressed in my doctoral thesis *Simplification of the South African Criminal Trial Process: A Psycholinguistic Approach* (University of the Free State).

Unlike the civil trial process, a criminal trial is conducted mainly through the medium of the spoken word.<sup>14</sup>

The explanation of an undefended accused person's procedural choices is given orally by the presiding officer. It is therefore, in the light of the requirements for a fair trial, imperative that undefended accused persons firstly **understand what** their rights entail, and secondly are able to **make an informed choice** as to which of the avenues open to him or her should be followed.

As is the case with all forms of communication, certain factors have a negative influence on communication. Often "noises" distort communication between the sender (magistrate) and the receiver (accused).<sup>15</sup>

A few reasons for the 'distorted' communication in court include the following:

- 
14. Exceptions are the summons, charge sheet, evidence by way of affidavit and other documentary evidence.
  15. See in general regarding communication Eco U *A Theory of Semiotics* (1979) Indiana University Press 33 *et seq.*

- *The complicated and intimidating features of the criminal justice system:*

The procedures employed in the criminal justice system are complicated and were designed by professionals for professionals.

It is not difficult to imagine the fear installed in a person entering a court for the first time.

- *The poor conditions under which especially law enforcement officers have to communicate with arrested persons:*

Most busy police charge offices remind one of emergency wards in hospitals. How can we expect the arresting or interviewing officer to fully inform an accused of his rights and expect from the accused to understand what his rights are under such circumstances?

- *The language and cultural barriers:*

Envisage the situation where an Afrikaans speaking police officer has to explain to a Xhosa speaking accused his rights, with the aid of a Xhosa speaking colleague, especially when the latter's knowledge of Afrikaans is not that good.

■ *The work overload experienced by the criminal justice system:*

Although the presiding officers in most courts are quite patient, most normal persons, and especially overworked and underpaid magistrates, run out of patience sooner or later. The overloaded court rolls have the effect that magistrates cannot spend an indefinite period explaining the procedural rights to a single accused person.

As Scott<sup>16</sup> correctly points out:

"In many specialist domains, insiders often assume that, thanks to their specialized forms of talk, they can share uniformly with their peers a common body of knowledge and understanding and that they can, by these means of meaning, clarify and stabilize understanding with regard to even the most problematic of details. Conversely, they may assume that there is little need for them to communicate beyond the peer-community and/or little possibility of doing so, except by going to trouble that sources and recipients alike would agree was out of proportion to the gains achieved. Legal and medical professions cannot, or should not, allow themselves to communicate so selectively.

All citizens, even law-abiding and healthy citizens, are interested parties with regard to the concerns of these disciplines."

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16. Scott WT "Measures for Intelligibility in Legal Contexts" in *Law and the Conflict of Ideologies* Kevelson R (Editor), Peter Lang Publishers at 237.

### 3. *THE PROCEDURAL CHOICE REGARDING LEGAL REPRESENTATION*

Section 25(3)(e) of the interim Constitution affords every accused person a right to a fair trial, which right includes the right to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights. Likewise section 35(3) of the Constitution provides that every accused person has a right to a fair trial, which includes the right to choose and be represented by a legal practitioner, and to be informed of this right promptly. The accused likewise has a right to have a legal practitioner assigned to him or her by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

As is the case with other procedural choices, magistrates explain this choice orally at the first appearance to the accused. In the Port Elizabeth Magistrates' Courts the following "standard" form is available for magistrates to use:



S v : .....

DATE: .....

Presiding officer: .....

Public Prosecutor: .....

For defence: .....

Interpreter: .....

Court to Accused No:

You are entitled to be represented by an Attorney or Advocate of your own choice whom you have appointed out of own funds. (*sic*)

If you cannot afford a legal representative you may apply to the local Legal Aid Officer for assistance.

If your application is successful an independent legal representative will be appointed for you by the Legal Aid Officer.

Rights of information contained in docket explained to accused.

Do you understand?

.....

What do you wish to do?

From the standard explanation it is clear that the accused has three choices: to appoint his or her legal representative of choice and to pay for the services of the appointed legal representative; to apply for legal aid<sup>17</sup> or to conduct his or her own defence.

Although the language employed in the standard form is simple, the choice the undefended accused has to make will indeed have important consequences for the trial to follow.

For the layman who has no or very little knowledge of the legal system, the task of electing what to do is not that simple.

As judge Didcott correctly commented on the position of the undefended accused in *S v Khanyile*:<sup>18</sup>

"The odds are stacked against him, and stacked heavily. He knows nothing about the rules of evidence, rules mastered only through training and experience, rules that no tips he receives from the trial Court can equip him to understand fully or apply effectively.

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17. In terms of The Legal Aid Act, Act 22 of 1969, a Legal Aid Board is established to provide legal aid for indigent persons. A "means test" is employed to determine whether an applicant qualifies for legal aid. Mostly private practitioners are appointed to represent the applicant. In some centres there are Public Defenders Offices and Legal Aid Clinics run by the Board in conjunction with Universities.

18. 1988 (3) SA 795 (N) at 811J.

He knows nothing of the criminal law's subtleties, a law so infected nowadays with the notions of *Strafrechtswissenschaft*, a law so encrusted thus with doctrine, that concepts in constant currency, *mens rea* and common purpose to mention but a couple, give lawyers trouble enough and must mystify everyone else ignorant on such scores, he has no real grasp of what counts in law and what does not, with particular pieces of the evidence levelled at him he had better set out to refute and which he may safely leave alone because they are by the way, which specific facts he himself should advance and which he need not adduce since they take matters nowhere. Cross-examination, that weapon indispensable to forensic battle, is one in which he has no skill."

#### 4. *A DAY AT COURT: THE EMPIRICAL STUDY*

In preparation for this paper an empirical study was conducted at the New Brighton Magistrates' Courts. This magistrate's court is situated in a former black township. In court 23 most first appearances are dealt with. The right to legal representation is explained to the accused and he is required to make a choice as indicated above.

The empirical research took the form of a pilot survey or an exploratory research project.<sup>19</sup>

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19. In total there were 20 "fresh" cases on the court's roll. Twelve of the accused were interviewed immediately after the procedural choices regarding legal representation were explained to them.

A questionnaire, annexed hereto as annexure "A", was employed to gain information from the interviewed respondents.<sup>20</sup>

The results of the empirical research are as follows:

- Two out of the twelve respondents stated that their right to legal representation was explained to them by the police before their first appearance in court. For 83% of the respondents the explanation in court was their first.<sup>21</sup>
- All twelve respondents were able to repeat the three choices explained to them.
- Two respondents (16,5%) chose to apply for legal aid;
- Two respondents (16,5%) chose to appoint their own legal representative;

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20. The respondents were charged with a wide ranging list of crimes, which included murder, rape, assault, negligent driving, theft and malicious injury to property. The age of the respondents ranged between 16 years and 47 years and their level of education from standard 1 to second year university level. Four of the respondents were female and eight were males. Seven out of the twelve respondents (58%) were first offenders. In all cases the magistrate explained the procedural choices in English or Afrikaans and the explanation was translated to them in Xhosa.

21. This situation is of course contrary to the express provisions of section 35(2) of the Constitution.

- Eight respondents (67%) chose to conduct their own defence;
- From the five (41,5%) respondents who were not first offenders, two chose to apply for legal aid.

From the choices made by the respondents, the following comments may be made:

- It is clear that the respondents were able to repeat **what** the choices they could make were;
- The fact that 67% of respondents wished to conduct their own defence is alarming, especially if the **reasons** for their choices are considered: 4 respondents wished to conduct their own defence, because they believed that the case against them would be withdrawn by the complainants, as they knew the complainants in some or other way, or because they had paid "compensation" to the complainants;<sup>22</sup> two respondents did not "trust" attorneys appointed by the Legal Aid Board;

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22. These respondents were charged with assault or malicious injury to property.

four respondents said that they decided to conduct their own defence, because they did not understand their rights to legal aid properly<sup>23</sup> and one respondent decided to conduct his own defence because he is unemployed.<sup>24</sup>

- The two respondents who decided to appoint their own attorneys did not know how much the services of an attorney would cost them and only one of them knew which attorney she wished to appoint.

The other respondent did not know how to get hold of an attorney, but stated that her mother would assist her in finding an attorney.

- The two respondents who applied for legal aid were both not first offenders and had appeared in court previously.

It is therefore clear that although the respondents were able to recall what the three choices were, their choices were not made in an informed manner or in their best interests. As an exploratory research project is supposed to provide guidelines for future research, this research indicated the following:

- An extended and in depth empirical study regarding the effectiveness of explanations of procedural choices is necessary;

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23. These accused were charged with murder and rape respectively! The accused charged with rape was 16 years old.

24. This accused was charged with theft.

- The questionnaire used was effective and easily understood by the respondents and could be re-employed in future;
- There is a need to find ways to empower undefended accused to make informed procedural choices;
- Such mechanisms will enhance the notion of a fair trial.

#### 7. ***ONE POSSIBLE SOLUTION: TECHNOLOGY TO THE RESCUE***

One possible solution to cure the communication problems would be to supply undefended accused persons with booklets or brochures, informing them about their rights or the relevant procedures. The Department of Justice must be complimented on their recent booklet explaining the criminal justice system to witnesses.

In the South African context, this publication is a step in the right direction, but not the ultimate solution. This submission is based on the fact that a vast section of our population is illiterate.<sup>25</sup> It is furthermore a known fact that the average person is lazy to read.

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25. The South African literacy rate (persons over 13 years with Standard 5 and lower) is 61%. Thus 39% of persons are illiterate.

It is suggested in this paper<sup>26</sup> that the utilization of the electronic media is the appropriate means to alleviate the problems encountered regarding the communication process. To prove the viability of this submission a mandate was given to *Skills Facilitating Academy CC* to produce a short video film.

In this video the fundamental rights and the first court appearance of arrested and accused persons are explained and illustrated.<sup>27</sup>

It is suggested that this video film should be shown to the arrested or accused persons after their arrest, and after the police have performed their initial procedural tasks regarding the accused, such as the taking of fingerprints and blood samples and after the relevant officer has given the accused the normal police warnings.

The following are some of the major advantages of the video film as communication channel:

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26 These are some of the suggestions expressed in my above-mentioned doctoral thesis.

27 The close corporation has also been mandated to produce a video film explaining the court procedures to witnesses and the entire trial process to unrepresented accused persons.



- The accused can watch the video in an atmosphere which is more relaxed, than a charge office or the investigating officer's office. It is suggested that special video rooms should be established at the relevant centres.
  
- The video can readily be made available in all the eleven official languages.<sup>28</sup>
  
- The cost factor in implementing the concept is small compared to the envisaged effectiveness of the concept. It is suggested that all police stations, prisons and court buildings, where awaiting trial prisoners are held, be equipped with television monitors, video playback machines and copies of the video tapes.
  
- The accused person will know in advance what to expect at his first appearance in court. This will to a large extent eliminate the fear and intimidation associated with the unknown. The accused will in addition have a basic knowledge of his rights. As is shown in the video film, the right to legal representation and the role of the Legal Aid Board will be emphasised.

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28. In terms of section 6 of the Constitution South Africa has the following official languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

- This concept will ensure that accused or detained persons are informed about their rights. This concept might in addition ensure that law enforcement officers do not abuse the rights of persons in their custody.
  
- The video film is short and concise and should capture the attention of the viewer. People are inclined to look before they listen.

There are numerous other advantages to the concept, which I wish the conference to discuss. Please join me, in watching a prototype of the first video in the series.

My appreciation to Vista University for their financial assistance with this research project, Mr Festile, my student assistant, for interpreting to the respondents and to *Skills Facilitating Academy CC* for completing the video film with very limited resources.

**TABLE 1: THE NUMBER OF UNREPRESENTED ACCUSED PERSONS**

	1990	1991	1992	1993
Total number of accused appearing in lower courts	587 332	776 082	788 749	754 403
Number of accused without legal representation	517 242	683 641	684 246	644 207

## ANNEXURE "A"

## QUESTIONNAIRE

AGE: _____	FIRST OFFENDER: YES/NO
SEX: _____	CHARGE: _____
LEVEL OF EDUCATION: _____	

QUESTION	ANSWER
1. When were your rights to legal representation explained to you for the first time?	
_____	
2. Just now in court these rights were explained to you:	
(a) What were the choices you could make?	
_____	
(b) Which choice did you make?	
(i) Apply for legal aid?	
(ii) Appoint own legal representative?	
(iii) Conduct your own case?	
_____	
3. If 2(b)(i): Do you know:	
• What the Legal Aid Board is?	
• What the means test is?	
• What you must do to obtain legal aid?	
• Who will represent you?	
_____	
4. If 2(b)(ii): Do you know:	
• Which attorney are you going to appoint?	
• How much will this attorney cost you?	
• If you do not know which attorney you will appoint, how will you find one?	
_____	
5. If 2(b)(iii):	
• Why did you choose this option?	
• Why did you not apply for legal aid?	
• May you change your mind and apply for legal aid?	

**Form 1 - Right to legal representation**

A185  
Page No:

S v : .....  
DATE: .....  
Presiding officer: .....  
Public Prosecutor: .....  
For defence: .....  
Interpreter: .....  
Court to Accused No:

You are entitled to be represented by an Attorney or Advocate of your own choice whom you have appointed out of own funds. (*sic*)

If you cannot afford a legal representative you may apply to the local Legal Aid Officer for assistance.

If your application is successful an independent legal representative will be appointed for you by the Legal Aid Officer.

Rights of information contained in docket explained to accused.

Do you understand?

.....

What do you wish to do?

.....

*Form 2 - Explanation of plea*

Roneo no.6

PLEA OF NOT GUILTY

Proceedings in terms of Section 115 of Act No. 51 of 1977.

Section 115(1)

COURT TO ACCUSED

Do you wish to make a statement indicating the basis of your defence? You are not obliged to make such a statement. The statement must be voluntary.

ACCUSED IN REPLY: \_\_\_\_\_

Questioning of the accused in terms of Section 115(2)(a) of Act No. 51 of 1977 in order to establish which allegations in the charge are in dispute. The accused is informed that he is not obliged to answer the questions.

Admissions in terms of sections 115(2) of Act No. 51 of 1977.

COURT TO ACCUSED

Do you agree that the following allegations are not in issue and that it may be recorded as admissions? You are not obliged to make any admissions. If you make admissions it will not be necessary for the prosecutor to prove the facts contained therein.

Admissions as above read over to accused. Accused confirms and consents that it may be recorded as admissions in terms of section 220 of Act 51 of 1977.

MAGISTRATE

DATE: \_\_\_\_\_

**Form 3 - Rights at the close of the case for the prosecution**

Stencil No. 22.

a556

PAGE NO.: \_\_\_\_\_

CASE NO.: \_\_\_\_\_

**RIGHTS OF THE ACCUSED:**

The State has now closed its case. You now have the opportunity to place your version of the case before the Court. You can do this by testifying yourself and also by calling witnesses to testify on your behalf. If you testify, (your co-accused and)\* the State Prosecutor may cross-examine you and the Court may put questions to you. If you elect to call witnesses they may also be cross-examined in the same fashion that has just been explained to you.

You may also elect to remain silent. If you elect to remain silent you nevertheless retain the right to call witnesses. If you remain silent you may not be cross-examined by the State Prosecutor and the Court may not put questions to you.

Q. : Do you understand so far?

A. : \_\_\_\_\_

\* The statement(s) you made at the beginning of the proceedings in terms of Section 115 Act 51 of 1977 and the statement(s) made by you during cross-examination is/are not evidence in your favour unless you repeat it in evidence or call witnesses to confirm those statements on your behalf.

\* Admissions you made at the beginning of the proceedings in terms of 112(1)(b) stand as proof of those facts but the exculpatory statement(s) that you have made up to now as well as the statement(s) made by you during cross-examination is/are not evidence in your favour unless you repeat it in evidence or call witnesses to confirm those statements on your behalf.

Q. : Do you understand this explanation?

A. : \_\_\_\_\_

Q. : Do you understand that you have as yet not given evidence?

A. : \_\_\_\_\_

Q. : Do you wish to testify?

A. : \_\_\_\_\_

Q. : Do you wish to call witnesses?

A. : \_\_\_\_\_

See further page \_\_\_\_ of record.

(\* Delete which is not applicable.)

*Form 4 - Plea in terms of section 112(1)(a)*

Roneo Nr.7

a749

PAGE: \_\_\_\_\_

CASE NO.: \_\_\_\_\_

THE STATE VERSUS: \_\_\_\_\_

DATE: \_\_\_\_\_

PRESIDING OFFICER: \_\_\_\_\_

PUBLIC PROSECUTOR: \_\_\_\_\_

FOR DEFENCE: \_\_\_\_\_

INTERPRETER: \_\_\_\_\_

PROCEEDINGS IN TERMS OF SECTION 112(1)(a)

PLEA: \_\_\_\_\_

ACCUSED: \_\_\_\_\_

JUDGMENT: \_\_\_\_\_

ACCUSED: \_\_\_\_\_

P.P PROVES PREVIOUS CONVICTIONS / DOES NOT PROVE PREVIOUS CONVICTIONS.

Rights explained to the accused. He understands.

accused elects to / not to testify under oath.

Accused calls / does not wish to call witnesses.

Accused states in mitigation of sentence:

\_\_\_\_\_

Prosecutor in respect of sentence:

\_\_\_\_\_

SENTENCE: SEE CHARGE SHEET  
ADD. MAGISTRATE / PORT ELIZABETH



**Form 5 - Plea in terms of section 112(1)(b)**

Roneo No.5

a12(a)

PAGE \_\_\_\_\_

CASE NO: \_\_\_\_\_

PLEA OF GUILTY

THE STATE VERSUS: \_\_\_\_\_

Questioning in terms of section 112(1)(b) of Act No. 51 of 1977:

COURT TO ACCUSED:

Do you understand the charge?

Reply: \*Yes/No

\_\_\_\_\_

RECORD OF QUESTIONING

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The court is satisfied that the accused is guilty of the offence to which he/she has pleaded guilty and finds him/her guilty as charge.

\_\_\_\_\_  
\_\_\_\_\_

ACCUSED'S RIGHTS EXPLAINED.  
ACCUSED WANTS / DOES NOT WANT TO TESTIFY UNDER OATH.  
ACCUSED WANTS / DOES NOT WANT TO CALL WITNESSES.

Accused in mitigation of sentence:

\_\_\_\_\_  
\_\_\_\_\_

Prosecutor on the question of sentence:

\_\_\_\_\_

SENTENCE: SEE J15/ANNEXURE

\_\_\_\_\_  
MAGISTRATE

**Form 6 - SAPS explanation of rights at arrest**

**THE RIGHTS OF AN ARRESTED PERSON**

1. DID THE PERSON WHO APPREHENDED YOU, INFORM YOU IN A LANGUAGE THAT YOU UNDERSTOOD:-

[A] that he/she is a police officer?

YES NO

[B] that he/she is arresting you?

YES NO

[C] what the reasons for your arrest are?

YES NO

[D] that you have the right to remain silent?

YES NO

[E] that, should you say anything, it will be written down and might be used in evidence against you?

YES NO

[F] that you are entitled to a legal advisor?

YES NO

2. REMEMBER THAT YOU ARE ENTITLED TO THE FOLLOWING:-

[A] that you can immediately consult with a legal advisor of your choice;

[B] that you can communicate with and be visited by your spouse, next of kin, religious advisor and medical practitioner of your choice;

[C] that you must be supplied with food, reading material and medical treatment;

[D] that within 48 hours after arrest you must be brought before a court;

PLACE: .....

.....  
SIGNATURE/THUMBPRINT OF ARRESTED PERSON

DATE: .....

TIME: .....

.....  
OFFICER EFFECTING THE ARREST

## CASE REGISTER

### A: SOUTH AFRICAN CASE LAW

*Caroll v Caroll* 1947 (4) SA 37 (D&CLD)

*De Freitas and Another v Society of Advocates Natal* 1998 (11) BCLR 1345 (CC)

*Khumbusa v The State and Another* 1977 (1) SA 394 (N)

*Nkani v Attorney General and Another* 1989 (3) SA 655 (Ck)

*Namib Wood Industries (Pty) Ltd v Mutiltha NO and Another* 1992 (1) SACR 381  
(Nm)

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## ***SUMMARY***

In this research the validity of the following two hypotheses are tested within the broad framework of the right of an accused person to a fair trial, as embodied in section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996:

- The criminal trial process is a communicative process in essence which aims at ensuring a fair trial for undefended accused persons; and
- Ineffective communication takes place during the criminal trial process.

The concept of a fair trial is discussed within a jurisprudential and communicative framework. In order for the criminal trial process to comply with the constitutional requirement of a fair trial the process itself has to be fair. The aim of the criminal trial process is thus to ensure a fair trial. However, in order to be fair, the process must be intelligible and accessible to all participants, especially in the case of undefended accused persons.

It is pointed out that the criminal trial process is indeed a communicative process and that various factors impact negatively on communication.

"Distorted" communication is one of the factors leading to an undefended accused not receiving a fair trial.

The criminal trial process is identified as a primarily oral process. Procedural explanations given to accused persons during the process are identified and the content of these procedural explanations is ascertained within the framework of case law and legal literature. These procedural explanations are indeed instances of communication between the presiding officer and the undefended accused. It is accordingly submitted that the first hypothesis is supported by both the positive law and communication theories.

In order to test the validity of the second hypothesis, a field study was undertaken, employing a qualitative research methodology. Ten sample cases were identified and attended at court 30, Gelvandale Magistrate's Court, Port Elizabeth. The undefended accused persons in those cases were chosen as subjects of the empirical research. The purpose of the field study was to determine the level of intelligibility of procedural explanations afforded to the subjects by the presiding officer.

In order to evaluate the information gathered during the field research, a norm to test the intelligibility of the procedural explanations had to be adopted. After evaluating available norms, the psycholinguistic approach of the Charrows was adopted.

The performance of the subjects who took part in the field study was evaluated. It became evident that the subjects who took part in the field study, on average, understood only 37% of the procedural explanations afforded to them by the presiding officer. It is accordingly submitted that highly ineffective communication took place during the field research and the second hypothesis is supported by the results of the field study.

The low level of intelligibility of the procedural explanations may have the result that on average, the undefended accused persons who took part in the research project did not receive a fair trial.

Suggested instances of remedial action are accordingly advanced. It is suggested *inter alia* that legal aid should be afforded to undefended accused persons on a much larger scale and that a multi-disciplinary task team be appointed to re-address the position of the undefended accused.

## *SUMMARY IN AFRIKAANS*

In hierdie navorsing is die geldigheid van die volgende twee hipoteses, binne die breë raamwerk van die reg van 'n beskuldige tot 'n billike verhoor, soos vervat in artikel 35 van die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996, getoets:

- Die strafverhoor prosedure is in wese 'n kommunikasie proses wat ten doel het om 'n billike verhoor vir onverdedigde beskuldigdes te verseker; en
- Ondoeltreffende kommunikasie vind plaas gedurende die strafverhoor prosedure.

Die konsep van 'n billike verhoor word bespreek binne 'n regswetenskaplike en kommunikatiewe raamwerk. Ten einde aan die grondwetlike vereiste van 'n billike verhoor te voldoen, moet die prosedure, wat gedurende 'n strafverhoor gevolg word, billik wees. Die doel van die strafverhoor prosedure is dus om 'n billike verhoor te verseker. Om egter billik te wees, moet die proses verstaanbaar en toeganklik wees vir alle persone wat daaraan deelneem, veral in die geval van onverdedigde beskuldigdes.

Dit word benadruk dat die strafverhoorprosedure inderdaad 'n kommunikasie proses is en dat verskeie faktore negatief op hierdie proses inwerk.

"Verdraaide" kommunikasie is een van die faktore wat daartoe kan lei dat 'n onverdedigde beskuldigde nie 'n billike verhoor kry nie.

Die strafverhoorprosedure word geïdentifiseer as 'n primêre mondelinge proses. Prosesregtelike verduidelikings wat aan beskuldigdes gegee word, word geïdentifiseer en die inhoud daarvan word bepaal binne die raamwerk van regspraak en literatuur. Hierdie prosesregtelike verduidelikings is inderdaad gevalle van kommunikasie tussen die voorsittende beampte en die onverdedigde beskuldigde. Dit word gevolglik aan die hand gedoen dat die eerste hipotese deur beide die positiewe reg en kommunikasie teorieë ondersteun word.

Ten einde die geldigheid van die tweede hipotese te toets, was 'n gevallestudie gedoen. Hierdie gevallestudie het die vorm van 'n kwalitatiewe metodologie aangeneem. Tien sake was geïdentifiseer en bygewoon in hof 30, Gelvandale Landdroshowe, Port Elizabeth. Die onverdedigde beskuldigdes in hierdie sake het as deelnemers in die empiriese navorsing opgetree. Die doel van die gevallestudie was om die mate van verstaanbaarheid van die prosesregtelike verduidelikings, wat aan die deelnemers gegee is deur die voorsittende beampte, te bepaal.

Ten einde die inligting wat tydens die gevallestudie versamel is te evalueer, is 'n norm gekies om verstaanbaarheid van die prosesregtelike verduidelikings te bepaal.



Na evaluasie van verskillende norme, is die psigolinguistiese benadering van die Charrows aangeneem.

Die prestasie van die deelnemers wat aan die gevallestudie deelgeneem het, is daarna evalueer. Dit het aan die lig gekom dat die deelnemers slegs 37% van die prosesregtelike verduidelikings wat die voorsittende beampte aan hulle verduidelik het, verstaan het. Dit word gevolglik aan die hand gedoen dat hoogs oneffektiewe kommunikasie tydens die gevallestudies plaasgevind het. Die tweede hipotese is dus deur die gevallestudie gestaaf.

Die lae vlak van verstaanbaarheid van die prosesregtelike verduidelikings mag die gevolg gehad het dat die onverdedigde beskuldigdes wat aan die gevallestudie deelgeneem het, nie 'n billike verhoor gehad het nie.

Gevalle van remediërende aksie word voorgestel. Onder andere word daar voorgestel dat regshulp op 'n groter skaal aan onverdedigde beskuldigdes toegestaan word en dat 'n multi-dissiplinêre taakgroep saamgestel word om die situasie van die onverdedigde beskuldigde opnuut aan te spreek.