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An analysis of pre-trial publicity and the accused's right to a fair trial: A deconstruction of the *Krion* case

by

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Volume I

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SUMMARY OF THESIS

The title of this thesis is: **An analysis of pre-trial publicity and the accused's right to a fair trial: A deconstruction of the *Krion* case**. Based on the so-called *Krion* pre-trial motion for a permanent stay of prosecution (*Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T)), which constitutes the case study in this thesis and which application was handled by the candidate on behalf of the State (as First Respondent), this thesis principally seeks to examine the following two main questions:

- Firstly, whether the right of an accused to be presumed innocent would be violated by the prior reporting in law reports of adverse findings made against such accused in other judicial proceedings stemming from the same facts as the pending criminal matter, and whether the judicial officer required to preside over the criminal trial would not be impartial in the adjudication of the case by virtue of having prior knowledge of such findings.
- Secondly, whether by analogy, and indeed by extension of such theme, there would generally be a real and substantial risk that adverse pre-trial media publicity concerning a pending criminal case in South Africa would violate the accused's right to be presumed innocent and the accused's right to be tried before an impartial court comprised of a judge or magistrate sitting alone or with assessors duly appointed, thereby infringing the right of the accused to a fair trial which is entrenched in section 35(3) of the Constitution of the Republic of South Africa, 1996.

Essentially, this thesis explores the question whether in general, in South Africa's legal system, prejudicial pre-trial publicity relating to a criminal case is likely to have an adverse effect on the fairness of the accused's trial or to have a biasing effect on the outcome of the trial, when weighed against the backdrop of the developed system of the South African accusatory trial, procedural safeguards and judicial

mechanisms that have evolved to prevent just such a contingency. In this respect, this thesis also examines the constitutional right to freedom of expression and the media appertaining investigative journalism and the pre-trial reporting of a criminal case, and the balancing of such right with the accused's right to a fair trial. This includes an examination of the *sub judice* rule, the crime of contempt of court *ex facie curiae*, pre-trial publication bans, and the test for the granting of a stay of prosecution predicated on adverse pre-trial publicity.

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DECLARATION OF ORIGINALITY

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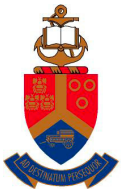

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This project would not have arisen were it not for my colleague, Adv. Arno Rossouw, who afforded me the opportunity to handle the *Krion* pre-trial motion for a stay of prosecution, on behalf of the State, and who appointed me as a co-prosecutor on the related substantive criminal case. I'm also deeply indebted to my supervisor, Professor Pieter Carstens, who came with the suggestion to apply for the upgrade of my degree from LLM to LLD, and whose guidance throughout was invaluable. Professor Carstens believed in this project from the start. The University is thanked for having granted the upgrade of my degree. I'm moreover deeply indebted to Professor Dawie de Villiers, who, in my oral defence, planted the seed for the discussion on adversarial process as a procedural safeguard in the face of adverse pre-trial publicity – he helped me to see the light. I must also thank Professor Annelize Nienaber for her support and guidance.

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"Those who sow in tears shall reap with shouts of joy!" – Psalm 126:5.

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CHAPTER 1

INTRODUCTION

There is general recognition of the fact that the courts cannot operate in a vacuum.[1]

One of the crucial elements of a fair hearing is the right to be tried solely on the evidence before the court, and not on any information received outside that context.[2]

1.1 Background to the present study

During 1998, Maria Johanna Prinsloo, commonly known as 'Marietjie', started an illegal Ponzi or multiplication scheme in the Vaal Triangle area. This scheme was operated until May 2002. The scheme spread countrywide; it grew to a nationwide network of agents and investors. During the four years of its existence, approximately R1.5 billion was invested in the scheme and upon its demise scores of investors had lost their money and were left destitute. The scheme had some 14,000 investors. Deposits were taken from investors (effectively the business of a bank was operated) and an average interest rate of 10% per month was offered on investments, which meant that the effective interest rate was 120% per annum if the interest was paid out monthly, and more if the interest was 'capitalised'. Such an interest rate was 20% and more above the Repo rate; hence a multiplication scheme was operated in contravention of Notice No. 1135 of 1999 issued in terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988. Ms Prinsloo initiated the scheme, but subsequently her six co-accused (accused 2 was at a stage married to Ms Prinsloo, and the remaining accused were family members), became involved at different times and in different capacities. Ms Prinsloo was the main role player throughout the operation of the scheme and was at the forefront of the criminal enterprise. Various entities were used to run the scheme, but in essence the scheme and the nature of the investments remained the same. The matter ultimately became known as the *Krion* case, as the last entity through which investments were solicited was Krion Financial Sevices Ltd.

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[1] *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245 para 65.
[2] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 31D.

The scheme was insolvent *ab initio*. There was never sufficient underlying business to generate enough income to pay the outlandish and unsustainable returns due to investors. Thus, the capital of new investors constantly had to be used to pay the interest commitments to old investors; typical of a get-rich-quick Ponzi scheme where the proverbial Peter is robbed to pay Paul.[3]

When the scheme was ultimately closed by the authorities during May/June 2002, the total value of active investments was approximately R965 million. This meant that the accused had to generate more than R90 million per month to pay the interest of investors. However, as at 4 June 2002 there was only R3.7 million remaining in the Krion bank account.

Ms Prinsloo (accused 1) and her co-accused were arrested during July 2002. They were subsequently arraigned in 2009 on no less than 218 683 counts. When the trial commenced, the matter was the biggest Ponzi scheme case to have been prosecuted in South Africa. The accused were charged *inter alia* with racketeering, money laundering, operating the business of a bank without being registered as such, unlawfully operating or conducting a multiplication scheme, fraud, theft and a range of tax offences. The trial commenced at the end of July 2009, and in 2010, the accused were convicted on a large number of the counts preferred against them and sentenced to long terms of imprisonment, save for accused 5 (Ms Prinsloo's son, whose role in the scheme was minor), who was sentenced to a shorter period of imprisonment, and accused 7, who received a suspended sentence. Ms Prinsloo in fact received an effective sentence of 25 years' imprisonment.[4] Ms Prinsloo and accused 2-6 appealed against their convictions and sentences, but in the main, their respective appeals were dismissed by the Supreme Court of Appeal on 4 December 2015.[5]

Whilst the criminal case was being investigated and an auditor of PricewaterhouseCoopers (PwC) was compiling his forensic audit report as regards

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[3] A Ponzi scheme is named after an Italian immigrant, Charles Ponzi of Boston, Massachusetts, USA, who in 1919 devised a scheme by which he enticed some 11 000 Bostonians to invest approximately USD20 million with him, promising exceptionally high rates of return within a short period of time by purchasing international reply coupons from other countries and then redeeming them in the US for postage stamps. Initially he was able to pay these exorbitant returns to previous investors by simply drawing from the capital investments received from subsequent investors. However, seeing that the scheme was not based upon any viable underlying economic enterprise, it eventually had to collapse when no more investors could be persuaded to make further investments.

[4] See *S v Prinsloo en Ander* GNP 08-06-2010 case no CC384/2006; *S v Prinsloo* 2010 JDR 0725 (GNP); *S v Prinsloo* 2010 JDR 1234 (GNP).

[5] See *S v Prinsloo and Others* 2016 2 SACR 25 (SCA).

the scheme operated by the accused (for purposes of the pending criminal trial), the activities forming the substance of the charges against the accused fell to be considered by various courts in civil cases, which courts included the Supreme Court of Appeal and the Income Tax Special Court. Judgments were given by these courts which were reported.[6] In these judgments, several pronouncements were made imputing criminal wrongdoing directly or indirectly to the accused persons, as operators of the scheme.[7] The gist of these pronouncements or findings was that the activities forming the substance of the criminal indictment were deemed to be fraudulent and unlawful. In a media summary issued by the Registrar of the Supreme Court of Appeal pertaining to the findings of the Court in one of the civil judgments, it was said:[8]

> Pyramid scheme swindlers must pay tax on their takings. This is the conclusion reached by the Supreme Court of Appeal. The case before it involved an illegal and fraudulent scheme operated by Marietjie Prinsloo through various corporations in the tax years 2000 to 2002 in Gauteng and neighbouring provinces.
>
> … The scheme made its money by illegal means. That was its income. The operators took the money for their own benefit, not with the intention to comply with supposed contracts with the investors. The scheme never had that contractual intention in any of the tax years.

Subsequent to these judgments having been given, one of the cited accused in the pending criminal case, filed an application in 2008 for a permanent stay of prosecution. The application was premised on the so-called pronouncements of guilt, or the findings of criminal conduct and criminal liability, contained in the civil judgments, as aforesaid. The Applicant averred in essence that the accused would not receive a fair trial principally because the trial court in the criminal case would be biased against the accused on account of the civil judgments and their right to be presumed innocent was violated by the findings of criminal liability expressed in the said decisions, which findings related to alleged illegal activities forming the substance of the criminal indictment.

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[6] See *Fourie NO and others v Edeling NO and others* 2005 4 All SA 393 (SCA); *MP Finance Group CC (In Liquidation) v Commissioner, South African Revenue Service* 2007 5 SA 521 (SCA); *Janse van Rensburg and Others NNO v Myburgh and Two Other Cases* 2007 6 SA 287 (T); *Van Eeden and Another v Engelbrecht* (2590/2002) 2002 ZAFSHC 21 (3 December 2002) *SAFLII* <www.saflii.org/za/cases/ZAFSHC/2002/21.pdf> (accessed 30-05-2018); *Income Tax Case No 1789* 67 SATC 205 (Natal Tax Court – 2 February 2005).

[7] These findings are dealt with more fully in chapter seven, where the *Krion* motion is discussed.

[8] Media Summary – Judgment delivered in the Supreme Court of Appeal: *MP Finance Group v CSARS* (31-05-2007) <http://www.justice.gov.za/sca/judgments/sca_2007/sca07-071%20ms.pdf> (accessed 01-06-2018).

Broadly, it was contended by the Applicant's counsel that:

- it was wrongful to publish in recognised law reports the adverse findings in the civil decisions that tended to prejudice the outcome of the criminal case;
- the findings could affect the objective and impartial adjudication of the case by the criminal trial court;
- the criminal trial would not be seen to be fair on account of the adverse findings;
- the prosecutors handling the criminal case would also be unduly influenced by these findings;
- witnesses would be unduly affected or influenced by the findings in the kind of evidence which they would give;
- the findings could 'tend to interfere with the administration of justice in that trial by the media is now lawful' and there was a 'prejudging by the media';
- the findings imputed criminal conduct to the accused who were not party to the civil proceedings and thus had no say in such proceedings (where, that is, the *audi alteram partem* rule was not applied);
- the findings, by indicating directly or by implication that the accused persons had broken the criminal law, damaged the reputation and good name of the accused, and were therefore defamatory;
- the findings in the civil judgments creating legal consequences would be binding on the criminal trial court;
- the accused were no longer presumed innocent but instead presumed guilty;
- the presumption of guilt created by the findings would mean that the accused would have to testify, and thus their rights to remain silent and not to testify during the proceedings were violated;
- it was unfair for the civil courts 'to publish detailed defamatory findings concerning [the accused] *in absentia* on some of the main issues to be raised in their pending criminal trial';
- the accused's right of appeal in a higher court was violated in that the appellate court would be biased on account of the findings expressed in the civil judgments;
- the findings, in light of the above, violated the accused's right to a fair trial;
- the constitutional infringements were not saved by the limitations clause.

It is clear from the afore-going that the Applicant likened the adverse findings in the civil decisions, and indeed the publishing of such in law reports and in the media, to prejudicial pre-trial publicity which paints an accused as guilty of criminal wrongdoing, thus having the potential of violating the accused's right to a fair trial in the impending criminal proceedings, particularly in relation to the accused's right to an unbiased and impartial court.

The State therefore, as First Respondent in the pre-trial motion, in opposing the application for a stay of prosecution, principally argued the matter on the basis of the effects, if any, which the impugned findings could have on the impartial adjudication of the criminal trial, with reference to the analogous position of pre-trial publicity and the right to a fair trial. It was also argued in essence by the State that a judge is a trained judicial officer who knows that he or she must decide every case which comes before him or her on the evidence adduced in that case, and that he or she would further know that a decision on the facts in one case is irrelevant in respect of any other case, and that he or she would be required to confine him- or herself to the evidence produced in the case he or she is actually trying. It was contended moreover by the State that the prosecution would still be required to prove each and every element of the crimes mentioned in the indictment beyond a reasonable doubt, despite the judgments in the civil matters.

The Court which heard the application, per Ngoepe JP, held that there was no basis for the contention that the criminal trial court would be influenced by the impugned pronouncements in the various civil cases and would therefore fail to adjudicate in the criminal trial objectively, with an open mind and with the necessary impartiality. The Court held that it was trite law that a decision by one court on factual matters is not binding on another court, where the parties in the respective cases are not the same. The criminal trial court would know that it would have to render a decision on the evidence adduced in the criminal case. Moreover, the standard of proof in criminal cases is higher than in civil trials. The State would have to prove its case beyond a reasonable doubt despite the findings as per the civil judgments.[9] Ngoepe JP also found that the Applicant's submissions:[10]

> … could lead to absurdities. Not only would an accused person be absolved from criminal prosecution once a civil judgment has been handed down against him/her in respect of the

[9] See *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) paras 8-10.
[10] *Ibid* para 8.

> same conduct, but the reverse would also have to occur: once a criminal conviction has been made against an accused person in respect of particular conduct, a subsequent civil trial in respect of the same conduct could likewise be deemed to be unfair to the accused (defendant) as a result of the perceived influence of the criminal verdict. This argument would make nonsense of the well established principle of our law that conduct can give rise to both civil and criminal liability, both of which are prosecutable against the perpetrator.

Ngoepe JP accordingly found that there were no substantive grounds on which to grant a permanent stay of prosecution and proceeded to dismiss the application.

If, however, it is accepted that judges are human too,[11] and may thus conceivably be affected by outside information of a prejudicial nature,[12] the question arises, with respect, whether Ngoepe JP's findings are indeed correct, particularly with regard to the notion that the criminal trial court would not be influenced by pre-trial publicity and would, notwithstanding such publicity, adjudicate on the case objectively, with an open mind and with the necessary impartiality.

More recently, questions have for instance been raised, as reported on in the media, whether former president Jacob Zuma would receive a fair trial, particularly an unbiased hearing, in his impending racketeering, money laundering, fraud and corruption case, due to the many years of negative publicity surrounding Zuma and a so-called trial by media that has occurred.[13]

There is considerable case-law and academic literature, including empirical studies, on the effects of adverse pre-trial publicity on the capacity of jurors to adjudicate on a case objectively and impartiality, that is, on their ability to decide a case solely on the evidence adduced at trial and not to be influenced by any information received outside that context. There is, however, less authority on the possible detrimental effects which prejudicial pre-trial publicity can have on a professional judicial officer's capacity to decide a case impartiality, that is, without bias occasioned by the publicity. There is still less authority dealing with the impact of pronouncements of guilt made in decisions in parallel judicial proceedings on the impartiality of the trial court in the subsequent criminal case, although under European law there is considerable case-law on the effects of such pronouncements

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[11] J Frank *Courts on Trial: Myth and Reality in American Justice* (1950) 146-156, 410; *In re JP Linahan* 138 F.2d 650 651-654 (1943); J Frank *Law and the Modern Mind* Reprint Edition (1970) 114.

[12] See, for example, *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36D; P Swanepoel 'Pre-trial publicity: Freedom of the press *versus* fair trial rights in South Africa?' (2006) 27(1) *Ecquid Novi* 3 9.

[13] See D Spies 'Zuma unlikely to get a fair trial in SA – MKMVA' (17-03-2018) *Mail & Guardian* <https://mg.co.za/article/2018-03-17-zuma-unlikely-to-get-a-fair-trial-in-sa-mkmva> (accessed 19-03-2018).

on the accused's right to be presumed innocent. It would seem that this dearth of authority is due to the commonly held belief that a judge by his or her training, experience and oath of office is better equipped than jurors to disabuse his or her mind of any extraneous and prejudicial matter and to decide the case before him or her solely on the evidence adduced at trial and the submissions of counsel. As in other jurisdictions, the perspective generally taken in South Africa is that the judiciary is immune to external influences for it is well schooled and mature enough to ignore media reports.[14] Such a belief is reinforced by the trite presumption of judicial impartiality, which, according to the Constitutional Court of South Africa,[15] 'is not easily dislodged' and 'requires "cogent" or "convincing" evidence to be rebutted.'[16]

Some academics nonetheless suggest that judges, being human, may be unduly influenced by the so-called inarticulate premises, or take or rely on mental or cognitive shortcuts or rules of thumb (otherwise known as heuristics) in their decision-making by acting upon a range of subconscious biases,[17] and that perfect judicial impartiality therefore does not exist. Judges may be susceptible to intuitive reasoning that may undermine a properly deliberated judgment, hindsight bias, or confirmation bias.[18] The last-mentioned bias may be material in the context of pre-trial publicity, in that it says that once we hold an initial or early tentative view or hypothesis, we are more likely to seek or favour and assimilate information or evidence, or to interpret such evidence in a way, that confirms, rather than contradicts, our beliefs, preconceptions and hypotheses, regardless of whether the information is correct or not. Conversely, disconfirmation bias connotes an inability to ignore prior beliefs when processing counter-arguments or counter-evidence.

As evidenced most notably in South Africa in the Oscar Pistorius and Shrien Dewani cases, it cannot be denied that pre-trial media coverage of a criminal matter

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[14] Swanepoel (2006) *Ecquid Novi* 9; K van Rooyen 'Challenges to the sub judice rule in South Africa' (2014) 70(1) *HTS Teologiese Studies / Theological Studies* 1-9 7, 9; *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 35J-37A; *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) paras 104-115.

[15] Hereinafter referred to as the Constitutional Court.

[16] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 12.

[17] These are cognitive biases which must be distinguished from social biases, such as racial bias or gender bias.

[18] See, for example, C Guthrie, JJ Rachlinski & AJ Wistrich 'Inside the Judicial Mind' (2001) 86 *Cornell Law Review* 777; C Guthrie, JJ Rachlinski & AJ Wistrich 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 *Cornell Law Review* 1; E Peer & E Gamliel 'Heuristics and Biases in Judicial Decisions' (2013) 49 *Court Review* 114; WH Gravett 'The myth of rationality: Cognitive biases and heuristics in judicial decision-making' (2017) 134 *The South African Law Journal* 53.

may induce a belief that an accused has a propensity to commit the crime in question, or induce a belief that the accused is of bad character and that he or she is guilty not only of the charge with which he or she is to be prosecuted but other similar offences besides.[19] However, in an age of rapid dissemination of news and information on radio, television, the press, the internet and social media platforms such as Facebook and Twitter, where speculation and mis- or inaccurate reporting can be rife and premature opinions on the matter frequently expressed, such publicity in most instances would be an unavoidable feature in notorious or high-profile cases or cases of public interest and concern. The question though that would remain is what impact such publicity may have on the fairness of the accused's trial, which is to be heard not by a jury but by a judge or magistrate alone or a judge or magistrate sitting with assessors.

This thesis seeks to answer this question from a South African perspective. In light of the *Krion* pre-trial motion as a case study, indeed as the basis for the present work, attention is focused on the effects, if any, of adverse pre-trial publicity, be it in the form of media publicity or published judicial pronouncements in parallel court proceedings arising from the same facts, on the accused's right to be presumed innocent and the right to an impartial court. Ultimately, the application for a stay of prosecution in the *Krion* motion centred primarily around these aspects of the accused's right to a fair trial. This question cannot properly be answered without considering the nature of the South African criminal trial and how it functions in an adversarial, or accusatorial, common-law system. Naturally, the meaning of the presumption of innocence and judicial impartiality is also key to answering the question. It is moreover pertinent to consider the in-built procedural safeguards or judicial mechanisms that may protect the fairness of an accused's trial in the face of extensive and detrimental pre-trial publicity.

1.2 Proposed aims or outcomes of the present study

The main purpose of this thesis is two-fold. Firstly, the aim is to elucidate, from a South African perspective, what happens when freedom of expression in the form of pre-trial publicity and an accused's right to a fair trial intersect. This thesis aims to

[19] Compare also, for example, *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 34B; *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 92.

show that in a South African legal context, (i) only a remote possibility exists that the impartiality required of presiding officers and assessors may be coloured by adverse pre-trial publicity and (ii) adverse pre-trial publicity would not encroach on the accused's right to be presumed innocent, even publicity which induces a belief or suggests or creates the perception or impression that the accused is guilty before he or she has been properly tried and convicted in a court of law.

Secondly, the aim is to show that similar considerations *mutatis mutandis* would apply when a criminal court before trial becomes aware of judicial findings made in parallel court proceedings arising from the same facts, which findings impute criminal conduct or criminal liability to the accused. The aim is to explore the question of whether a criminal court is likely to be unduly influenced by the findings contained in a prior judgment arising from the same facts as the pending case.

Central to these aims is to show that the South African accusatorial trial functions in such a way that it would indeed rarely happen that negative pre-trial publicity would impinge on an accused's right to a fair trial; in other words, such publicity would seldom give rise to trial related prejudice. This is especially so in light of the nature and structural demands of adversarial process in South Africa and other fundamental in-built or inherent procedural safeguards or judicial mechanisms designed to protect the fairness of an accused's trial.

For these reasons, this thesis also seeks to argue that a pre-trial publication ban in respect of publicity appertaining impending criminal proceedings, would violate the right to freedom of expression, including freedom of the press and other media. Such a limitation would not be reasonable and justifiable in an open and democratic society, unless the publication is deemed to be unlawful and thus susceptible to being prohibited, where that is, the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice would occur if publication were to take place.

This thesis moreover seeks to argue on the same premise, that a stay of prosecution would generally not be in the interests of justice even when there is extensive virulent pre-trial media coverage surrounding the criminal matter.

Perhaps recommendations should nonetheless also be made not only for the media but for the judiciary too. It cannot be gainsaid that in the interests of justice greater vigilance should be exercised by the media in the type of publicity which it gives to crimes in which trials are still pending. Media reporting of a judicial process,

or in advance of it, may, in certain circumstances, be so irresponsible and prejudicial as to make the unfairness irreparable and the administration of justice impossible.[20] Judges and magistrates should also be more conscious of any underlying biases so as to prevent the operation thereof in the adjudication process.[21]

1.3 Significance of the present study (topic defended)

It is evident that even in South Africa which does not have a jury system, issues may arise as to the impact of adverse pre-trial publicity on the accused's right to a fair trial.[22] Issues may also arise as to the impact or influence on an accused's trial of findings in a prior decision in parallel judicial proceedings, which impute criminal conduct or criminal liability to the accused.[23] There is a paucity of authority and literature on these issues in South Africa's jurisprudence, and aspects sought to be discussed in this thesis are not settled in academic writing.[24] Outside the question of the *sub judice* rule and the crime of contempt of court *ex facie curiae*, there is only one known reported judgment in South Africa that has dealt squarely with the question of whether any trial related prejudice was shown to have resulted from adverse pre-trial media coverage and the concomitant question of whether a stay of prosecution was justified in the circumstances.[25] The *Krion* pre-trial motion is also the first known case in South African legal history to have dealt with the question of the impact or influence of prior related civil judgments on the fairness of an accused's criminal trial. It is submitted that there is as yet no definitive or substantial work or authority on this topic from a South African perspective. It is thus submitted that there is scope in our jurisprudence for a fuller in-depth analysis of the question of pre-trial publicity and any effect or influence it might have on an accused's trial.

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[20] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 32E.

[21] *In re JP Linahan* 138 F.2d 650 652-653 (1943).

[22] See *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC). For the similar position in Zimbabwe, see *Banana v Attorney-General* 1999 1 BCLR 27 (ZS).

[23] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T).

[24] Compare, for example, the discussion in Swanepoel (2006) *Ecquid Novi* 3 on pre-trial publicity and the *sub judice* rule, with that in C Cleaver 'Ruling without reasons: contempt of court and the *sub judice* rule' (1993) 110 *The South African Law Journal* 530; G Hill '*Sub judice* in South Africa: Time for a change' (2001) 17 *South African Journal on Human Rights* 563. The latter writers suggest that the *sub judice* rule cannot be justified because the danger of prejudice to pending criminal proceedings by pre-trial publicity is remote or non-existent, whereas the former argues that the *sub judice* rule is an important mechanism to limit the prejudgment of issues in, or prejudice to, pending or imminent criminal litigation.

[25] See *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC).

It is further submitted that in this thesis several new aspects are introduced in a South African academic context which allow the present study to be undertaken:

- Firstly, the question of the effects on the fairness of an accused's criminal trial of adverse findings made against the accused in a prior judgment delivered in parallel proceedings arising from the same facts and published in an officially recognised law report. (Besides the *Krion* case, it would also be unique to this study to consider whether any reported findings made by the trial and appellate courts in the Schabir Shaik criminal matter, that may suggest criminal conduct on the part of his co-suspect, Jacob Zuma, may have an influence on Zuma's impending trial.[26] As with a prior civil judgment, the question may be considered whether findings made by a court in a separate trial of a co-accused, which findings suggest criminal wrongdoing by the accused still to be tried, may have an effect on the second criminal trial);
- Secondly, the question of the impact of adverse pre-trial publicity or adverse findings in parallel judicial proceedings on the presumption of innocence as it is construed under South African law;
- Thirdly, an analysis of adversarial or accusatorial process as a procedural safeguard against possible trial related prejudice being occasioned by adverse publicity in advance of trial (particular emphasis is given in this work to the latter aspect, since, as far as it is known, the question of accusatorial process as a critical procedural safeguard in the context of pre-trial publicity has not been considered in other comparable common-law jurisdictions).

1.4 Problem statement (main research questions and sub-questions)

In this thesis, the central research question to be explored is whether there is a real and substantial risk that adverse pre-trial media publicity concerning a pending criminal case in South Africa would violate the accused's right to be presumed innocent and the accused's right to be tried before an impartial court comprised of a judge or magistrate sitting alone or with assessors duly appointed, thereby infringing the right of the accused to a fair trial which is entrenched in section 35(3) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

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[26] See *S v Shaik and Others* 2007 1 SACR 142 (D); *S v Shaik and Others* 2007 1 SACR 247 (SCA); *S v Shaik and Others* 2008 1 SACR 1 (CC).

By analogy, this question is apposite to the substantive issues that were raised by the Applicant in the *Krion* motion for a stay of prosecution, namely whether the right of the accused to be presumed innocent would similarly be violated by the prior reporting in law reports of adverse findings made against such accused in other judicial proceedings stemming from the same facts as the pending criminal matter, and whether the judicial officer required to preside over the criminal trial would not be impartial in the adjudication of the case by virtue of having prior knowledge of such findings. Since the *Krion* case constitutes the proposed case study in this thesis, the second main research question is whether Ngoepe JP, who heard the motion, was correct in holding in effect that such fair trial rights would not be infringed by the reporting of the prior findings.

The following salient, ancillary points are considered in this thesis:

- The nature of pre-trial media publicity and when generally such can be construed as adverse;
- The purpose and importance of the right to freedom of expression in terms of section 16(1) of the Constitution, including freedom of the press and other media, specifically as it relates to pending criminal cases;
- The rule of precedent and when a matter is *res judicata* or binding on another court;
- General principles relating to a limitation of rights;
- The common-law *sub judice* rule in South Africa and when a pre-trial publication ban would be reasonable and justifiable in open and democratic society;
- When the granting of a stay of prosecution would be justified on the basis of adverse pre-trial publicity;
- Adversarial or accusatorial process as a procedural safeguard in the face of negative pre-trial publicity;
- The essential nature of the South African criminal trial and how it functions in a common-law, adversarial system;
- A trial by judge or magistrate alone in contrast to a jury trial;
- The appointment of assessors and the role they play in the adjudication of criminal cases in South Africa;
- The function and role of the prosecutor in the face of pre-trial publicity;

- In-built procedural safeguards or judicial mechanisms that may eliminate the potentially harmful effects of adverse pre-trial media coverage;
- The meaning, scope, function and rationale of the presumption of innocence under South African law, and the instance in which it is violated at trial;
- The nature of judicial impartiality in the adjudication of, or decision-making process in, criminal cases, the oath of office and presumption of impartiality, and the chimera of perfect impartiality or absolute or colourless neutrality;
- The inarticulate premises and cognitive biases or heuristics in the judicial context, and the need for greater awareness by judicial officers of possible underlying biases or unconscious intuitive thought processes or factors that may operate in the adjudication or decision-making process;
- The ability of a judicial officer to lay aside or to disabuse his or her mind of extraneous or inadmissible information in adjudicating on a case;
- The character of disqualifying judicial bias, and the test for recusal of the judicial officer.

1.5 Hypotheses or assumptions (thesis statement)

Having regard to (i) the way in which the South African accusatorial trial functions, (ii) the fact that an accused is not tried before a jury, and (iii) the procedural safeguards or judicial mechanisms designed to protect the fairness of the accused's trial, it is posited that one would rarely encounter a real and substantial risk that a trial court would be unable to impartially adjudicate on a criminal case as a result of adverse pre-trial publicity. From this perspective, it is posited that pre-trial publicity is unlikely to affect or bias the outcome of a trial by judge or magistrate alone or with assessors.

It is posited that for similar reasons, it is unlikely that prior adverse findings contained in a judgment in parallel judicial proceedings, which findings impute, directly or indirectly, criminal conduct or criminal liability to an accused whose trial is still pending, would have an influence or effect on the accused's criminal trial.

It is further posited that neither pre-trial media coverage nor judicial pronouncements of guilt in parallel proceedings arising from the same facts, would have any impact on the accused's right to be presumed innocent under South African law.

In light of these considerations, the *sub judice* rule would generally not be infringed by adverse pre-trial media publicity and consequently a pre-trial publication ban would violate the constitutional right to freedom of expression, which limitation would generally not be reasonable and justifiable in an open and democratic society.

Similarly, a stay of prosecution would generally not be justified because the risk of trial related prejudice resulting from negative pre-trial publicity is remote or non-existent.

1.6 Research methodology

A doctrinal research approach is proposed in arriving at the conclusions of this thesis. Doctrinal research has been defined as:[27]

> … research which asks what the law is in a particular area. The researcher seeks to collect and then analyse a body of case law, together with any relevant legislation (so-called primary sources). This is often done from a historical perspective and may also include secondary sources such as journal articles or other written commentaries on the case law and legislation. The researcher's principal or even sole aim is to describe a body of law and how it applies. In doing so, the researcher may also provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment.

Doctrinal research is 'research which provides a systematic exposition of the rules governing a particular category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.[28] Doctrinal research is predominantly concerned with the analysis of legal principle and how it has developed and applied.[29] Doctrinal research may be accepted as a valid methodology in scholarly legal research.[30]

Doctrinal research is however 'not simply a case of finding the correct legislation and the relevant cases and making a statement of the law which is objectively verifiable.'[31] It is also 'a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation. For this reason it can be argued that doctrinal research is

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[27] I Dobinson & F Johns 'Qualitative Legal Research' in M McConville & WH Chui (eds) *Research Methods for Law* (2007) 16 18-19.

[28] M Pendleton 'Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article' in M McConville & WH Chui (eds) *Research Methods for Law* (2007) 159 159.

[29] Dobinson & Johns 'Qualitative Legal Research' in *Research Methods for Law* 40.

[30] *Ibid* 18-19, 21-32, 40-41; Pendleton 'Non-empirical Discovery in Legal Scholarship' in *Research Methods for Law* 159-178.

[31] Dobinson & Johns 'Qualitative Legal Research' in *Research Methods for Law* 21.

qualitative.'[32] To describe doctrinal research as qualitative 'recognises that law is reasoned and not found.'[33] While legal sources can be accessed to determine what the law is, in terms of case-law and legislation, the application of the law is contentious.[34] Ultimately, 'law may be knowable but it is not necessarily predictable.'[35]

Qualitative doctrinal legal research involves inductive reasoning, as also used by judges in their decisions,[36] in terms whereof a principle is essentially gleaned from a detailed analysis of a range of relevant authorities.[37] 'In legal research the process of reviewing the documents and synthesising results is a process of inductive reasoning. Authorities are summarised and acknowledged and *an overall principle derived from the survey*.'[38]

It has been said that a large part of legal research '"consists of formulating hypotheses to give meaning to detailed legal rules already created (whether by statute or judicial decision) and projecting these hypotheses so as to create new patterns of rule-making. Often the most profound 'discoveries' are in fact those that *give new coherence to familiar legal phenomena*. For this reason, *the process of ascertainment and synthesis of existing legal principles constitutes original research*, as also does coming to terms with the dynamic of past, present and future legal development."'[39]

1.7 Brief chapter overviews

This thesis is structured into eight chapters. After the introductory chapter, it shall be considered in chapter two the nature of pre-trial publicity and the importance of media freedom in the exposure of crime. The rule of precedent and the concomitant publication of judicial decisions in law reports and online, shall also be examined. Chapter two shall moreover deal with the general principles pertaining to a limitation

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[32] *Ibid* 21-22.
[33] *Ibid* 22.
[34] *Ibid* 19.
[35] *Ibid* 21.
[36] *Ibid* 21, 32. See also LWH Ackermann 'Constitutional Comparativism in South Africa' (2006) 123 *The South African Law Journal* 497 509, noting that a judge's process of reasoning contains inductive as well as deductive elements.
[37] Dobinson & Johns 'Qualitative Legal Research' in *Research Methods for Law* 21.
[38] *Ibid* 32 (my emphasis).
[39] Pendleton 'Non-empirical Discovery in Legal Scholarship' in *Research Methods for Law* 161 (my emphasis).

of rights, the *sub judice* rule and the test for granting a pre-trial publication ban, as well as the test for granting a stay of prosecution and particularly when the latter would be warranted on account of pre-trial publicity.

In chapter three, attention will be focused on adversarial or accusatorial process in showing how such can be an in-built procedural safeguard against the possible prejudicial effects of adverse pre-trial publicity. This chapter shall examine the advantages, as well as the disadvantages of accusatorial process – even in considering the disadvantages of accusatorial procedure, it may be gleaned how such a system is fundamentally concerned with the fairness of trial proceedings, perhaps more so than establishing the truth.

In chapters four and five, the basic contours of the South African accusatorial trial, as well as certain procedural safeguards or judicial mechanisms that may protect the fairness of the accused's trial in the face of any detrimental pre-trial publicity, shall be considered. It is important to understand how the typical South African criminal trial functions in examining whether pre-trial publicity is likely to impact or prejudice it. Various aspects are discussed, such as the structure and mode of such a trial, the function and role of the judicial officer and that of the prosecutor particularly where there is surrounding pre-trial publicity, the appointment and role of assessors, the public nature of the criminal trial, and the requirement of a reasoned verdict. Specifically in chapter five, the meaning and scope of the presumption of innocence as a fundamental feature of the South African accusatory trial, shall be analysed, and the question of whether adverse pre-trial publicity would have any impact on the presumption, shall be canvassed.

Chapter six will cover the nature and constitutive elements of judicial impartiality, the character of judicial bias, the inarticulate premises and the human element in judging, the right of recusal, the ability of the judge to disabuse his or her mind of extraneous matter, judicial decision-making in a criminal case, and further judicial mechanisms or procedural safeguards that may ensure the impartial adjudication of an accused's trial in the face of pre-trial publicity.

Chapter seven deals with the *Krion* case study. The chapter examines the merits of the application for a stay of prosecution: the respective cases for the Applicant and the State. The chapter also evaluates or assesses the findings of the Court in dismissing the application, and examines the manner in which the trial and the subsequent appeal against conviction and sentence were ultimately decided.

In chapter eight, the conclusions of this thesis shall be discussed based on the survey of the pertinent literature and authorities covered in the preceding chapters and the *Krion* case study; the chapter shall seek to answer the main research questions raised in this thesis.

1.8 Limitations of the present study

Whilst every endeavour is made in this thesis to deal comprehensively with the literature and authorities relevant and apposite to the present theme, this study does not pretend to be, nor can it be, an exhaustive analysis of the main and ancillary questions. Material sources or aspects may have been overlooked. All attempts have nevertheless been made to pinpoint at least the leading and oft-cited sources. Foreign based research can be particularly difficult as one may miss critical developments in the jurisprudence of other jurisdictions.

This is also not an empirical study where judges and magistrates have been interviewed and tests conducted to determine the influence, if any, of adverse pre-trial publicity on their ability to impartially adjudicate on a case at hand. Nonetheless, the *Krion* case study, particularly the manner in which the criminal trial was ultimately decided by the trial court (comprised of a judge sitting with two assessors) notwithstanding the prior civil judgments containing adverse findings against the accused, provides a helpful factual, observable or objective perspective on the question (perhaps somewhat similar or analogous to field research).[40] I handled the *Krion* pre-trial motion on behalf of the State, and I was a member of the prosecuting team which conducted the criminal trial in the matter and the criminal appeal in the Supreme Court of Appeal. The Oscar Pistorius and Shrien Dewani cases similarly provide an insightful perspective on the question of negative pre-trial media coverage and the accused's right to a fair trial. Whilst not involved in the Dewani case, I was a member of the prosecuting team in the Oscar Pistorius appeals and sentencing afresh proceedings. The Dewani judgment, where the accused was discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977, affords valuable insight into the approach of the trial court to the adjudication of the case despite the extensive and overwhelming pre-trial publicity which the case generated.

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[40] Compare J Bruschke & WE Loges *Free Press vs. Fair Trials: Examining Publicity's Role in Trial Outcomes* (2004) 76 *et seq*.

A general principle can also be gleaned from the authorities and literature through a process of inductive reasoning. The literature explored in the present study includes studies which have been conducted pertaining to judicial decision-making and the critical evaluation of such studies.

When comparing adversarial process with inquisitorial process, an attempt has had to be made to distil the most fundamental facets and tenets of both, as many divergences in procedure exist in the different jurisdictions that traditionally fall under either system, and many of the jurisdictions contain mixed elements of adversarial and inquisitorial procedure.

Only salient or key aspects are discussed in this work in relation to the nature of the South African accusatorial trial and how it functions, as well as those aspects that may be construed as procedural safeguards or judicial mechanisms that may help to ensure the fairness of the accused's trial in the face of adverse pre-trial publicity. It is not possible in this thesis to consider all constitutional and procedural features and evidential rules appertaining criminal proceedings which in general are designed to guarantee an accused a fair trial; it has been said that a criminal conviction is not arrived at without many legal safeguards.

Similarly, only salient and pertinent aspects of the constitutional right to freedom of expression are canvassed in this thesis, as freedom of expression is a multi-faceted concept or principle.

There is a welter of material on the meaning and scope of the presumption of innocence. This thesis is consequently selective in identifying the most germane aspects in comparing the general common-law construal of the presumption as opposed to the wide reading thereof particularly as a human right. In this thesis, jurisprudence of the European Court of Human Rights in examining the broad construction of the presumption of innocence, is especially highlighted, as this Court has produced considerable case-law on the wide features of the presumption as a fundamental right enshrined in Article 6(2) of the European Convention on Human Rights. That Court has also given decisions relating to the impact on the presumption of innocence of earlier judgments delivered in parallel judicial proceedings.

It is also beyond the scope of the present study to examine the aspect of the televising and/or broadcasting on the radio (or live broadcasting) of criminal trial proceedings, as this is a separate or distinct matter to the aspect of pre-trial media

coverage of a criminal case, and was not a matter to be decided in the *Krion* pre-trial motion. The specific focus in this thesis is on publicity in advance of a criminal trial and the question of the impact or influence thereof on such proceedings and the effects which such publicity may have on the outcome of the trial. The present work is not an analysis of the open court or open justice principle as it relates to trial proceedings. A brief discussion is, however, given in chapter four of the open court principle and the publicising or broadcasting of judicial proceedings by the media. The open court or open justice principle is a fundamental feature of the South African adversarial or accusatorial trial (indeed, an accused has a constitutional right to a public trial), and it is explained how such principle may serve as a procedural safeguard that protects the fairness of an accused's trial where there is hostile or virulent pre-trial publicity.

As pointed out above, several sub-rights of the accused's constitutional right to a fair trial were alleged by the Applicant in the *Krion* pre-trial motion to have been violated by the reporting in law reports of adverse findings made against the accused in decisions in parallel judicial proceedings. This study, however, is limited to a discussion of the gravamen of the issues raised, namely the question of the impact of such findings on the presumption of innocence and the impartiality of the trial court. It is not possible in this thesis to also deal extensively with such discrete elements of the right to a fair trial as the right to remain silent and not to testify in proceedings and the right of appeal. It is submitted that the rights to remain silent and not to testify in proceedings are in any event closely associated or interrelated with the question of the right to be presumed innocent, and are alluded to in the discussion in chapter five of the application or import of the presumption of innocence under South African law. Moreover, similar considerations that apply to the judicial decision-making process at trial would apply to the decision-making process on appeal insofar as outside or extraneous information is concerned, as well as the requirement of the furnishing of reasons for a decision. The question of the possible undue influence of witnesses by pre-trial publicity is dealt with under the discussion on contempt of court *ex facie curiae*.

It is moreover outside the scope of this thesis to consider the question of the violation of section 12 of the Constitution by prejudicial pre-trial publicity. This is not an aspect which was raised in the *Krion* case. The Constitutional Court has also pointed out that the right to freedom and security of the person enshrined in section

12 of the Constitution does not include a residual fair trial right.[41] There is accordingly no due process seepage from section 12 into section 35 of the Constitution, and no seepage of fair trial rights from section 35(3) of the Constitution into other spheres.[42]

In this thesis, then, the sole or primary aim is to explain why pre-trial publicity would either not affect or be unlikely to affect specific key elements of the accused's right to a fair trial guaranteed in section 35(3) of the Constitution, and to explain why it is unlikely that publicity in advance of trial would affect or have a biasing effect on the outcome of the accused's trial by a judge or magistrate alone or with assessors. The aim, in other words, is to explain that hostile pre-trial publicity is unlikely to create bias in the presiding officer and assessors and unlikely to contribute to a conviction where an accused is tried by such a court. To keep this work within reasonable limits, it is not possible to extend the scope of the enquiry to other possibly related or tangential aspects.

This thesis also does not contain a comparative study for two important reasons. Firstly, South Africa's constitutional understanding of the presumption of innocence differs to some extent, if not markedly, from that of other notable or major jurisdictions. Secondly, South Africa does not have a jury system; the present study explores the question of the possible biasing effects on a professional judge's or magistrate's adjudication of a criminal case, and the position of assessors presiding with a judge or magistrate over a criminal trial differs fundamentally to that of a jury.

1.9 Explanatory note on chapter lengths

This thesis contains certain lengthy chapters, particularly chapter three (the merits and demerits of adversarial or accusatorial process), chapter four (salient elements of the South African accusatorial trial), and chapter five (the meaning and scope of the presumption of innocence). There are several reasons for this. Firstly, chapter three contains perhaps the most original contribution made to the field of study, namely how accusatorial process can serve as a procedural safeguard in the face of adverse pre-trial publicity, especially in relation to its ability to promote or enhance

[41] See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 185.

[42] See F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 51-13.

judicial impartiality in adjudication and to aid in ensuring that the court's decision is based solely on the evidence presented at trial and the submissions of counsel through a party-orientated process (where, that is, the trial court is primarily reliant on the evidence adduced by the parties in the case in reaching its decision, with the parties naturally focusing the court's mind on the admissible evidence rather than extraneous matter, and where party participation or influence in the decision-making process is far greater than in inquisitorial systems). Literature or case-law has not been found that deals with adversarial process as a procedural safeguard in the context of prejudicial media coverage in advance of trial. An in-depth analysis is thus given of the nature and benefits of adversarial process, contrasting it with the inquisitorial system. Moreover, as indicated above, by also considering the shortcomings of adversarial process, one can glean how such a process is fundamentally concerned with the fairness of the proceedings, perhaps more so than in inquisitorial process which is regarded by several notable commentators as placing greater emphasis on accuracy in fact-finding. All the same, the aspect of adversarial process constituting a procedural safeguard is but one of several key procedural safeguards to be explored in this work. Indeed, it is a topic on its own. In light, then, of the overall scheme of the present thesis, it is submitted that the discussion on the adversary system cannot be canvassed in more than one chapter.

Chapter four broadly considers the nature of the South African accusatorial trial, identifying several salient features that are also procedural safeguards. It is submitted that it is vital to appreciate how such a trial normally functions and what its structural demands are, in order to ascertain whether pre-trial publicity in general is likely to have an influence or effect thereon. It is submitted that one frequently finds in the literature assertions being made regarding the possible, but highly speculative, influence which adverse pre-trial publicity might have on a trial court in the adjudication of a case. However, one generally finds very little attention been given to the critical importance of the mode of an accusatorial trial and procedural safeguards that are designed to protect the fairness of an accused's trial in the face of pre-trial publicity. Thus, drawing from extensive prosecutorial experience, this thesis seeks to delineate the central and pertinent facets of the South African criminal trial so as perhaps to arrive at a more informed or realistic conclusion on whether prejudicial pre-trial publicity is in general likely to affect or to have any adverse or biasing effects on the fairness of the accused's trial and the outcome of

the trial. It is submitted, however, that this analysis is but one of several sub-themes to be examined in this work, and the trial principles explored hang together and are interrelated. The discussion on the basic or inherent characteristics of the South African accusatorial trial is thus sought to be confined to one chapter, although this thesis does deal with the presumption of innocence and expands on judicial impartiality and decision-making (being cardinal features of the trial) in separate chapters.

In chapter five, the meaning, scope and application of the presumption of innocence will be examined, highlighting especially the presumption's construal under South African law. It is submitted that a full discussion is required on these points since there is a common misconception that adverse pre-trial publicity may violate the accused's right to be presumed innocent. There are also narrow and wide conceptions of the presumption of innocence which need to be considered, as well as which reading of the presumption is consistent with the South African Constitution under the right to a fair trial. Moreover, it is important to consider whether jurisprudence of the European Court of Human Rights on the question of adverse findings contained in parallel judicial proceedings impinging on the right to be presumed innocent, finds application in South Africa. As stated above, the question of the impact of adverse findings in parallel judicial (or civil) proceedings on the presumption of innocence as it is properly construed under South African law, is an original contribution to the field of study in South African jurisprudence. These aspects hang together and cumulatively constitute one sub-theme of the present work. This thesis therefore seeks to canvass the salient features of the presumption of innocence in one chapter.

Chapter two on freedom of expression, the nature of pre-trial publicity vis-à-vis a criminal case, and the public interest in the pre-trial reporting or exposure of crime, is also a full chapter. This is by reason of the fact that the chapter includes the aspect of the possible limitation of the right to freedom of expression and press freedom when balanced with the right to a fair trial, the *sub judice* rule and pre-trial publication bans, and the question of the granting of a stay of prosecution on the basis of adverse pre-trial publicity. It is submitted that these latter aspects tie in or are interrelated with the principle of freedom of expression in relation to pending judicial proceedings, and are thus incorporated in the same chapter as the discussion on media coverage of a criminal case in advance of trial. Moreover, in

light of the *Krion* case study, this chapter includes a related and pertinent discussion on the principles governing the publishing of decisions in law reports. Again, given the overall scheme of this thesis, it is submitted that all these related aspects ought to be canvassed in one chapter.

Chapter six, moreover, on judicial impartiality, is a full chapter given the complexity of the human factor, unconscious biases and the inarticulate premises in judicial decision-making, and the need for a summary of and broadening on the procedural safeguards or judicial mechanisms that are in place in South Africa's legal system to guarantee judicial impartiality in adjudication and to rid the influence of prejudice.

1.10 Additional explanatory note in relation to citations and quotations

The mode of citations for references in this thesis primarily follows the *Stellenbosch Law Review* Style Guide, particularly in relation to books, chapters in books, loose-leaf publications, theses and dissertations, journal articles, press articles and internet sources.[43] In respect of books, a full citation is given for the first reference. In subsequent references, only the surname of the author, title of the book (possibly an abridged title of the book) and the page(s) to which reference is made, are given. Pertaining to theses and dissertations, the same conventions as with books are followed. The first reference relating to these is a full citation, including the name of the degree for which the thesis or dissertation was presented, the name of the university which conferred the degree, and the relevant year in brackets. Subsequent references only contain the surname of the author, the title of the thesis or dissertation and the page(s) to which reference is made. As with books, subsequent references to theses or dissertations may contain an abridged title of the work.

In respect of chapters in books and loose-leaf publications, full citations are given for the first reference. With regard to subsequent references, the following information is furnished: the surname of the author of the chapter or section, the title of the chapter or section in inverted commas, the title of the book or loose-leaf publication (possibly abridged or abbreviated), and the cited page number(s). With

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[43] <http://blogs.sun.ac.za/iplaw/files/2018/02/Stellenbosch-Law-Review-Style-Guide.pdf> (accessed 02-10-2018).

respect to journal articles, the first reference is a full citation. Appertaining subsequent references, only the following information is furnished in the article citation: the surname of the author, the year of publication in brackets, the name of the journal (in some instances abbreviated, in particular in respect of local journals), and the specific page(s) to which reference is made.

In relation to case-law, full citations are given for each case in the first and, in most instances, subsequent references, and then the specific page or paragraph number to which reference is made.

Most of the chapters in this thesis are introduced with a quotation(s). It is submitted that these set the context of the content of the particular chapters. Moreover, the introductory quotations given in chapter one are intended to set the context of the overall theme of this thesis. Sections within a chapter may also be introduced with a quotation(s). These similarly set the context of the content of the particular section.

In the main body of the thesis text, the particular style that is followed for many of the quotations given, is to reflect same in a separate indented or bulleted paragraph and with a smaller font. Quotations are otherwise given with single quotation marks in the text.

CHAPTER 2

FREEDOM OF EXPRESSION & PRE-TRIAL PUBLICITY

[S]unlight is the most powerful of disinfectants.[1]

2.1 Foundational principles

Freedom of expression 'constitutes one of the essential foundations of a democratic society';[2] indeed, it is a necessary feature of a modern democracy.[3] Free expression 'is the lifeblood of an open and democratic society' cherished by the South African Constitution.[4] This chapter explores this aspect, the nature of pre-trial publicity, the rule of precedent and case reporting, the *sub judice* rule and pre-trial publication bans, and the question of a stay of prosecution based on adverse pre-trial publicity.

The United States Supreme Court has observed that freedom of expression 'is the matrix, the indispensable condition, of nearly every other form of freedom.'[5] Similarly in South Africa, it was held in *Mandela v Falati* that '[i]n a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all others depend; it is the freedom without which the others would not long endure.'[6] The Supreme Court of Canada has likewise pointed out that:[7]

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be overemphasized.

Freedom of expression is of the utmost importance in the kind of open and democratic society the Constitution has set as South Africa's aspirational norm.[8] Having regard to South Africa's past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open

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[1] *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995) 98 CCC (3d) 20 (SCC) para 118 (Westlaw para 129), quoting Brandeis J writing extra-judicially.
[2] *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245 para 65.
[3] *Dolphin Delivery Ltd. v R.W.D.S.U., Local 580* (1987) 25 CRR 321 para 21 (Westlaw).
[4] *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 92.
[5] *Palko v Connecticut* 302 US 319 327 (1937).
[6] 1995 1 SA 251 (W) 259F.
[7] *Edmonton Journal v Alberta (Attorney General)* (1990) 45 CRR 1 11 (Westlaw para 78).
[8] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 37.

exchange of ideas – is vitally important, no less than it is in the United States of America,[9] albeit that under the First Amendment of the Constitution of the United States freedom of speech or of the press is a pre-eminent freedom ranking above others and is an unqualified right – the First Amendment declaims an unequivocal and sweeping commandment with regard to the right to freedom of expression.[10] It may be contended with much force that in South Africa's fledgling democracy the open marketplace of ideas encapsulated in the right to freedom of expression is all the more important, and thus in this country 'we should be particularly astute to outlaw any form of thought control, however respectably dressed.'[11]

Freedom of expression is entrenched in section 16 of the South African Constitution under the Bill of Rights. It includes the right to freedom of the press and other media and freedom to receive or impart information or ideas. However, in terms of section 16(2) of the Constitution, the right to freedom of expression does not extend to 'propaganda for war', 'incitement of imminent violence', or 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. In South Africa's constitutional democracy, freedom of expression has been called a 'first generation' right alongside such rights as human dignity, life, equality and the right to vote.[12]

Three justifications or rationales are traditionally advanced for the protection of freedom of expression: 'the search for truth, the functioning of a democracy and self-fulfilment'.[13] The Constitutional Court has expressed itself as follows on the aspect:[14]

> Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

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[9] *Ibid* para 37.
[10] *Ibid* para 41.
[11] *Ibid* para 37.
[12] J van der Westhuizen 'A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy' (2008) 8 *African Human Rights Law Journal* 251 255.
[13] D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 42-16.
[14] *South African National Defence Union v Minister of Defence and Another* 1999 4 SA 469 (CC) para 7 (footnotes omitted).

The same Court similarly found in *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* that: 'The right to freedom of expression is integral to democracy, to human development and to human life itself. It must be all the more zealously guarded because the infringement of this right was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans.'[15] In a different court, Van der Westhuizen J (as he then was) articulated the matter thus:[16]

> The different theoretical and philosophical explanations offered as reasons why freedom of expression should be protected do not refer only to the democratic process, including the need for peaceful change, etc, as well as the possible value of free expression for human kind is search for the truth, but also that expression is an essential part of one's awareness of oneself, one's very being, and one's human dignity. There is thus an element of the protection of dignity involved in the protection of expression. Therefore not only true or meaningful statements, which could contribute to a debate, are protected, but also other forms of expression, simply because it is human to communicate.[17]

In the Supreme Court of Canada decision of *Irwin Toy Ltd. v Quebec (Attorney General)*, it was affirmed that the principles and values underlying the 'vigilant protection of free expression' in society may be summarised as follows: '(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.'[18]

Another rationale advanced for the protection of freedom of expression is that free speech 'is more likely to encourage tolerance, as the community (and

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[15] 2003 3 SA 345 (CC) para 23.

[16] *Holomisa v Khumalo and Others* 2002 3 SA 38 (T) 61C-D.

[17] See also, for example, *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 120:

> 'The public in turn has the right to receive information. In an open democracy based on the values of equality, freedom and human dignity, the right of the public to be informed is one of the rights underpinned by the value of human dignity.'

See likewise, *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC) para 45:

> 'Suffice it to repeat that freedom of expression is a vital incidence of dignity, equal worth and freedom. It carries its own inherent worth and serves a collection of other intertwined constitutional ends in an open and democratic society.' (Footnote omitted).

In *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 31F, Gubbay CJ held that freedom of expression 'is recognised as a core value of society, essential to truth, democracy and personal fulfilment'.

[18] (1989) 39 CRR 193 para 54 (Westlaw).

government) is more likely to accept the co-existence of a variety of opinions, ideas and ways of life.'[19] The Constitutional Court has pointed out in this respect that: 'The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.'[20] It has been said that '[t]his rationale has a particular appeal in post-apartheid South Africa, given the heterogeneous nature of our society and our past of racial, religious, cultural and other intolerance.'[21]

The proper functioning of democracy is regarded as a 'dominant rationale' for freedom of expression.[22] Freedom of expression includes the power to criticise government and to engage in political speech.[23] 'Courts in most democracies agree that political expression is at the core of the protection of freedom of expression.'[24] One court has crisply observed as follows in this regard:[25]

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.

Freedom of expression is necessary for a properly functioning democracy 'because it promotes, in particular, the twin democratic values of *accountability and participation*.'[26] Freedom of expression 'enhances democratic *accountability* - as well as the other core constitutional values of responsiveness and openness - by imposing a valuable check on governmental and other public power.'[27] Freedom of expression facilitates, for example, 'the exposure of maladministration, corruption and nepotism.'[28] Freedom of expression is fundamental in a representative democracy such as that in South Africa, in which the people elect the government, are represented by that government and in which the government should be

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[19] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-28.
[20] *South African National Defence Union v Minister of Defence and Another* 1999 4 SA 469 (CC) para 8.
[21] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-28.
[22] *Ibid* 42-21-42-22.
[23] *Ibid* 42-22.
[24] *Ibid* 42-22.
[25] *Hector v Attorney-General of Antigua and Barbuda and Others* (1990) 2 AC 312 318.
[26] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-23 (authors' emphasis).
[27] *Ibid* 42-23 (authors' emphasis) (footnote omitted).
[28] *Ibid* 42-23.

accountable to the electorate.[29] Freedom of expression 'also enhances democratic *participation* in several ways. It enables citizens, and particularly the media, to communicate information and ideas to the community and thus contributes to the creation and maintenance of an informed electorate, so that they can better participate in the democratic process.'[30] In the Constitutional Court decision of *Khumalo and Others v Holomisa*, it was noted in this respect:[31]

> Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.

Moreover, it has been appositely held as follows in the same Court, albeit in the context of the related right of access to information:[32]

> The constitutional guarantee of the right of access to information held by the State gives effect to 'accountability, responsiveness and openness' as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.

Freedom of expression enables communication between the governed and those who govern.[33] Freedom of expression 'advances democratic participation by enabling people to communicate the wishes of the population to the government.'[34] If a country adopts a democratic form of government, 'such a government functions most effectively amidst a culture of accountability and participation; a culture that is served by freedom of expression.'[35] Freedom of expression 'is a precondition to the proper functioning of the democratic system - particularly a system of representative democracy. Without the protection of this fundamental right, one cannot be confident in the outcome of the democratic process.'[36]

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[29] *Ibid* 42-23.
[30] *Ibid* 42-24 (authors' emphasis).
[31] 2002 5 SA 401 (CC) para 21.
[32] *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 2 SA 50 (CC) para 10 (footnotes omitted).
[33] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-24, citing *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 2 SA 221 (T) 227J-228A.
[34] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-24.
[35] *Ibid* 42-24.
[36] *Ibid* 42-24-42-25.

Open and transparent government and a free flow of information concerning the affairs of the State is the lifeblood of democracy. One of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.[37] People's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.[38]

Government by the free public opinion of an open society demands the condition of a virtually unobstructed, or untrammelled, access to and diffusion of ideas.[39]

Freedom of expression is vital to liberty itself. As was pointed out in *Mandela v Falati*: 'The history of liberty shows that the currency of every free society is to be found in the marketplace of ideas where, without restraint, individuals exchange the most sacred of all their commodities.'[40] Even if 'the market is sometimes corrupt or abused or appears to serve the interests of the wicked and unscrupulous, that is reason enough to accept that it operates in accordance with the rules of human nature.'[41]

The ideas exchanged in this open marketplace 'are not always pleasing to be heard.'[42] Freedom of expression '"is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."'[43] In an open and democratic society, 'freedom of speech and the right to expose all public institutions to criticism of the most robust and inconvenient kind, are vital.'[44] Aside from hate speech and considerations relating to every person's dignity, including their

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[37] See *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 2 SA 1 (SCA) para 1; *Brümmer v Minister for Social Development and Others* 2009 6 SA 323 (CC) para 62.
[38] *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 2 SA 50 (CC) para 24.
[39] See *Grant v Torstar Corp.* (2009) 204 CRR (2d) 1 para 48 (Westlaw), also noting that free expression has three core purposes: (i) democratic discourse, (ii) truth-finding and (iii) self-fulfillment (paras 47-50).
[40] 1995 1 SA 251 (W) 259E.
[41] *Ibid* 259E.
[42] *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 2 SA 221 (T) 227C.
[43] *Ibid* 227D-E; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 4 SA 294 (CC) para 28 – citing *Handyside v The United Kingdom* (1979-80) 1 EHRR 737 para 49.
[44] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 71.

reputation, 'it is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of public affairs.'[45]

As noted above, the constitutional right to freedom of expression includes freedom of the press and other media. A free press (an oft generic term by which is meant 'the media in all its forms') is regarded in all open democracies and constitutional dispensations or orders where civil liberties, rights and freedoms are protected, as 'indispensable to democracy'.[46] The Constitutional Court has made clear that '[t]he print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate.'[47] The media 'rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.'[48]

In *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another*, Joffe J underlined the essential role which the media plays in a democratic state, holding that:[49]

> The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.

In the latter regard, Joffe J referred with approval to the United States Supreme Court decision of *New York Times Co. v United States*, where it was observed:[50]

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[45] *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)* 2011 4 SA 191 (CC) para 100.
[46] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 5.
[47] *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) para 22.
[48] *Ibid* para 22. See also R Brand *Media Law in South Africa* (2011) 36 (para 61): 'The media are key agents in ensuring that citizens are able to exercise their rights to receive and impart information. The ability of citizens to be responsible and effective members of society thus depends largely on the way in which the media carry out their function. The media, therefore, both rely on freedom of expression, and foster it.'
[49] 1995 2 SA 221 (T) 227I-228A, endorsed in *Khumalo and Others v Holomisa* supra para 23.
[50] 403 US 713 717 (1971).

> The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people…[51]

In *Khumalo and Others v Holomisa*, the Constitutional Court affirmed that 'the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require.'[52] The Court added that:[53]

> In a democratic society… the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.

The same Court similarly remarked in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*, as follows:[54]

> The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy… '(T)he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring'. A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of

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[51] In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 6, the Supreme Court of Appeal indicated that 'the constitutional promise of a free press is not one that is made for the protection of the special interests of the press', but 'is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself.'

[52] 2002 5 SA 401 (CC) para 23.

[53] *Ibid* para 24.

[54] 2007 1 SACR 408 (CC) para 28 (footnote omitted).

> laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.

In *Brown v National Director of Public Prosecutions and others*,[55] Henney J endorsed a speech made at SANEF in February 2010 by the former Chief Justice Sandile Ngcobo entitled 'Justice and the Media', where the following was stated as to the vital role which the media fulfils:

> Indeed without the media, there could be no constitutional democracy. The media not only provides the main forum for the great societal debate that is democracy; it also sustains that debate by supplying the information that the people need to make the political, economic, and cultural choices that constitute the fabric of our democratic society… [T]he media does so much more than enabling democracy by informing and educating the people. It also ensures that the people know their rights and the way to enforce those rights. It serves as a watchdog and indeed as one of the strongest and most important checks on the power of all three branches of government. And in a diverse society like ours, it has the potential to act as a unifying force and to provide a voice for the voiceless, marginalized and disadvantaged. For these reasons, the protection and encouragement of the free press, freedom of speech and the free flow of information are cornerstones of our Constitution's Bill of Rights.

Democracy and freedom of speech and of the press are interrelated: 'As ideas they were born together; hence, some might say that if they do not live together, they will die together. From such a perspective, a democratic regime without freedom of speech and of the press is a contradiction in terms. A regime is not democratic save for freedom of speech and of the press alongside the right to vote, the right to assemble and associate, the right to seek information, inclusive citizenship and rule under the law. At the same time, democracy is a prerequisite for freedom of both speech and the press. Democracy requires a free press, and a free press requires democracy. Together they stand, together they fall, and separate they are unthinkable.'[56] The relationship between democracy and the media can be considered as a social contract: 'Just as democracy requires its people, it requires a system for the flow of information, for public discussions and for a watchdog function independent of the political system. By securing freedom of speech and of the press, democracy creates such a system for itself.'[57] Perhaps the most important role of media and journalism in a democracy is to provide the information people

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[55] 2012 1 All SA 61 (WCC) paras 3-4.
[56] J Strömbäck 'Democracy and the Media: A Social Contract Dissolved?' in S Dosenrode (ed) *Freedom of the Press: On Censorship, Self-censorship, and Press Ethics* (2010) 173 173.
[57] *Ibid* 180.

need in order to be free and self-governing.[58] Freedom of the press 'is as much or more about the rights of the people to know as it is about the media's right to publish.'[59] The media provides society with the information required to be free and self-governing 'mainly by facilitating the communication flows between the governors and the governed, by providing a public forum where political discussion can take place, by scrutinizing and holding accountable those in power, and by providing people with information that is verified and reliable'.[60] The media does of course provide content in a variety of other forms, not least in the form of entertainment, 'but from the perspective of democracy and the social contract between democracy and the press, the overriding importance of the press lies in its ability and willingness to provide people with the information they need to be free and self-governing.'[61] Thus, 'any form of political censorship would be a violation of this social contract, and the press has all the rights to protest as loud as possible if or when attempts are made to curtail their freedom.'[62] The press is required to function as a watchdog rather than a lapdog, and hence have the power to investigate those in power more thoroughly.[63]

Freedom of the press 'is celebrated as one of the great pillars of liberty.'[64] It is internationally recognised that a free press 'is a fundamental pillar of a free society. Without a free media there is no free society. A free media is the bulwark and watchdog of the public interest. A free media is a means of mass communication and if responsibly exercised, it becomes a reliable barometer or *litmus* of public opinion.'[65] Freedom of the press 'does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However, freedom of the press does mean that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish.'[66]

One court has stated that '[w]e live – whether we like it or not – in an *egalitarian, pluralistic and global* society which is or ought to be characterised by

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[58] *Ibid* 181, 183.
[59] *Ibid* 181.
[60] *Ibid* 181.
[61] *Ibid* 181.
[62] *Ibid* 181.
[63] *Ibid* 181.
[64] *Tshabalala-Msimang and another v Makhanya and Others* 2008 3 BCLR 338 (W) para 35.
[65] *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 13 (Court's emphasis and underlining).
[66] *Tshabalala-Msimang and another v Makhanya and Others* 2008 3 BCLR 338 (W) para 35.

tolerance and broad-mindedness. In all democratic societies, the press plays an essential role in that, although it should not overstep certain bounds, in particular in respects of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information, comments and ideas on all matters of *public concern and interest*.'[67]

For present purposes, it is important to note that in a democratic society, 'a free media must also be *investigative* and stand ready to expose any bureaucratic secrecy, sloth in the enforcement of criminal laws, underhand dealings or corruption. It must call all the State institutions to account.'[68] The role of the media and journalism in a democracy in providing the information people need in order to be free and self-governing, includes the requirement that 'the media must act as a watchdog against abusive use of power.'[69] The media is to act as a watchdog and an independent monitor of power: 'As long as power is being exercised, it must be monitored and checked. This is the best defense against corruption and abuse of power. From this it follows that there is a positive correlation between investigative reporting and acting as a watchdog.'[70] Cameron J (as he then was) had this to say on the aspect in *Holomisa v Argus Newspapers Ltd*:[71]

> In a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide.

Yvonnne Burns[72] similarly observes that one of the essential roles of the South African press and the media in general is 'the assumption of the "watchdog" function over the government by informing the public of government malpractice or incompetence.'[73] Burns notes thus on the need for investigative journalism:[74]

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[67] *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 24 (Court's and my emphasis).
[68] *Ibid* para 14 (Court's and my emphasis).
[69] Strömbäck 'Democracy and the Media' in *Freedom of the Press* 183-184.
[70] *Ibid* 185.
[71] 1996 2 SA 588 (W) 608H-609A.
[72] At the time of writing, Burns was Emeritus Professor in the School of Law, University of South Africa.
[73] Y Burns *Communications Law* 3 ed (2015) 67.
[74] *Ibid* 387.

> Investigative journalism, which is often undertaken by newspapers or freelance journalists, is generally understood to mean that reporters investigate a topic such as crime, political corruption or other scandals.
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> History has shown that investigative press reporting has a very definite surveillance function. This surveillance or "watchdog" function has become very significant…
>
> The press plays a major role in uncovering corruption in government and business. The average citizen is not in a position to investigate government or business activity, but the press is ideally suited to this task. It has adequate and generally well-qualified personnel, as well as the necessary financial structure to undertake such an investigative function.
>
> During the apartheid years, the government was strenuously opposed to the role of the press in general and investigative journalism in particular… [But] history has shown the value of investigative journalism in uncovering "cover-ups", be they on the part of the government, business or professional people.

In *Mandela v Falati*, the Court recognised that the public is 'entitled to be informed about the conduct of its political leaders; particularly so when this related to criminal conduct', and that:[75]

> There may be a few exceptions, but in general no politician should be permitted to silence his or her critics. It is a matter of the most fundamental importance that such criticism should be free, open, robust and even unrestrained. This is so because of the inordinate power and influence which is wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity was hidden from public scrutiny.

One commentator points out that '[j]udges increasingly acknowledge that there is a public interest in the survival of a press which is free to probe, and to publicize suspicions of wrongdoing or incompetence, especially on the part of public bodies.'[76]

In *Tshabalala-Msimang and another v Makhanya and Others*, Jajbhay J held that the public has the right to be informed of current news and events concerning the lives of public persons such as politicians and public officials. The public has the right to be informed not only on matters which have a direct effect on life, such as legislative enactments, and financial policy. The constitutional right to freedom of expression, which protects freedom of the press and other media and the freedom to receive and impart information and ideas, may in appropriate circumstances extend to information about public figures.[77] Jajbhay J affirmed that the test whether a person is a public figure should be whether he or she by his or her personality, status

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[75] 1995 1 SA 251 (W) 260B-D.
[76] ATH Smith 'The Press, the Courts, and the Constitution' (1999) 52 *Current Legal Problems* 126 130.
[77] 2008 3 BCLR 338 (W) para 38.

or conduct has exposed him- or herself to such a degree of publicity as to justify intrusion into, or a public discourse on, certain aspects of his or her private life.[78] Where a person seeks publicity and consents to it, or in relevant circumstances, by the nature of the position occupied by the individual, this individual cannot object when his or her actions are publicised.[79]

The media's role of acting as 'a "public watchdog", parallel to the justice system, to uncover abuses and betrayals of public trust', does not only relate to the State: corruption, dishonesty and graft may 'occur in any sphere of life, including the private sector. Thus the media's watchdog role extends to sectors of society other than the State, and would include vigilance over private institutions such as corporations.'[80]

Where a criminal case has a marked degree of notoriety, or the accused is a newsworthy person or prominent leader or public figure, where that is, the case is a high-profile matter, the media has every right to report on the case as a matter of public interest and concern. This is a feature of modern times.[81]

In *Brown v National Director of Public Prosecutions and others*, Henney J, on the matter of pre-trial publicity, recognised 'the public's legitimate right to know about the involvement of people who have committed serious crimes which have had an adverse result on the public.'[82]

2.2 The nature of pre-trial publicity and the need for media exposure of criminal wrongdoing and malfeasance

Pre-trial reporting on crime is an accepted and common phenomenon or practice worldwide, albeit that it can give rise to a tension between the right to freedom of expression, more particularly the right to a free press and other media, and the right to a fair trial.[83]

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[78] *Ibid* para 39.
[79] *Ibid* para 40.
[80] Brand *Media Law in South Africa* 48 (para 89).
[81] See *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 34C, in the context of pre-trial publicity adverse and hostile to the accused.
[82] 2012 1 All SA 61 (WCC) para 2.
[83] Compare, for example, *Banana v Attorney-General* 1999 1 BCLR 27 (ZS); *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC). See also A Paizes 'Conduct of Proceedings' in E du Toit, F de Jager, A Paizes, A St Q Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) 22-42B; Swanepoel (2006) *Ecquid Novi* 3.

As the name of the term suggests, the nature of pre-trial publicity has been described as follows:[84]

> Pre-trial publicity can arise during any stage of the criminal justice process, from the time that a person is suspected of having committed a criminal offence to the time of the trial for that offence. There are two main ways in which pre-trial publicity can arise during this time. First, pre-trial publicity can arise as a result of general, on-going developments in the case that occur throughout the time prior to trial as the police investigation unfolds and as new evidence and information about the matter are brought to light. Second, it can arise from specific pre-trial proceedings such as bail applications … and preliminary inquiries.

The case of *Brown v National Director of Public Prosecutions and others* is the first matter in South Africa in which the Court had to deal with an application for a stay of prosecution lodged by the accused based in part on the substantive issue of widespread and adverse pre-trial publicity and whether such would prejudice the accused's right to a fair trial.[85] In its judgment on the application, the Court proceeded to define 'pre-trial publicity' thus:[86]

> The term trial by media relates to a matter that has received extensive media coverage prior to the trial commencing, this is known as pretrial publicity.[87]

It is generally recognised, as notably illustrated in South Africa in the Oscar Pistorius and Shrien Dewani cases, and Jacob Zuma's rape and fraud and corruption matters, that notorious or high-profile cases, be they civil or criminal, can immediately capture the attention of the public and draw extensive media coverage. In respect of criminal matters, it invariably happens that such media reportage would continue as the police investigation progresses and suspects are arrested.[88] In a finding germane to this aspect, the United States Supreme Court in *Bridges v California* declared: 'It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist.'[89]

Media reporting of notorious cases can draw large audiences.[90] Interest in crime news is generally high; crime frequently attracts public curiosity, especially if

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[84] SA Radke *Pre-trial publicity and the criminal justice system* LLM thesis University of Alberta (1991) 17.
[85] 2012 1 All SA 61 (WCC) para 33.
[86] *Ibid* para 33.
[87] Compare also *Nebraska Press Association v Stuart* 427 US 539 577-578 n 4 (1976).
[88] See *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 29B-H, 32G-34D; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 1.
[89] 314 US 252 268 (1941).
[90] Swanepoel (2006) *Ecquid Novi* 6.

prominent persons, sex, serious violent crime or homicides and mystery are involved.[91] It has been said, in this context, that '[d]eviance is the quintessential element of newsworthiness.'[92] Several criteria or so-called 'news values' are commonly advanced which render a crime story newsworthy and shape crime news.[93] These include crimes of a sexual nature, notorious crimes, crimes involving celebrity or high-status persons, and violent crime.[94] The fact is, as studies show, that stories about crime are prominent in the media.[95] In South Africa, pre-trial news, or investigative journalism, on corruption and associated crimes such as fraud ('State capture'), heinous or notorious murders, and serious or high-profile gender-based violence, rapes and child abuse, and robberies, is well covered in the media.

Such media reports can, however, be sensationalised and details of crimes revealed which may otherwise be inadmissible as evidence in court, but which become public knowledge before a trial is begun. This is commonly known as a 'trial by media'.[96] The media may elicit details of crimes from victims before trial.

The killing by Paralympic champion and superstar Oscar Pistorius of his glamour model girlfriend, Reeva Steenkamp, and his ensuing arrest on a murder charge, rapidly attracted a deluge and frenzy of extensive media coverage both locally and abroad. Such included detailed reports containing wild speculation about what transpired on the fateful early morning in question, along with articles reflecting negatively on Pistorius' character. In the week that followed, during which the accused's bail application was held, the case dominated headline news in the press and on radio and television, as well as on the internet and online social media or networking services such as Twitter.

As regards the intense reportage of the bail application on Twitter, one commentator aptly observed:[97]

> This week productivity must have been at an all time low as people took to their Twitter accounts to watch the minute-by-minute tweets of journalists covering Oscar Pistorius' bail

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[91] G Resta 'Trying cases in the media: A comparative overview' (2008) 71(4) *Law and Contemporary Problems* 31 33.

[92] R Reiner, S Livingstone & J Allen 'From law and order to lynch mobs: crime news since the Second World War' in P Mason (ed) *Criminal Visions: Media representations of crime and justice* (2003) 13 13.

[93] See, for example, Y Jewkes *Media & Crime* 3 ed (2015) 49-70.

[94] *Ibid* 56-60, 63-64.

[95] See, for example, Reiner, Livingstone & Allen 'From law and order to lynch mobs' in *Criminal Visions* 15.

[96] Swanepoel (2006) *Ecquid Novi* 4. See also CR Snyman *Criminal Law* 6 ed (2014) 321.

[97] Editorial 'The Power of Twitter' *Saturday Star* (2013-02-23) 14.

> application. Normally noisy offices became eerily quiet as tweet after tweet fell… As the excitement mounted yesterday afternoon, waiting for the decision on Pistorius' bail, radio journalists were talking about South Africa's first Twitter "soap opera".

An associate editor dubbed it: 'the trial of Pistorius by Twitter',[98] seemingly borrowing from the oft-heard phrase, namely 'trial by media'.

In the wake of these events, *Time* magazine, featured on its front cover a photograph of Oscar Pistorius wearing his famous blades, with the headline: 'MAN SUPERMAN GUNMAN Oscar Pistorius and South Africa's Culture of Violence'.[99] The magazine contained a full story related to the case within the context of the problem of serious violent crime in South Africa.[100]

Within days of the murder having been committed, a local newspaper, *City Press*, ran a headline article titled 'BREAKING NEWS EXCLUSIVE: THE CASE AGAINST OSCAR', wherein it was suggested that Oscar Pistorius may have killed Ms Steenkamp in so-called 'roid rage', with reference to the role that steroids might have played in the commission of the crime.[101] The article also stated that three sources close to the high-profile investigation ruled out the possibility that Pistorius could have mistaken Steenkamp for an intruder when he killed her, as the police found no evidence of a forced entry. It was moreover mentioned in the article that one cartridge was found in the bedroom and that the police suspected that Pistorius may have 'chased' Steenkamp and fired the first shot before she could lock herself inside the toilet. In the premises, the tenor of or cumulative impression created by the article was that Pistorius was guilty of murder, which he committed in a fit of rage. None of these statements later turned out to be fact at trial and on appeal.[102] Nonetheless, it is pertinent to note that this article is a prime illustration of how pre-trial publicity can prejudge the issues or the guilt of an accused, or, in other words, portray the accused as guilty either expressly or by implication or subtle suggestion, before a trial commences. The article also illustrates that pre-trial publicity can be nothing more than speculation of the actual events in question, and that accurate reporting, where facts are verified, can be sacrificed for a sensational scoop or story.

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[98] P de Wet 'Media masters work to win two trials' *Mail & Guardian* (2013-02-23) 5.
[99] Headline: 'MAN SUPERMAN GUNMAN Oscar Pistorius and South Africa's Culture of Violence By Alex Perry' *Time* (2013-03-11).
[100] A Perry 'Oscar Pistorius and South Africa's Culture of Violence' *Time* (2013-03-11) 19-25.
[101] A Basson & J Steenkamp 'BREAKING NEWS EXCLUSIVE: THE CASE AGAINST OSCAR' *City Press* (2013-02-17) 1.
[102] See *S v Pistorius* 2014 JDR 2127 (GP); *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA).

Similarly, within a couple of weeks of the murder having been committed, a popular local magazine, *You*, featured a headline and several articles on the Pistorius case where reference was made *inter alia* to Pistorius as 'VOLATILE HOTHEAD' and to 'INSIDE THE TROUBLED SPORT HERO'S MIND'.[103] In one of the articles titled 'CRACKS IN THE FACADE', mention was *inter alia* made of Pistorius' 'angry tirades' on and off the track; his 'fascination with firearms'; an incident where Pistorius threatened to break the legs of a television producer who had become involved with his previous girlfriend while he was at the Olympics; allegations by friends of Pistorius and Ms Steenkamp that Pistorius late on the night before the murder may have come across an upsetting SMS from a previous boyfriend of Reeva on her phone; and other 'incidences of a domestic nature' that had occurred at Pistorius' home in relation to a previous relationship(s) he had had.[104]

Another article titled 'WHO IS OSCAR PISTORIUS?', covered reports which had emerged which 'tarnished the golden boy's image in many eyes.'[105] Besides reference having been made to the use of illicit drugs and to Pistorius having been caught in a net of 'parties, alcohol abuse, fast cars and beautiful women', mention was also made of reports which indicated that Pistorius was 'a jealous guy who doesn't treat women well'; that he 'likes waving guns around and threatening people'; that he was 'an explosive egotist, a man caught in a toxic lifestyle, someone who has exposed himself to bad influences'; that he had previously had fights with Ms Steenkamp, which were so bad that the police were called; that in these fights, Pistorius became aggressive towards Steenkamp; that '[w]hen Oscar loses his temper he has little self-control'; and that '[t]he truth must come out so everyone will know what an animal Oscar is'.

Even though in the latter article, it was stated that two other women had painted a positive picture of Pistorius, implicit in the articles, in the context in which they were presented, was that Pistorius had a serious temper problem and that he may have killed Ms Steenkamp after losing his temper, perhaps sparked by jealousy. At the very least, the articles showed Pistorius to be of bad character away from the

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[103] Headline: 'THE SHOOTING THAT'S STUNNED THE WORLD: RUINED!: OSCAR: GOLDEN BOY & VOLATILE HOTHEAD: GORGEOUS MODEL REEVA'S DOOMED LOVE: INSIDE THE TROUBLED SPORT HERO'S MIND' *You* (2013-02-28) 1.

[104] You Editorial Team 'CRACKS IN THE FACADE' *You* (2013-02-28) 12-13.

[105] You Editorial Team 'WHO IS OSCAR PISTORIUS?' *You* (2013-02-28) 8-9.

adoring cameras (or cast aspersions on his character amounting to prejudice) and that the killing in question not only stunned the world, but had turned on its head the perception of Pistorius as a 'squeaky clean superhero'.[106]

Overwhelming media attention of this nature continued in relation to the Pistorius case up to the commencement of the trial in 2014, which in turn was televised and broadcast in other media, with a dedicated television channel having been devoted to the trial proceedings and to featuring daily comments and analyses of the proceedings. Both subsequent State appeals against conviction and sentence were also televised. The trial proceedings captivated large audiences globally.

Dubbed the 'trial of the century',[107] *You* magazine during the months leading up to trial ran further articles wherein they dealt with who would say what in court, how, that is, the case would possibly unfold in court.[108] These articles were simply another example of a trial by media that took place before the Pistorius trial proceedings started.

This pervasive pre-trial, what can be termed, 'saturation coverage',[109] demonstrates that in respect of a criminal case which involves a public figure, newsworthy personality or politician, or which is reprehensible and shocking and causes an outcry from society, media reporting of such a matter ahead of the pending trial can be described as one of the unavoidable '*by-products*'[110] of the criminal justice system of any country which holds to democratic values and openness or open justice. Pre-trial publicity prejudicial to an accused is stimulated by the notoriety of the accused and the heinousness of the crime.[111] In this respect, the Constitutional Court recognised in *Sanderson v Attorney-General, Eastern Cape*, the 'inevitable' 'general disadvantages' which an accused may suffer in consequence of serious charges being preferred against him or her, such as extensive publicity

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[106] *Ibid*.

[107] Headline: 'TRIAL OF THE CENTURY: OSCAR: ONE YEAR LATER: HOW HE'S COPING AS HIS DAY IN COURT LOOMS' *You* (2014-02-13) 1; H Scholtz 'ALL EYES ON OSCAR' *You* (2014-02-13) 6-9, drawing comparisons between the OJ Simpson case and that of Pistorius.

[108] H Scholtz, D Blaauw, A van Zyl & H Fourie 'IN SEARCH OF THE TRUTH' *You* (2013-08-29) 12-16; M Potgieter, P van Zyl & R van Rensburg 'INSIDE THE TRIAL' *You* (2013-08-29) 18-19.

[109] Resta (2008) *Law and Contemporary Problems* 31.

[110] This term was used by the Constitutional Court in *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 23, with reference to the 'impact of a public process' on the 'accused person – [who] despite being presumptively innocent – is subject to various forms of prejudice and penalty merely by virtue of being an accused.' The Court held that '[t]hese forms of prejudice are unavoidable and unintended by-products of the system.' (My emphasis).

[111] *The Queen v Glennon* (1992) 173 CLR 592 para 13, cited with approval in *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 39F-40C.

(that may considerably tarnish the reputation of the accused) and serious social embarrassment having regard to the accused's station in life.[112]

In the Southern African decision of *Banana v Attorney-General*, the applicant was indicted in the High Court of Zimbabwe for trial on two counts of sodomy, three counts of attempted sodomy and six counts of indecent assault. At the inception of the trial, the applicant brought an application for a permanent stay of prosecution. One of the grounds advanced for the application was that there was a real risk that the applicant would not receive a fair trial in consequence of prejudicial pre-trial publicity to which he had been subjected.

The applicant, with the advent of independence in Zimbabwe in 1980, was appointed the country's non-executive president. He was an eminent statesman who served as a member of a United Nations Commission, and in 1996 he was named as the Organisation of African Unity's special envoy to mediate an end to civil wars raging in Liberia and Sierra Leone. The applicant was, moreover, an acclaimed academic and minister of the Methodist Church, who was an honorary professor and lecturer in religious studies, classics and philosophy at the University of Zimbabwe.

The case against the applicant arose from another criminal matter, in which a former police inspector, who had served as the applicant's aide-de-camp, was convicted of having murdered a police constable. One of the extenuating circumstances established in respect of sentence was that the accused in that matter had been traumatised as a result of being the victim of repeated 'homosexual abuse' by the applicant during the years 1983 to 1986. The presiding judge recommended that a full investigation be instituted through the Attorney-General's office and the police to establish the veracity of the accused's claims of sexual abuse.

The application for a stay of prosecution was referred by the trial court to the Supreme Court of Zimbabwe for decision. In its judgment, the Court, per Gubbay CJ, held that it was 'apparent that by virtue of his position in society and international standing, the applicant [was] a newsworthy personality both within and outside the borders of Zimbabwe.'[113] The Court went on to find in effect that the case would naturally be given extensive prominence by the media, on account of the fact that 'the applicant possesse[d] a marked degree of notoriety' and was 'an extremely newsworthy person, a prominent leader in society against whom the commission of

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[112] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 40.
[113] 1999 1 BCLR 27 (ZS) 29C.

grave crimes [had been] alleged.'[114] This, the Court crisply declared, 'is a feature of modern times.'[115] The Court pertinently proceeded to hold:[116]

> *Inevitably*, therefore, the applicant had to succumb to greater coverage than those individuals who are less well known, or whose cases are not as serious.

The Court ultimately found that it had not been established that there was 'a real or substantial risk' of the accused not being afforded a fair trial on account of the pre-trial publicity, and accordingly dismissed the application for a stay of prosecution.[117]

In *Brown v National Director of Public Prosecutions and others*,[118] which case related to serious white-collar crime, the accused was charged on counts of fraud, corruption, money-laundering and theft.[119] The charges were all related to the demise of a company, Fidentia Asset Management (FAM), controlled by the accused. The accused was ultimately convicted on two counts of fraud. These counts involved, respectively, an investment with FAM by the Transport Education and Training Authority (TETA), a statutory body; and the purchase of Mercantile Asset Trust Company (MATCO), a company that administered pension funds and held the investment portfolios underlying those funds (an amount of more than R1 billion). As a statutory body, TETA was required, in terms of Treasury Regulations, to invest its funds with an entity that had an investment profile and status no less than that of South Africa's four major banks. The charge against the accused was that, by making improper financial inducements to the CEO of TETA, he had persuaded TETA to make an initial investment with FAM, which did not qualify as an acceptable investment vehicle in terms of Treasury Regulations, by way of two promissory notes to the value of R100 million. TETA subsequently made a further investment of a similar amount. The State alleged that the accused fraudulently misrepresented to TETA that the promissory notes would be secure and that all its investments would be managed as trust property, invested safely, and would yield higher returns. However, as soon as the accused received the promissory notes he cashed them before their maturity date at a discount of approximately R6 million less than their value and bought immovable property and four luxury vehicles for an amount of R14 million. In respect of the charge relating to MATCO, the State

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[114] *Ibid* 34C.
[115] *Ibid* 34C.
[116] *Ibid* 34D (my emphasis).
[117] *Ibid* 40D. This decision is dealt with more fully below.
[118] 2012 1 All SA 61 (WCC).
[119] For a synopsis of the criminal case itself, see *S v Brown* 2015 1 SACR 211 (SCA).

alleged that the accused fraudulently represented to its shareholders that FAM was able to pay in cash the full purchase price of R93 million and that he would only assume management control upon payment of the full purchase price. The accused, however, knew at the time that FAM did not have the cash to buy the MATCO shares and, in fact, before the full purchase price was paid, he took control of its assets and then used R60 million of its funds to pay the balance of the purchase price. The TETA and MATCO transactions involved hundreds of millions of rands. Thus the amounts at risk were substantial. In respect of the MATCO transaction, a material consideration was that a substantial number of beneficiaries of the portfolios which had been plundered by FAM belonged to a vulnerable class. In respect of the TETA funds, the investment emanated from a statutorily compelled body whose purpose was skills development.

The accused lodged a pre-trial motion wherein he applied for a stay of prosecution predicated in part on the widespread and adverse media coverage against him in respect of the Fidentia Group which it was claimed had 'resulted in the general public, some judicial officers and lawyers viewing (him) as a fraudster and thief having stolen billions from widows and orphans.'[120] The accused contended that he had been tried and convicted by the media, that the media reports and articles written about him were prejudicial towards him, and that not even the judiciary had been spared in being influenced against him as a result of this media campaign.[121] The accused submitted papers to Court quoting from these reports, which all discussed him and his behaviour and 'the large sum of money allegedly "stolen" from widows and orphans.'[122] The Court found that based on the media articles which the accused referred to, there had indeed been adverse pre-trial publicity.[123] The Court held in this respect that on a conspectus of the evidence, if one were to have regard to the reports written and publicised about the accused's involvement, objectively speaking the media coverage created the perception that there had already been a pronouncement on the allegations against the accused.[124] However, the Court found, on several bases (which are expanded on or amplified in this thesis), that although the pre-trial publicity in question was adverse, the accused

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[120] *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 18.3.
[121] *Ibid* paras 48-49.
[122] *Ibid* para 48.
[123] *Ibid* para 92.
[124] *Ibid* para 92.

had not shown a link between the publicity and 'the effect that it would have on the evidence that would be presented during the trial, if any and how it would result in him not having a fair trial.'[125] The accused had failed to prove that the adverse media coverage would lead to trial related prejudice, especially the biasing of the trial court. The Court pertinently proceeded to observe as follows:[126]

> We will be confronted in South Africa where there is adverse media coverage for a particular case but that in itself cannot be sufficient grounds to show that it would warrant a stay in prosecution. In the past, judges have adjudicated and dealt with such cases.

Importantly, as noted above, the Court in *Brown* also recognised 'the public's legitimate right to know about the involvement of people who have committed serious crimes which have had an adverse result on the public.'[127]

A video recording of the commission of a crime, such as in the Vicki Momberg case (where the accused was found guilty on four counts of *crimen iniuria* and sentenced to an effective term of two years' imprisonment, for using the 'k-word') or the case of Willem Oosthuizen and Theo Jackson (who assaulted and forced an African man into a coffin and threatened to set it alight, and who were convicted *inter alia* of attempted murder and sentenced to long terms of imprisonment (the so-called 'coffin case')), can go viral in the media, online and on social media before criminal proceedings are instituted. This is unavoidable in the modern era of rapid dissemination of news on various media platforms, particularly in notorious cases and cases involving high-status persons.

Because of the nature of a criminal case and the media publicity it enjoys, there may be considerable public interest in the matter.[128] In a high-profile case, therefore, any prejudice to or pressure felt by an accused caused by widespread media coverage of the matter, would be one of the 'unfortunate exigencies' of being involved in such a case.[129]

As crime is 'invariably injurious to the public interest, by which is meant, the interests of the state or the community',[130] it is submitted that the public has an interest in not only seeing justice being administered in trial proceedings but also in the exposure or pre-trial reporting of suspicions of crime, arrests being made, that

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[125] *Ibid* para 119.
[126] *Ibid* para 122.
[127] *Ibid* para 2.
[128] Compare, for example, *S v Van der Vyver* 2007 1 SACR 69 (C).
[129] *Ibid* para 9.
[130] Snyman *Criminal Law* 4.

the police are conducting investigations, the formal charging or indicting of accused persons, and the question of bail, etc. Equally permissible to media reporting of trial proceedings in terms of the open justice principle, must be any publication or media statement regarding actual facts relating to a pending case.[131] Facts do not cease to be a matter of public interest merely because they form the background to pending litigation.[132] Indeed, by bringing to light certain facts, a pre-trial media report may serve 'as a brake on speculative and unenlightened discussion.'[133] Moreover, a statement in the media that a person is suspected of committing a crime cannot be equated with a statement that the person has actually committed the crime; 'it is not the same as to say that he or she is guilty of that crime.'[134]

It is submitted that the open court or open justice principle applies not only to an accused's trial under section 35(3)(*c*) of the Constitution (which guarantees an accused the right to a public trial before an ordinary court), but also to pre-trial stages of judicial proceedings in terms of section 34 of the Constitution, which provides as follows: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'[135] Thus, for instance, the media would enjoy the right to report on a bail application lodged by an accused and any other pre-trial hearing. The Constitutional Court has appositely pointed out that:[136]

> It should be remembered… that open justice is observed in the ordinary course in that the public is able to attend all hearings. The press are also entitled to be there, and are able to report as extensively as they wish, and they do so… Courts should in principle welcome public exposure of their work in the courtroom, subject, of course, to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open courtrooms). The public is entitled to know exactly

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131 LG Loucaides 'Questions of Fair Trial under the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 27 39.

132 *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245 para 66.

133 *Ibid* para 66.

134 *Modiri v Minister of Safety and Security and Others* 2011 6 SA 370 (SCA) para 15.

135 See, for example, *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) paras 30-32; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 5 SA 31 (CC) para 39.

136 *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) paras 31-32. See also the remarks in Van der Westhuizen (2008) *AHRLJ* 268.

> how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.

It may be in the public interest or for the public benefit to name a suspect in the media and publish a photograph of him or her before he or she is charged and appears in court where it is necessary in the interests of public safety to warn the community to steer clear of the suspect, or where the suspect holds a high profile public office, with such a position requiring 'the incumbent to be, like Caesar's wife, above even suspicion'.[137] It needs repeating that the public has a significant interest in the media performing its vital function of ferreting out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators.[138] There are also of course cases in which the police specifically enlist the aid of the media in tracking down a suspect whose whereabouts are unknown.[139] The publication of suspicions of criminal wrongdoing may moreover serve the purpose of persuading members of the community to come forward with potential evidence against the suspect which the police eagerly seek.[140] However, the premature disclosure in the media of a suspect's identity and photograph whilst such person is merely being questioned by the police and has not been charged, and who ultimately is in fact not charged owing to a lack of evidence, may be found to be of damage to a person's *fama* or reputation where the decision to publish is not based on a reasonable belief that it is in the public interest to do so, and depending on the particular circumstances of the case.[141]

2.3 The publishing of judicial decisions in law reports

The doctrine of precedent, or the *stare decisis* principle (to stand by previous decisions), in terms whereof authority is given to past judgments, is followed in South Africa.[142] Judicial precedent is a fundamental source of South African law. The Constitutional Court has observed that '[t]he doctrine of precedent is an incident of

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[137] *Independent Newspapers Holdings Ltd and Others v Suliman* 2005 7 BCLR 641 (SCA) paras 45-46. See also *Nebraska Press Association v Stuart* 427 US 539 605-606 (1976).
[138] *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) para 23.
[139] *Independent Newspapers Holdings Ltd and Others v Suliman* 2005 7 BCLR 641 (SCA) para 46.
[140] *Modiri v Minister of Safety and Security and Others* 2011 6 SA 370 (SCA) para 26.
[141] See *Independent Newspapers Holdings Ltd and Others v Suliman* 2005 7 BCLR 641 (SCA). See also Burns *Communications Law* 349-350.
[142] HR Hahlo & E Kahn *The South African Legal System and its Background* (1968) 214, 237 *et seq*.

the rule of law. Its primary purpose is to advance justice by ensuring certainty of the law, equality and equal treatment and fairness before it. To that end, the doctrine imposes a general obligation on a court to follow legal rulings in previous judicial decisions.'[143] In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judicial officers to follow the legal rulings in previous judicial decisions. The individual litigant would feel him- or herself unjustly treated if a past ruling applicable to his or her case were not followed where the material facts were the same.[144]

The advantages of the principle of *stare decisis* are many: it enables the citizen, if necessary with the aid of practising lawyers, to plan his or her private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; '*it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice*, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike'; and it conserves the time of the courts and reduces the cost of lawsuits – the labour of judges would be increased almost to the breaking point if every past decision could be reopened in every case.[145] 'Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*.'[146] The Constitutional Court has said: 'In order to ensure that similarly situated litigants are treated similarly, the judicial process has developed principles such as *stare decisis* which ensure uniformity in the treatment of cases raising similar factual and legal issues. The principle that similarly situated litigants must be treated similarly is "a

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[143] *Daniels v Campbell NO and Others* 2004 5 SA 331 (CC) para 94, per Moseneke J (as he then was) (footnote omitted).

[144] Hahlo & Kahn *The South African Legal System and its Background* 214, cited with approval in *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 4 SA 613 (CC) para 57; *Daniels v Campbell NO and Others* 2004 5 SA 331 (CC) para 94 n 136.

[145] Hahlo & Kahn *The South African Legal System and its Background* 214-215 (footnote omitted) (my emphasis).

[146] *Ibid* 215 (footnote omitted), quoted with approval in *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 4 SA 613 (CC) para 57, per Kriegler J; *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 4 SA 42 (CC) para 28; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 30, which decisions all underscored or reaffirmed the importance of the doctrine of precedent.

fundamental component of *stare decisis* and the rule of law".'[147] In *True Motives 84 (Pty) Ltd v Mahdi and Another*, Cameron JA (as he then was) articulated as follows the indispensable value of the *stare decisis* principle in South Africa's constitutional democracy:[148]

> The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.

The Constitutional Court has made clear that to deviate from the rule of precedent 'is to invite legal chaos.'[149] The 'unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself.'[150]

In terms of the *stare decisis* principle, all courts are bound by the decisions of the Constitutional Court and, absent any decision by it, are bound by decisions of the Supreme Court of Appeal. Both the Constitutional Court and the Supreme Court of Appeal can depart from a previous decision of their own when satisfied that that decision was clearly wrong, or to correct clear error or oversight. As to courts below the two apex courts, the hitherto position has been that a single judge in one division of the High Court is bound by a decision of a full court (three judges), or a full bench (two judges), in that division or a division exercising concurrent jurisdiction. A single judge is bound by the decision of another single judge in the same division, unless he or she thinks it clearly wrong. A single judge is not bound by the decision of a single judge in another division, or indeed by a full court in another division.[151] The

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[147] *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC) para 39, per Ngcobo J (as he then was).

[148] 2009 4 SA 153 (SCA) para 100 (footnote omitted).

[149] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 4 SA 42 (CC) para 28.

[150] *Ibid* para 30.

[151] M Wallis 'Whose decisis must we stare?' (2018) 135 *The South African Law Journal* 1 2-3. In this extra-curial paper, the Justice of the Supreme Court of Appeal calls for a re-evaluation of the way in which *stare decisis* in respect of decisions of courts below the two apex courts is applied, in light of sections 166(*c*) and 169 of the Constitution, as amended, and section 6(1) of the Superior Courts Act 10 of 2013, which cumulatively provide for a single 'High Court' consisting of nine divisions, one for each province.

The Justice argues or suggests that a judgment by a full court in any division should bind all courts in all divisions, subject only to another full court departing from it because it regards the decision as 'substantially erroneous'. Similarly, a judgment by a full bench should bind all single-

magistrates' courts are bound by the judgments of all higher courts. If a conflict exists between the judgments of High Courts, the magistrate must follow the judgment of his or her own division. In general, one magistrate is not bound by the judgments of another, mainly because the judgments of magistrates' courts are not reported. Magistrates' courts do not establish precedents.[152]

Courts lower in the hierarchy to the court that makes a decision, are bound by such decision even if it is clearly wrong; only a court of equal status may depart from it in such an instance.[153]

It is trite law that precedent is limited to the binding basis (or *ratio decidendi*) of previous decisions. The doctrine obliges courts of equivalent status and those subordinate in the judicial hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside' or 'stated as part of the journey' or stated in passing (ie *obiter dictum*), and is not binding on subsequent courts.[154] The *ratio decidendi* is the reason for the judgment, originating or following a legal rule (not a course of reasoning on the facts), or the legal principle on which the court bases its decision.[155] Only a pronouncement on law can constitute a *ratio decidendi*.[156] Decided cases are 'of value not for the facts but for the principles of law which they lay down.'[157] In *R v Wells*, the Appellate Division affirmed in this respect that: '"No enquiry is more idle

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judge courts. A judgment by a single judge in any division should bind all other single judges, subject to it being departed from in accordance with the standard of the decision being substantially erroneous.

The effect of this would be to remove the current anomaly whereby a single judge is bound by a full court or full bench in the same division, but is free to disregard a judgment by a similarly constituted court in another division. From the perspective of magistrates, the application of *stare decisis* would be simpler and clearer, because there would be fewer instances of inter-divisional disagreement.

The suggestion by the Justice seeks to align South Africa's doctrine of precedent with the structure of South African courts. It also aims to provide a standard for judicial acceptance of and disagreement with the judgments of colleagues, in furthering the basic aims of predictability, certainty and consistency that underpin any system of precedent. Both are directed at strengthening, in a small way, the operation of the rule of law in South Africa. (*Ibid* 14-17).

[152] E Kahn 'The Rules of Precedent Applied in South African Courts' (1967) 84 *The South African Law Journal* 308 324-325.

[153] See, for example, *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 6 SA 592 (CC) para 57, where this principle was affirmed.

[154] See, for example, *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 4 SA 153 (SCA) para 101. See also *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 6 SA 592 (CC) paras 56, 61.

[155] *Pretoria City Council v Levinson* 1949 3 SA 305 (A) 317; *Fellner v Minister of the Interior* 1954 4 SA 523 (A) 537D; Hahlo & Kahn *The South African Legal System and its Background* 260.

[156] Hahlo & Kahn *The South African Legal System and its Background* 260, cited with approval in *S v Shabalala* 1986 4 SA 734 (A) 742E.

[157] *R v Wells* 1949 3 SA 83 (A) 87-88.

than one which is devoted to seeing how nearly the facts of two cases come together: the use of cases is for the proposition of law they contain, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case.'"[158] Decisions on questions of fact are therefore not binding.[159] Not even a decision of the Supreme Court of Appeal on a question of fact can be binding on another court 'except as between the same parties'.[160] However, when the decision is that from certain facts certain legal consequences follow, that decision is binding on another court in any case raising substantially similar facts.[161] Thus, for instance, a decision that certain evidence is relevant may lay down criteria that can guide, or even be authoritative, in subsequent cases.[162] Nevertheless, *stare decisis* remains applicable only in respect of legal principles abstracted from the facts, and it is axiomatic that a subsequent court must still decide a case on the basis of the evidence placed before it; that is, it would still be required to decide the case on its own merits.[163] Moreover, *res judicata*, namely that a matter at issue between the parties has previously been decided by a court,[164] can only be raised in respect of a finding concerning the same issue between the same parties.[165] A decision on the facts in one case is irrelevant in respect of any other case and a subsequent court must confine itself to the evidence adduced in the case it is actually trying.[166]

Besides a hierarchy of courts, a prerequisite for the operation of *stare decisis* is an efficient system of case reporting.[167] Without accessible records of court decisions, the doctrine of *stare decisis* would not function properly: '[t]he main advantages of the doctrine - legal certainty, predictability of the outcome of litigation,

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158 *Ibid* 88.
159 J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79 92.
160 *Shepherd v Mossel Bay Liquor Licensing Board* 1954 3 SA 852 (C) 861A.
161 *Ibid* 861A. See also *S v Shabalala* 1986 4 SA 734 (A) 742E-F.
162 See *S v Shabalala* 1986 4 SA 734 (A) 742E-F; D Zeffertt 'Law of Evidence' (1986) *Annual Survey of South African Law* 471 482.
163 See *S v Nienaber* 1976 2 SA 147 (NC) 150C-D.
164 See, for example, M Nathan *The Common Law of South Africa: A treatise based on Voet's Commentaries on the Pandects, with references to the leading Roman-Dutch authorities, South African decisions, and statutory enactments in South Africa: Volume IV* (1907) 2151 (para 2162); *S v Molaudzi* 2015 2 SACR 341 (CC) para 14. See also *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 3 SA 517 (BH), for an instructive analysis on the essentials of *res judicata*.
165 *S v Nienaber* 1976 2 SA 147 (NC) 150C.
166 See *R v T* 1953 2 SA 479 (A) 483A; *Danisa v British and Overseas Insurance Co Ltd* 1960 1 SA 800 (D) 801F-G; *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9.
167 WJ Hosten, AB Edwards, F Bosman & J Church *Introduction to South African Law and Legal Theory* 2 ed (1995) 387.

the protection of vested rights, and uniformity and equality in the application of legal principles - would consequently be lost.'[168] Were the judgments in important legal cases not reported, and adequately and accurately reported, it would be impossible to develop the law properly through judicial decisions, and the doctrine of precedent would at best work in a chancy and haphazard way.[169]

Judicial decisions are best made available by publication, the primary form of which has historically been the law report, in which are collected the reasoned judicial decisions of the various courts.[170] The law, insofar as judicial precedent is concerned, is found written and recorded in the law reports, and the law reports are the public record of the use and practice of legal principles, having recorded the decisions, actions and opinions of those most extensively involved on a daily basis with all segments of it.[171] Today law reports have become an indispensable element in the dissemination of our case-law.[172] Law reports are, of course, well known in English law, and their format in that system has been largely adopted in South Africa as it has in other legal systems influenced by the common law.[173]

These days, law reports are invariably available and searchable online, and a torrent of unreported decisions are also made available online.[174] In South Africa, both the Constitutional Court and Supreme Court of Appeal have a website where their judgments are posted together with a media summary of the judgments delivered. The Southern African Legal Information Institute (SAFLII) contains judgments online from all divisions in South Africa and from other African jurisdictions. Both LexisNexis and Juta have online websites containing electronic versions (or an electronic database) of the various law reports in South Africa, and they also contain English, Canadian, Botswanan, Namibian, Zimbabwean and Zambian reported judgments. These legal resource sites also contain a host of unreported judgments. The fact is that today, fairly comprehensive coverage in the print and online is given in the legal system of higher court decisions.

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[168] JP van Niekerk 'An Introduction to South African Law Reports and Reporters, 1828 to 1910' (2013) 19 *Fundamina* 106 106.
[169] Hahlo & Kahn *The South African Legal System and its Background* 283.
[170] Van Niekerk (2013) *Fundamina* 106-107, adding that at various stages in the past, newspapers also played a role in the publication of judicial decisions, but that such would be produced by journalists without any legal background, which would diminish their value and reliability (*ibid* 107 n 3).
[171] *Ibid* 107.
[172] *Ibid* 107.
[173] *Ibid* 107.
[174] *Ibid* 145.

While so-called 'legal elephantiasis', where every higher court judgment is reported, ought perhaps to be avoided so as to prevent (i) the legal profession from drowning in a sea of precedent, (ii) the cost of litigation rising, because of the expense in acquiring and consulting the vast number of volumes of reports, and (iii) the general principles of law tending to become lost in the thickets of cases on particular facts, under-reporting ought also to be avoided: 'An unreported decision does not die. It is in a state of hibernation, ready to be brought into active life by the judge or practitioner who by careful search or sheer good fortune discovers its existence.'[175]

The via media could possibly be that 'the general series of law reports should be confined to decisions that introduce a new principle or rule, or modify an old one, or settle the existence or non-existence of a hitherto doubtful one, or pin down the hitherto uncertain reach of an undoubted one, or pronounce on the validity or construction of an enactment the validity or meaning of which was uncertain or restate a proposition in a novel or helpful form that will henceforth be relied on.'[176] In short, the litmus test or benchmark for reporting would seem to be whether the judicial decision contributes to our knowledge of the law.[177]

What is certain is that '[i]t would be *most improper for an editor to don the mantle of a censor and refuse to report a decision or excise a portion of a judgment he considers wrong*.'[178] After all, a decision if reported (or fully reported, as the case may be) could possibly be challenged. If left quiescent it could be given active life in the future and be capable of destructive force. '*A law reporter should not assume the power to shape the course of things to come*.'[179]

2.4 A limitation of rights

It has been seen that the important right to freedom of expression lies at the heart of democracy. The search for the truth, the ability to take democratic decisions and self-fulfilment have been put forward as reasons why freedom of expression must be protected. Freedom of expression is closely linked to the right to human dignity and

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[175] Hahlo & Kahn *The South African Legal System and its Background* 283.
[176] *Ibid* 283.
[177] *Ibid* 283.
[178] *Ibid* 283 (my emphasis).
[179] *Ibid* 283 (my emphasis).

helps to realise several other rights and freedoms. Freedom of expression is emphasised as the lifeblood of an open and democratic society. South Africa's history illustrates the crucial importance of free expression for democracy. Censorship was central in the legal system of the apartheid era. The censorship system was a powerful tool to sustain political, cultural and religious dominance by the minority on all. Freedom of expression, however, continued to play an important role in the struggle for political and moral liberation.[180]

It has also been noted that the role of the media or journalists in society is linked to three important rights enshrined in South Africa's Constitution: 'freedom of expression, which is a right of each citizen; freedom of the press and other media, which recognizes particular institutional rights; and the right of citizens to access information.'[181] It has been considered that the media fulfils an important role in society and a democratic system in uncovering crime both in the public and private spheres. The public has the right to know about the commission of crime. The public has an interest in notorious cases and crimes committed by public persons or authorities. The media acts as the agent for, indeed as the eyes and ears of, the public in exposing such criminal wrongdoing.

Freedom of expression, constitutionally, is to be given a broad, benevolent or generous and purposive interpretation, with the purpose of the guarantee being to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment, and providing a mechanism by which it would be possible to establish a reasonable balance between stability and social change.[182] Yvonnne

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[180] See *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 6 SA 443 (CC) paras 93-95, per Van der Westhuizen J.

[181] Brand *Media Law in South Africa* 47 (para 84).

[182] See *Chavunduka and Another v Minister of Home Affairs, Zimbabwe, and Another* 2000 4 SA 1 (ZS) 9E-G; *S v Chinamasa* 2001 1 SACR 278 (ZS) 290*d-e* (endorsed in *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 22); *R v Zundel* (1992) 75 CCC (3d) 449 (SCC) paras 21-22 (Westlaw).

A purposive interpretation means that the meaning of a right or freedom is to be ascertained by an analysis of the purpose of such a guarantee; it is to be understood, in other words, in the light of the interests which the right is meant to protect – see *R v Big M Drug Mart Ltd* (1985) 18 CCC (3d) 385 (SCC) para 117 (Westlaw). The Constitutional Court has consistently adopted a purposive (teleological) approach to the interpretation of the Constitution, referring with approval to *R v Big M Drug Mart Ltd* supra – see, for example, *S v Zuma and Others* 1995 1 SACR 568 (CC) para 15; *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 9; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) paras 51, 53; Ackermann (2006) *SALJ* 502-503; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 136-138 (para 6.3(*b*)).

A generous interpretation means that the individual must be afforded the fullest possible protection of his or her constitutional guarantees – see, for example, *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* supra para 53. A generous interpretation is to be

Burns notes that '[i]t is generally accepted that the right to freedom of expression should be interpreted widely. A wide interpretation would encompass related freedoms such as freedom of speech (written and oral), freedom of the press, freedom of broadcasting, freedom of entertainment (which includes public entertainment in the form of theatre, movies, sports meetings, films and games), freedom of artistic creativity, academic freedom and freedom of scientific research, freedom of telecommunications, and freedom of expression/communication via the social media, amongst others.'[183]

However, although freedom of expression is fundamental to our democratic society, it is not a paramount right or value.[184] Under South African law, freedom of expression 'is not a pre-eminent freedom ranking above all others', nor is it an unqualified right or a right which enjoys superior status to other fundamental rights – it does not automatically trump other constitutional guarantees.[185] As with all rights in the Bill of Rights,[186] freedom of expression is not an absolute right.[187] It must be construed in the context of the other values enshrined in the Constitution, especially the values of human dignity, freedom and equality.[188] Freedom of expression may be limited, curtailed or restricted by another right entrenched in the Constitution[189] or by a law of general application, provided that such limitation complies with the general limitation clause contained in section 36(1) of the Constitution.[190] In *Islamic Unity Convention v Independent Broadcasting Authority and Others*, it was crisply

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preferred to a legalistic one, and is aimed at fulfilling the purpose of a constitutional guarantee and securing for individuals the full benefit of the right – see *R v Big M Drug Mart Ltd* supra para 118 (Westlaw); *S v Zuma and Others* supra paras 14-15; *S v Makwanyane and Another* supra para 9.

A generous interpretation is an interpretation 'in favour of rights and against their restriction. It entails drawing the boundaries of rights as widely as the language in which they have been drafted and the context in which they are used makes possible' - Currie & De Waal *The Bill of Rights Handbook* 138 (para 6.3(*c*)).

[183] Burns *Communications Law* 63.

[184] *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) para 25; Brand *Media Law in South Africa* 37 (para 64).

[185] See *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 41.

[186] In *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC) para 67, it was held: 'The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen.'

[187] See *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 3 SA 345 (CC) para 17; *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 72; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 4 SA 294 (CC) para 30; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 5; Brand *Media Law in South Africa* 47 (para 84).

[188] *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) para 25.

[189] *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC) para 67.

[190] See, for example, *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 3 SA 345 (CC) para 17.

pointed out by the Constitutional Court that there is recognition of the potential that freedom of expression has 'to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution.'[191] Moreover, section 16(2) of the Constitution, which was touched on above, sets out certain specific categories of expression (or 'internal limitations' or 'internal qualifiers') which are excluded from constitutional protection, namely propaganda for war, incitement of imminent violence, and advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[192] It is clear that the right to freedom of expression 'is not an "unruly horse" that can be allowed to trample other people's rights and interests. The right must be balanced in a democratic fashion against other considerations in order to secure equal enjoyment of fundamental rights by all persons'.[193] In the Canadian decision of *Fraser v Canada (Treasury Board, Department of National Revenue)*, the matter was stated thus:[194]

> [I]t it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one.

It is trite that in South Africa's constitutional order, 'all protected rights have equal value'.[195] One constitutional right 'is at least as worthy of protection as' other fundamental rights enshrined in the Bill of Rights.[196] Nonetheless, the majority of the Constitutional Court, per Langa CJ, in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* held that 'although it is correct that our Constitution does not postulate a hierarchy of rights in the abstract, there are circumstances in which one right will take precedence over others.'[197] This does not mean that the Bill of Rights permits the 'pitting' of one right against a competing right,

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[191] 2002 4 SA 294 (CC) para 30.
[192] See *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 72; Brand *Media Law in South Africa* 37, 39-41 (paras 64, 67-72); Burns *Communications Law* 125-126, 131-141.
[193] *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 23.
[194] (1986) 19 CRR 152 para 40 (Westlaw).
[195] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) paras 9, 11. See also *Tshabalala-Msimang and another v Makhanya and Others* 2008 3 BCLR 338 (W) para 43; *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In re S v Pistorius; Media 24 Ltd and Others v Director of Public Prosecutions, North Gauteng and Others* 2014 1 SACR 589 (GP) para 18.
[196] Compare *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 41.
[197] 2007 1 SACR 408 (CC) para 55.

or allows one right to be 'prioritised' or to 'trump', 'prevail' or simply be preferred or privileged over another.[198] What is required is a balancing of conflicting or competing rights according to the circumstances of the case and subject to section 36(1) of the Constitution, which requires courts 'to embark upon a nuanced analysis' in answering the question of 'how best to give effect to' and reconcile all competing rights, rather than simply concluding that there is a clash of rights and that one constitutional guarantee must give way to the other.[199] Thus, '[w]hen two constitutional rights (such as the right to freedom of expression and the right to a fair trial) butt heads it is not a matter of determining which right is more deserving so that courts may declare a victor and jettison the loser.'[200] Instead, 'the true path is far more complex, and involves a balancing exercise to reconcile the two.'[201] As the Supreme Court of Appeal made plain in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*:[202]

> Where constitutional rights themselves have the potential to be mutually limiting - in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa - a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36 [of the Constitution].[203]

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[198] *Ibid* paras 47, 102-103, 125, 128; *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 41; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 9.

[199] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) paras 47-48, 102, 125-128.

[200] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 42, endorsing D Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 9 <http://www.constitutionalcourt.org.za/site/judges/Justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf> (accessed 30-07-2017).

[201] Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 9.

[202] 2007 2 SACR 493 (SCA) para 9.

[203] Affirmed in *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 42. See also *Tshabalala-Msimang and another v Makhanya and Others* 2008 3 BCLR 338 (W) para 43:

> '[W]here two competing constitutional rights come into conflict - each invoked by different parties, and seeking to intrude on the other's right - a court must reconcile them. All constitutional rights have equal value and therefore this reconciliation is achieved by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other according to what is required by the

The majority of the Supreme Court of Canada, per Lamer CJC, in *Dagenais v Canadian Broadcasting Corp.*, appositely put it this way:[204]

> When the protected rights of two individuals come into conflict, as can occur in the case of publication bans,… a balance [is] to be achieved that fully respects the importance of both sets of rights.

In citing this finding with approval, the same Court, per McLachlin and Iacobucci JJ, held in *R v Mills*, under the rubric 'Balancing Interests and Defining Rights':[205]

> No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims… This illustrates the importance of interpreting rights in a contextual manner - not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.

Accordingly, in the present context, 'freedom of expression and the fair administration of justice, which are both essential to the proper functioning of any true democracy, should as far as possible be harmonised with one another',[206] where a tension may arise between the two fundamental rights.

Section 36(1) of the Constitution permits limitations to freedom of expression which are reasonable and justifiable in an open and democratic society based on

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> particular circumstances and within the constraints that are imposed by section 36 of the Constitution. In other words, one weighs the extent of the limitation against the purpose, importance and effect of the intrusion and this entails weighing the benefit that flows from allowing the intrusion against the loss that that intrusion will entail.'

See, moreover, *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In re S v Pistorius; Media 24 Ltd and Others v Director of Public Prosecutions, North Gauteng and Others* 2014 1 SACR 589 (GP) paras 18-19, applying *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* supra, and stating that when balancing competing fundamental rights, the 'point of departure is to ensure that each of the rights asserted finds proper expression and enjoyment without being unduly limited.'

See too *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* 2014 10 BCLR 1195 (CC) paras 161-162, citing with approval *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* supra, and holding:

> 'Courts are generally reluctant to presume that provisions in the Constitution operate in tension and so try to construe them harmoniously. This does not mean that we may overlook the impact of one right on other rights in specific situations, or that we must interpret rights narrowly from the outset to avoid possible tension. Constitutional provisions - including those protecting rights - have to be interpreted within the context of the Constitution as a whole. No provision may be interpreted in isolation and no right protected and enforced without regard to other rights. Especially the exercise of one constitutional right may often have to be balanced against another. Courts are regularly called upon to do so thoughtfully and candidly. To a considerable extent, this is what constitutional adjudication is about.
>
> No right is absolute. Sections 7(3) and 36 of the Constitution say that rights are subject to limitations contained in the Bill of Rights or in other provisions of the Constitution… But why do rights sometimes have to be limited? One reason is that the law often limits a right in order to protect the exercise of other rights. At its heart a limitation analysis is an acknowledgment that constitutional democracies are faced - and must wrestle - with complex competing interests, rights and values.' (Footnotes omitted).

[204] (1995) 94 CCC (3d) 289 316*h*-317*a* (Westlaw para 75).

[205] (2000) 139 CCC (3d) 321 para 61 (Westlaw).

[206] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 42.

human dignity, equality and freedom.[207] Where one right competes with other rights in the Bill of Rights, its limitation may be justified. However, that justification has to be subject to the Constitution.[208] Section 36(1) of the Constitution provides as follows:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (*a*) the nature of the right;
>
> (*b*) the importance of the purpose of the limitation;
>
> (*c*) the nature and extent of the limitation;
>
> (*d*) the relation between the limitation and its purpose; and
>
> (*e*) less restrictive means to achieve the purpose.[209]

In *S v Makwanyane and Another*, relating to the interpretation of the limitations clause in South Africa's interim Constitution,[210] the Constitutional Court, per Chaskalson P, observed as follows regarding the application of the general limitation clause:[211]

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1) [of the interim Constitution]. The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different

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[207] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 72.

[208] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 123, with reference to section 7(3) of the Constitution, which provides that: 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

[209] In *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 32, it was noted that 'the five factors expressly itemised in s 36 of the Constitution are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not [a] limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.' (Footnote omitted).

[210] Constitution of the Republic of South Africa, Act 200 of 1993.

[211] 1995 2 SACR 1 (CC) para 104 (footnote omitted) (my emphasis).

> interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, *whether the desired ends could reasonably be achieved through other means less damaging to the right in question*. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators.'[212]

Yvonnne Burns points out that the drafters of South Africa's final Constitution included aspects of the aforesaid findings of the Constitutional Court with regard to limitations in section 36 of the Constitution, 'namely the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and consideration of less restrictive means to achieve the purpose.'[213]

Chaskalson P in *Makwanyane*,[214] endorsed the approach of the Supreme Court of Canada to a limitation of rights, as enunciated in *R v Oakes*,[215] where the Court dealt with the limitations clause under section 1 of the *Canadian Charter of Rights and Freedoms*, which provides as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In interpreting this provision, the Court in *Oakes*, per Dickson CJC, held thus on the approach to the question of a limitation of a constitutional right:[216]

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of

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[212] In Currie & De Waal *The Bill of Rights Handbook* 163 (para 7.2(*b*)(i)), it is observed that '[t]his paragraph in *Makwanyane* has become a standard reference when the Constitutional Court considers the legitimacy of limitation.' In *S v Bhulwana; S v Gwadiso* 1995 2 SACR 748 (CC) para 18, the approach was summarised thus:

> 'In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.'

[213] Burns *Communications Law* 127. For a detailed discussion of these factors, see, for example, Currie & De Waal *The Bill of Rights Handbook* 150-175 (paras 7.1-7.4). See also N Steytler *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa, 1996* (1998) 18-24.

[214] 1995 2 SACR 1 (CC) paras 105-107, 134.

[215] (1986) 24 CCC (3d) 321.

[216] *Ibid* paras 73-75 (Westlaw) (Court's emphasis).

> sufficient importance to warrant overriding a constitutionally protected right or freedom"… The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"… Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question… Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

So then (as discussed more fully in the next section of this chapter), where it is alleged that pre-trial publicity may cause trial related prejudice, and a publication ban is thus sought which would limit or curtail the right to freedom of expression,[217] it would have to be shown that the ban would be necessary in order to prevent a real

[217] In Burns *Communications Law* 128, it is indicated that a publication ban, or 'prior restraint' on freedom of speech, is one of the best examples, besides censorship, of a limitation of the right to freedom of expression.

and substantial risk to the fairness of the trial, *because reasonably available alternative measures would not prevent the risk*, and it would have to be shown that the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[218] In *Dagenais v Canadian Broadcasting Corp.*, it was observed that this standard for a publication ban clearly reflects the substance of the *Oakes* test on the question of a limitation of rights.[219] Lamer CJC went on to find in this regard in *Dagenais*:[220]

> The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective *that cannot be achieved by a reasonably available and effective alternative measure*, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.

In a similar matter in South Africa, *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*,[221] the Supreme Court of Appeal, per Nugent JA, noted that this approach declared in *Dagenais* reflects what is required by section 36 of our Constitution.[222] Nugent JA stated that:[223]

> In determining the extent to which the full exercise of one right or the other or both of them might need to be curtailed in order to reconcile them what needs to be compared with one another are the 'extent of the limitation' that is placed upon the particular right, on the one hand, and the 'purpose, importance and effect of the intrusion', on the other hand. To the extent that anything needs to be weighed in making that evaluation it is not the relative values of the rights themselves that are weighed (I have said that all protected rights have equal value) but it is rather the benefit that flows from allowing the intrusion that is to be weighed

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[218] *Dagenais v Canadian Broadcasting Corp.* (1995) 94 CCC (3d) 289 (SCC) 317*c-d* (Westlaw para 77).
[219] *Ibid* 317*d-e* (Westlaw para 77).
[220] *Ibid* 326*h*-327*c* (Westlaw para 102) (my emphasis).
[221] 2007 2 SACR 493 (SCA).
[222] *Ibid* para 18. In Burns *Communications Law* 128, it is commented that the *Midi Television* case demonstrates that pre-censorship does not form part of South Africa's new constitutional dispensation, save in exceptional circumstances.
[223] *Midi Television* supra para 11.

> against the loss that the intrusion will entail. It is only if the particular loss is outweighed by the particular benefit, to an extent that meets the standard that is set by s 36, that the law will recognise the validity of the intrusion.

Nugent JA held, adopting the approach in *Dagenais*, that:[224]

> [A] publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is *demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place*. *Mere conjecture or speculation that prejudice might occur will not be enough*. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and *it cannot be prevented from occurring by other means*, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

Nugent JA[225] applied the Constitutional Court decision of *S v Manamela and Another (Director-General of Justice intervening)*, where the following was said, per O'Regan J and Cameron AJ (as he then was), as regards the correct approach to the question of a limitation of a fundamental right:[226]

> The approach to limitation is… to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, *taking into account the availability of less restrictive means available to achieve that purpose*.

In respect of the factor of less restrictive means to achieve the purpose of a limitation, the well-known authors Iain Currie[227] and Johan de Waal[228] remark that in order to be legitimate, a limitation of a fundamental right 'must achieve benefits that are in proportion to the costs of the limitation. *The limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent*. If *a less restrictive (but equally effective) alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred*.'[229]

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[224] *Ibid* para 19 (my emphasis).
[225] *Ibid* para 10.
[226] 2000 1 SACR 414 (CC) para 66 (my emphasis).
[227] At the time of writing, Currie was Professor of Law, University of the Witwatersrand, Johannesburg.
[228] At the time of writing, De Waal was an Advocate, Member of the Cape Bar.
[229] Currie & De Waal *The Bill of Rights Handbook* 170 (para 7.2(*b*)(vi)) (my emphasis).

What is more, for purposes of a limitation of rights analysis, 'proportionality means that the infringement of rights should not be more extensive than is warranted by the purpose that the limitation seeks to achieve.'[230] Section 36 of the Constitution 'does not permit a sledgehammer to be used to crack a nut.'[231] If the harm is disproportionate to the benefits, the limitation is not justifiable.[232] The test is whether the limitation does more damage than is 'reasonable' for achieving its purpose.[233]

In the circumstances, it is submitted that if, as this thesis seeks to show, adverse pre-trial publicity does not have a bearing on the accused's constitutional right to be presumed innocent, and if pre-trial publicity that is hostile and prejudicial to an accused is generally unlikely to give rise to trial related prejudice or to create bias in the presiding officer and assessors or to have a biasing effect on the outcome of a South African criminal trial, particularly in light of the numerous procedural safeguards or judicial mechanisms that are designed to protect the fairness of an accused's trial and in light of the structure and mode of the South African accusatorial trial, a pre-trial publication ban of such publicity would be a disproportionate (overbroad) restriction or be disproportionate to the purpose of such a prior restraint on freedom of speech (it would not be reasonable for achieving the purpose of the ban) – *a fortiori* where there are less restrictive (but equally effective) alternative means in the form of procedural safeguards to guarantee the fairness of an accused's trial in the face of pre-trial publicity. Moreover, the deleterious effects of the ban would outweigh the salutary effects of the limitation, having regard to the interests of every person in having access to information. It is submitted therefore that such a pre-trial publication ban would generally not be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and thus would not pass constitutional muster. Where, however, it can be demonstrated that there is a real and substantial risk that trial prejudice will occur if publication takes place, a prior restraint would be justifiable.

It ought not to be forgotten that freedom of expression is a wholly necessary condition of democracy in South Africa, 'and this significant status has be kept prominently in mind regarding the possibility of any curtailments or limitations.'[234]

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[230] *Ibid* 168 (para 7.2(*b*)(iv)).
[231] *S v Manamela and Another (Director-General of Justice intervening)* supra para 34.
[232] Currie & De Waal *The Bill of Rights Handbook* 168 (para 7.2(*b*)(iv)).
[233] *Ibid* 168 (para 7.2(*b*)(iv)).
[234] Brand *Media Law in South Africa* 47 (para 84).

2.5 The *sub judice* rule and pre-trial publication bans

> The law is a living thing and in the course of time parts of it become atrophied while other parts live and grow.[235]

> Yesterday's orthodoxy might appear to be today's heresy.[236]

Freedom of expression may be limited by the *sub judice* rule.[237] The *sub judice* rule prohibits statements that prejudice the administration of justice in pending proceedings.[238] Proceedings become pending in a criminal case from the moment an arrest is made.[239] The *sub judice* rule is aimed at protecting judicial officers and witnesses from being influenced, or from being perceived to be influenced, by statements that appear in the media.[240] In criminal trials, it protects the right of the accused to a fair trial.[241] The *sub judice* rule is encapsulated in the common-law crime of contempt of court *ex facie curiae* (beyond the face of the court), which is committed 'if a person publishes, either by the written or the spoken word, information or comment about a case which is still pending'.[242] Publications which may violate the *sub judice* rule include comments on the merits of a pending criminal case, any matter which prejudges a case or suggests that an accused is guilty or innocent of the offence charged or which attacks or praises his or her character, and exhorting or pleading with the judiciary to disregard evidence given in the course of legal proceedings.[243] In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*, it was observed in this regard as follows:[244]

> It is an established rule of the common law that the proper administration of justice may not be prejudiced or interfered with and that to do so constitutes the offence of contempt of court. That is now reinforced by the constitutional right of every person to have disputes resolved by a court in a fair hearing and by the constitutional protection that is afforded to a fair criminal trial. It is not contentious in all open and democratic societies - and it was not contentious

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235 *R v Chipo and Others* 1953 3 SA 602 (SR) 604G.
236 *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmS) 87A.
237 *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 24.
238 Brand *Media Law in South Africa* 87 (para 216).
239 *Ibid* 87 (para 216).
240 *Ibid* 87 (para 216).
241 *Ibid* 87 (para 216).
242 Snyman *Criminal Law* 320.
243 Brand *Media Law in South Africa* 87, 88-89 (paras 217, 221-224 (also dealing with the publication of admissions and confessions, previous convictions and witness statements before trial, that may fall foul of the *sub judice* rule)); J Burchell *Principles of Criminal Law* 4 ed (2013) 842.
244 2007 2 SACR 493 (SCA) paras 12-13 ('*Midi Television*') (footnotes omitted).

> before us - that the purpose that is served by those principles of law provides a proper basis for limiting the protection of press freedom, and the reason for that is self-evident. The integrity of the judicial process is an essential component of the rule of law. If the rule of law is itself eroded through compromising the integrity of the judicial process then all constitutional rights and freedoms - including the freedom of the press - are also compromised.
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> The exercise of press freedom has the potential to cause prejudice to the administration of justice in various ways - it is prejudicial to prejudge issues that are under judicial consideration, it is prejudicial if trials are conducted through the media, it is prejudicial to bring improper pressure to bear on witnesses or judicial officers - and it is not possible to describe exhaustively how prejudice might occur.

Freedom of expression and of the media may therefore be abridged in favour of preserving the integrity of the administration of justice,[245] and this may be done by the common-law *sub judice* rule constituting a law of general application for purposes of section 36 of the Constitution.[246] The common-law position is buttressed by the constitutional right of every person to have disputes resolved by a court in a fair hearing[247] and by the constitutional protection of a fair trial that is afforded to an accused in a criminal case.[248] However, the extent to which such intrusion on the right to freedom of expression is constitutionally valid must be evaluated against the standard that is set by the provisions of section 36 because there are no other grounds upon which it is permissible to limit protected rights.[249] This means that such a limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, amongst others, the factors enumerated in section 36,[250] considered in the

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[245] *Ibid* para 5.

[246] *Ibid*. In *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) paras 9-10, it was appositely held:

> 'The main purpose of the common-law *sub judice* rule is to protect the fair administration of justice against any statement that has the substantial effect of prejudicing the impartiality, dignity or authority of the court which is seized with the pending court proceedings… [T]he *sub judice* rule constitutes the common law's long standing and recognised limitation upon the constitutional freedom of expression. It is contravened by publication of any material which *objectively* interferes, influences or prejudices the conduct of pending legal proceedings or… prejudges the issue at stake in those proceedings.' (Court's emphasis).

In Cleaver (1993) *SALJ* 537, it is noted that the *sub judice* rule 'is concerned with striking a sensible balance between freedom of expression and a fair trial.'

The *sub judice* rule also helps to ensure that evidence considered by the court is not tainted - Swanepoel (2006) *Ecquid Novi* 14.

[247] Section 34 of the Constitution.

[248] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 12.

[249] *Ibid* para 8.

[250] *Ibid* para 7.

previous section of this chapter. The question is what the test is for a breach of the *sub judice* rule that would justify the cutting back of freedom of expression, in the present context in the form of adverse pre-trial publicity, in an open and democratic society.

The test that was previously applied in this type of contempt was 'particularly wide': the test was whether the words published tended to prejudice or interfere with the administration of justice or the outcome of the case. It was immaterial whether the statement complained of had reached the ears of the court, and, if so, whether the court had in fact believed or been influenced by it.[251] According to this test, it was not necessary to show that the impugned words or publication actually influenced the judge hearing the case.[252] The offence could be committed even where the words would not be likely to influence the judge's mind.[253] Consequently, the courts did not examine the actual or probable prejudice caused by the words but simply had to decide whether the words *tended* to interfere with the administration of justice in a particular case, which would be judged by asking: 'if the facts as set forth in the document were accepted by the tribunal would this influence the case[?]'.[254]

However, the well-known academic, John Dugard, was critical of this approach, stating that:[255]

> The objection to this test is that it fails to take into account the fact that *judges by training are unlikely to be influenced by most comments on pending proceedings* and that it punishes comment and potentially prejudicial comment alike… This truth has now been accepted by English law, where a distinction is drawn between *jury trials*, *for which contempt powers are primarily intended*…, and non-jury proceedings… [I]n contempt proceedings it should be borne in mind that a 'judge is in a very different position from a juryman. Though in no sense superhuman he has by his training no difficulty in putting out of his mind matters which are not evidence in the case'… The result of this new attitude is that English courts insist that the words used must constitute 'a real risk, as opposed to a remote possibility' of prejudice, in order to amount to contempt of court…[256]

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[251] Snyman *Criminal Law* 320-321, referring to *S v Van Niekerk* 1972 3 SA 711 (A); *S v Harber and Another* 1988 3 SA 396 (A). See also *S v Mshumpa and Another* 2008 1 SACR 126 (E) para 74.
[252] J Dugard 'Judges, Academics and Unjust Laws: The Van Niekerk Contempt Case' (1972) 89 *The South African Law Journal* 271 278.
[253] *Ibid* 278.
[254] *Ibid* 278.
[255] *Ibid* 278-279 (my emphasis). See also Burns *Communications Law* 307, 308-309.
[256] Endorsed in *S v Hartmann and Another* 1984 1 SA 305 (ZS) 311B. In this case it was observed that the wide *sub judice* test would make too great an inroad into freedom of expression (*ibid* 311A). See also *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 11.

In the *Midi Television* case, the Supreme Court of Appeal altered the common-law test in relation to the question of a publication ban appertaining pending criminal proceedings.[257] This accordingly has a bearing on the *sub judice* rule and the crime of contempt of court *ex facie curiae*. In this case, a heinous crime was committed in Cape Town (known as the 'Baby Jordan' case). Four men gained access to the home of the deceased's mother, who was away at work at the time, and snatched the six-month-old deceased from the arms of her domestic worker, and then proceeded to deliberately stab the child to death. What had occurred immediately captured the attention of the public and received extensive media coverage, which continued as the police investigation progressed and suspects were arrested. Shortly after the incident, whilst the case was being investigated, E-TV decided to make a documentary relating to the events and their impact upon the child's family, which documentary was intended to be broadcast on a weekly current affairs programme. E-TV recorded interviews with various people, including the deceased mother's brother and the domestic worker, who had witnessed what had occurred. A decision was taken not to broadcast the documentary before the police had made arrests. When four men and a woman had been arrested and charged, E-TV proceeded to schedule its broadcast. However, a few days before the intended broadcast, the Director of Public Prosecutions for the Western Cape (DPP) became aware that the documentary was to be aired. His representatives asked E-TV to allow them to view the documentary so as to satisfy themselves that the broadcast would not prejudice the forthcoming trial but E-TV refused. Discussions ensued, certain undertakings were offered to the DPP, but the impasse continued. On the date on which the documentary was to be aired, the DPP applied to the High Court at Cape Town as a matter of urgency for an order prohibiting the broadcast until he had been furnished with a copy of the documentary and had been afforded 24 hours to institute any further proceedings that he considered to be necessary. E-TV agreed to suspend its broadcast pending the outcome of the application, thereby relieving the urgency. The matter came before Zondi AJ who granted the relief that was claimed. E-TV then appealed against that order.[258]

The Supreme Court of Appeal affirmed that: '"Press exceptionalism - the idea that journalism has a different and superior status in the Constitution - is not only an

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[257] 2007 2 SACR 493 (SCA).
[258] *Ibid*.

unconvincing but a dangerous doctrine."'[259] Nugent JA pointed out that the constitutional promise of freedom of expression or media freedom was made 'to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press.'[260] Thus, to abridge the freedom of the press was 'to abridge the rights of all citizens and not merely the rights of the press itself.'[261] As noted above, Nugent JA made plain that the right to freedom of expression may be cut back or curtailed in favour of preserving the integrity of the administration of justice.[262] The Justice recognised that it is an established rule of the common law that the proper administration of justice may not be prejudiced or interfered with and that to do so constitutes the offence of contempt of court.[263] This rule was reinforced by section 34 of the Bill of Rights, which grants every person the right to have disputes resolved by a court in a fair hearing, and by section 35(3) of the Bill of Rights, which affords protection in the form of a fair trial to accused persons in criminal matters.[264] Nugent JA proceeded to outline the various ways in which the exercise of press freedom has the potential to cause prejudice to the administration of justice,[265] which was considered above. However, it was also made clear that 'the administration of justice does not take place in private, completely shielded from public scrutiny and comment, and there is always the potential for some element of prejudice when the media report or comment on judicial proceedings.'[266] Applying the Canadian decision of *Dagenais v Canadian Broadcasting Corp.*,[267] Nugent JA observed that what must be guarded against is the '*facile assumption*' that if there is any risk of prejudice to a fair trial, however '*speculative*', a ban on publication should be ordered.[268]

Taking guidance from pertinent case-law of several foreign jurisdictions (England, Canada and Australia), especially the *Dagenais* case,[269] whose findings

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[259] *Ibid* para 6, quoting with approval *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 610D.
[260] 2007 2 SACR 493 (SCA) para 6.
[261] *Ibid* para 6.
[262] *Ibid* para 5.
[263] *Ibid* para 12.
[264] *Ibid* para 12.
[265] *Ibid* para 13.
[266] *Ibid* para 13.
[267] (1995) 94 CCC (3d) 289 (SCC).
[268] 2007 2 SACR 493 (SCA) para 13 (my emphasis).
[269] *Ibid* paras 15-18. The *Dagenais* case dealt with the question of the banning of a broadcast alluding to pending criminal proceedings involving allegations of physical and sexual abuse of children committed by members of a Catholic religious order.

were observed above, Nugent JA, for a Full-Bench of the Supreme Court of Appeal, suggested that the pre-constitutional decisions of *S v Van Niekerk*[270] and *S v Harber and Another*,[271] which indicated that a publication is capable of sustaining a charge of contempt of court if it merely 'tends' to prejudice the administration of justice, were incongruent with the Constitution.[272] The wide common-law *sub judice* test to determine prejudice, as espoused in *Van Niekerk* and *Harber*, was inconsistent with what is to be expected in 'contemporary democracies', where the test for a ban on a publication relating to pending judicial proceedings is whether there is '*a demonstrable relationship between the publication and the prejudice that it might cause to the administration of justice; substantial prejudice if it occurs; and a real risk that the prejudice will occur*.'[273] According to Nugent JA, the latter narrower test to determine prejudice was also now applicable in South Africa.[274]

But merely to ask whether there was indeed a risk of prejudice which met the said narrower criteria did not end the enquiry. Nugent JA reiterated that a 'limitation must not only be directed towards a permitted end, *but must also be no more than is necessary to achieve its permitted purpose*.'[275]

In sum, the Supreme Court of Appeal held, as stated above, that whenever a court is asked to limit media freedom so as to protect the administration of justice, a publication will be deemed to be unlawful, and thus susceptible to being prohibited, 'only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place.'[276] Mere conjecture or speculation that prejudice might occur will not be enough. Even then, a publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information.[277]

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[270] 1972 3 SA 711 (A).
[271] 1988 3 SA 396 (A).
[272] 2007 2 SACR 493 (SCA) para 16.
[273] *Ibid* para 16 (my emphasis).
[274] *Ibid* para 16.
[275] *Ibid* para 16 (my emphasis).
[276] *Ibid* para 19. Compare also *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 75; *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 111.
[277] 2007 2 SACR 493 (SCA) para 19.

Where, however, a demonstrable, real and substantial risk exists of prejudice to the administration of justice, and '*it cannot be prevented from occurring by other means*', a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.[278]

The Court found that without a reasonable apprehension that the conduct of the trial would indeed be compromised by the broadcast of the documentary, there was no basis for prohibiting the broadcast.[279] Moreover, while the law prohibited E-TV from broadcasting material that prejudiced the administration of justice, there was no general principle of our law, whether in the common law, or in a statute, or to be extracted from the Constitution, that obliged E-TV to furnish its material to the DPP before it was broadcast, and least of all a law that prohibited it from broadcasting the material unless it could first demonstrate that the publication would not be unlawful. The law generally allowed freedom to publish and freedom was not subject to permission. In the absence of a valid law that restricted that freedom, a court was not entitled to impose a restriction of its own.[280] In the absence of a law obliging E-TV to furnish the documentary to the DPP before it was broadcast the first requirement for the grant of a final interdict against publication, namely a clear right, was not met and the interdict ought to have been refused.[281] The DPP had to do what any person was required to do in similar circumstances: he had to expect that freedom would not be abused until he had adequate grounds for believing the contrary. But he could not require the press to demonstrate that it would act lawfully as a precondition to the exercise of the freedom to publish, in the absence of a valid law that accorded him that right.[282]

In the premises, the Supreme Court of Appeal upheld the appeal and reversed the order of the Court *a quo*.[283]

One notable commentator on criminal law in South Africa, in discussing the crime of contempt of court *ex facie curiae*, opines that the narrower test enunciated in *Midi Television* 'must be welcomed as more fair than the previous wide test.'[284] Moreover, former Deputy Chief Justice, Dikgang Moseneke, in an extra-curial

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[278] *Ibid* para 19 (my emphasis).
[279] *Ibid* para 24.
[280] *Ibid* para 25.
[281] *Ibid* para 26.
[282] *Ibid* para 27.
[283] *Ibid* para 28.
[284] Snyman *Criminal Law* 321.

address observed that the *sub judice* rule, and its relevance in South Africa, 'is, at the very least, on the verge of extinction', by reason of the fact that a statement outside of court would '*rarely*' affect the outcome of a case in South Africa, where we have no jury system.[285] Moseneke remarked that the Supreme Court of Appeal in *Midi Television* had 'significantly narrowed the scope' of the *sub judice* rule; in other words, 'the *sub judice* rule has been whittled down considerably.'[286] Importantly, Moseneke also observed, in this context, that '*the social and other media blasts and immediacy make the sub judice rule nearly impossible to hold and to keep*, for better or for worse. What is more it will be near impossible for the courts to police the rule. And, as you know, what the courts cannot police cannot be enforced.'[287]

Before the *Midi Television* case, Graeme Hill,[288] similarly to John Dugard, pointed out that '[t]he traditional justification for the *sub judice doctrine* is that it ensures that the fact-finders decide cases only on the basis of evidence admitted in court, by preventing them from being exposed to potentially inadmissible material outside the court.'[289] However, while this justification may have been persuasive when the fact-finder was a jury, jury trials had been abolished in South Africa.[290] Hill stated: 'When the fact-finder is a judge, the traditional justification for the *sub judice* doctrine is much less persuasive. Judges are already required to rule on whether evidence is admissible and to disregard inadmissible evidence when reaching a decision. Accordingly, judges will necessarily be exposed to some inadmissible material and *a rule preventing the publication of that material outside court will not make the trial any more fair*. Admittedly, the media may publish prejudicial material outside court that neither party will attempt to introduce as evidence in court. However, judges' training means (in theory at least) that they are better equipped than juries to put extraneous material out of their mind.'[291] Hill[292] referred in this regard to *S v Chinamasa*, where the Court remarked that 'only the remotest possibility exists of a judge, imbued with basic impartiality, legal training and the

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[285] Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 15-16 (my emphasis).
[286] *Ibid* 16.
[287] *Ibid* 16-17 (my emphasis). See similarly, *Dagenais v Canadian Broadcasting Corp.* (1995) 94 CCC (3d) 289 (SCC) 323*d-e* (Westlaw para 93).
[288] At the time of writing, Hill was Counsel assisting the Solicitor-General of Australia.
[289] Hill (2001) *SAJHR* 566.
[290] *Ibid* 566.
[291] *Ibid* 566-567 (footnote omitted) (my emphasis).
[292] *Ibid* 567.

capacity for objective and unemotional thought, being consciously or subconsciously influenced by extraneous matter.'[293] Hill commented that '[e]ven if this statement perhaps overstates the position, the fact that (unlike juries) *judges are required to give reasons for their decisions, at least limits the extent to which extraneous matters influence these decisions*.'[294] The present thesis, particularly in chapter four, seeks

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[293] 2001 1 SACR 278 (ZS) 298*e*, affirming *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36D-E.

[294] Hill (2001) *SAJHR* 567 (footnote omitted) (my emphasis). I return to the latter important aspect of judicial officers having to provide reasons for their decisions (such being a fundamental procedural safeguard), later in this thesis.

For similar observations to that of Hill and Dugard, see Cleaver (1993) *SALJ* 532-534. The latter commentator (*ibid* 533) also espouses the view that: 'A judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case.' – expressed by Lord Parker CJ in *R v Duffy & Others: Ex parte Nash* (1960) 2 QB 188 198.

In *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 3, relating to the question of freedom of expression and contempt of court, it was affirmed that it is unlikely that a judge would give a decision which he or she would not have given but for extraneous information which had been improperly conveyed to him or her, adding that a trained judicial mind is 'capable and indeed able to dismiss or ignore any offending matter and decide the matter impartially upon the evidence adduced and law applicable.'

In Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 7, the author remarks assuredly that:

> 'From a legal point of view my conclusion on the sub judice rule is that it should constantly, in reporting on a pending trial, be borne in mind that it is the judge who must ultimately decide on the weight of the evidence and the guilt of the accused. *However, it is also well known that judges, who are bound by their oath, only decide matters on the facts as placed before them in the matter at hand. They would ignore any opinions expressed in the media*.' (My emphasis).

Van Rooyen goes on to opine that while some speculation may be permitted in publications appertaining pending judicial proceedings, the media ought not to pronounce on the verdict before the judge has done so. The weighing of evidence in publications would also be improper. 'Fortunately [however], judges, *who are trained to decide a case on the facts before them*, will not be influenced by speculation and views expressed in the media.' (*Ibid* 9). (My emphasis).

Van Rooyen (*ibid* 7 n 44) cites, in the above respect, PA McDermott 'Contempt of Court and the need for Legislation' (2004) 4 *Judicial Studies Institute Journal* 185 194, where it is noted that it will be particularly hard to establish contempt of court pertaining to prejudicial press comments on pending cases 'where the trial will be by judge only.' Both Van Rooyen (*ibid* 7 n 44) and McDermott (*ibid* 194) refer to the Irish case of *Desmond v Glackin (No 1)* (1993) 3 IR 1 19-20, where it was held as follows on the question of *sub judice* contempt of court with regard to public comments on radio of the Minister for Industry and Commerce concerning a matter of public controversy, which comments were said to have prejudiced judicial review proceedings which were then pending:

> 'I do not consider that the interview or the publicity that preceded it is calculated to make it difficult for a judge of the High Court, sitting to hear the application for judicial review, to decide in an objective and unbiased manner the legal issues which arise for consideration in those proceedings. In arriving at this conclusion, I do not find it necessary to pass judgment on the presence or absence in judges as a class of that human frailty which would make them susceptible to publicity adverse to one side or the other in a particular piece of litigation. In the present case the judge who is called upon to deal with the application for judicial review will have to endeavour to exclude from his mind not only what he may have heard or read of the second respondent's interview, but the contents of numerous newspaper reports and radio and television commentaries regarding the case, extending over a period of some months. *I am of opinion that the judge concerned should be able to decide the legal issues involved in the case fairly and objectively notwithstanding the war of words which has been in progress for some months past*.' (My emphasis).

Compare in the latter regard, *Moafrika Newspaper* supra para 26.

to argue that assessors who may sit with a judge or magistrate in a South African criminal trial, are also not in the same position as juries, and that it is therefore unlikely that they would be influenced or biased by pre-trial publicity.[295]

In light of such considerations, one writer contends that the only remaining justification for the *sub judice* rule could be that it may protect witnesses from the adverse effects of improper communications.[296] However, the writer argues that 'public comments on active proceedings can only justifiably be restricted if they carry with them the "real risk" that they will "seriously influence" a witness in the presentation of his evidence at a trial.'[297] Graeme Hill remarked in this regard, in the context of the erstwhile *sub judice* doctrine, that:[298]

> … in South Africa, the argument that the *sub judice* doctrine is required to exclude improper communications obtains much of its persuasive effect from its application to witnesses. It may well be true that extensive and prejudicial media coverage could in some cases intimidate witnesses into changing their testimony or refusing to testify at all. However, the strength of this argument is undercut by two considerations. The first is that there are alternative means of encouraging witnesses to come forward and testify truthfully (such as subpoenas and perjury laws) that do not restrict freedom of expression.
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> Moreover, it is at least arguable that restricting media coverage of pending proceedings will have the opposite effect from that intended. In the absence of detailed press coverage, witnesses may feel *less* constrained to tell the truth and potential witnesses may not come forward, because they do not realise that they have potentially relevant information. Therefore, while the argument that witnesses need to be shielded from improper communications might justify some restrictions on freedom of expression, it is doubtful whether it would justify the extensive restrictions… permitted by the *sub judice* doctrine.

In *Van Breda v Media 24 Ltd and Others*, the Supreme Court of Appeal, on the question of the televising of a criminal trial and what impact it could have on witnesses required to testify,[299] appositely observed that cross-examination, where the defence is in possession of a copy of witnesses' police statements, would be an effective means 'to point to specific instances of *tainted testimony*. The adversarial

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See, nevertheless, the remarks of Keane J in the Irish Supreme Court decision of *Kelly v O'Neill* (2000) 1 IR 354 375.

[295] See moreover the comments in Hill (2001) *SAJHR* 567; Cleaver (1993) *SALJ* 534. But see Swanepoel (2006) *Ecquid Novi* 9.

[296] Cleaver (1993) *SALJ* 542. See also Burns *Communications Law* 306; Hill (2001) *SAJHR* 589.

[297] Cleaver (1993) *SALJ* 542.

[298] Hill (2001) *SAJHR* 567-568 (footnotes omitted) (author's emphasis).

[299] With the argument being that by viewing other evidence during the televised proceedings, the memory and recollection of a prospective witness would be impermissibly refreshed, which might serve to enhance the credibility of that witness' testimony and corrupt the truth-seeking function of a trial.

nature of criminal proceedings and the pivotal role that cross-examination plays in it should enable the judge to safely make findings as to whether or not a witness's testimony has been tainted by the exposure. In any event, the reality of court reporting today is that even without any form of audio or audiovisual reportage, the media provide live text-based communications through various social media platforms such as Twitter and Facebook from inside the courtroom. In truth therefore the risk of "tailoring" already exists. Thus, whether that risk will be materially exacerbated by audiovisual coverage remains moot.'[300]

It may moreover be said that the influence which media comment may have on a trial is 'a matter of *speculation*, and *consequently it is immensely difficult, some would say impossible*, to define with precision what public comments should be stifled because they carry with them the danger of unduly interfering with judicial proceedings.'[301]

In light of the above considerations, it is submitted that the *sub judice* rule should now be seen, as one Southern African court put it, as 'an important and useful process whereby the proper administration of justice is protected against *extra-curial* statements which have a substantial risk of prejudicing or interfering with pending court proceedings. Modern courts today should interpret this limitation on the freedom of expression somewhat restrictively safe [sic] in cases where real and substantial risk exists.'[302] The Court added the caveat, nonetheless, that '[w]hen publishing critical comments over pending proceedings the media should do so advisedly and with a full sense of responsibility without creating any risk or prejudice to those pending court proceedings.'[303]

A prior restraint of publication is 'a drastic interference with freedom of speech' and should only be ordered where there is 'a substantial risk of grave injustice'.[304] 'Because they operate to censor speech, such restraints are subject to a heavy presumption against their constitutionality.'[305] It is submitted that if, as this

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[300] 2017 2 SACR 491 (SCA) para 55 (my emphasis).
[301] Cleaver (1993) *SALJ* 531 (footnote omitted) (my emphasis).
[302] *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 5 BCLR 534 (LesH) para 28. The Court also underlined that 'whereas the freedom of expression (media) may be limited by a salutary principle such as the time-honoured *sub judice* rule – the latter must always be narrowly interpreted and "necessity for any restrictions must be convincingly established"'. (*Ibid* para 24).
[303] *Ibid* para 28.
[304] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 15.
[305] Currie & De Waal *The Bill of Rights Handbook* 374 (para 16.5(*d*)).

thesis seeks to show, there are sufficient or adequate procedural safeguards or judicial mechanisms that apply in a criminal trial that can prevent pre-trial publicity from biasing the court or the outcome of the case, particularly in a South African accusatory or adversarial trial where there is no jury, and if such a trial 'is governed by rules of evidence and procedures designed to seek out the truth, not in a general way, but in the context of specific dispute resolution and administration of justice', and if these rules 'also endeavour to ensure the fairness of the trial process',[306] the *sub judice* rule would not be violated unless it can successfully be demonstrated, that there is a real and substantial risk, a risk that is, 'the reality of which is *well-grounded in the evidence*',[307] of prejudice occurring to the administration of justice if publication takes place. Unless a risk of that kind is 'clearly established' and cannot be prevented by other means,[308] such as with procedural safeguards, the *sub judice* rule would not be offended and a publication ban would then not be justified and a charge of contempt of court *ex facie curiae* could not be sustained.

While there may be an ongoing need for the crime of contempt of court to address the problem of the media seeking to influence the outcome of a case,[309] the

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306 *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 50.

307 *R v Mentuck* (2001) 158 CCC (3d) 449 (SCC) para 34 (Westlaw), reaffirming the test laid down in *Dagenais v Canadian Broadcasting Corp.* (1995) 94 CCC (3d) 289 (SCC), and adding that such a risk must be one 'that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.' (My emphasis).

Analogously, in dealing with the question of the degree or seriousness of risk needed to found *mens rea* in the form of *dolus eventualis* for the crime of murder, the Appellate Division, per Beyers JA, in *R v Horn* 1958 3 SA 457 (A) 463G, recognised that the risk to life evident in earlier case-law as being 'real and substantial' connoted a risk which is '*likely* to result in death'. (My emphasis).

308 *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 19.

309 In explaining the underlying rationale for *sub judice* contempt of court, in the context of South Africa's new constitutional dispensation, it is opined in Snyman *Criminal Law* 321-322 as follows:

> 'The existence of this form of contempt of court is not incompatible with the provisions of section 16(1) of the Constitution, which provides for the right to freedom of expression, including the freedom of the press and other media, as well as the right to receive or impart information. Although the rule does infringe on the right created in section 16(1), the infringement is reasonable and justifiable in an open and democratic society, as provided in the limitation clause in section 36(1) of the Constitution. The whole concept of a "fair trial" presupposes a trial in which the court decides on the issues before it on the basis of the evidence placed before it, and not on the basis of statements or opinions in the media. Generally speaking, before the case has been finally disposed of by the courts the media, therefore, ought not to have the right to publish information on the case which would have a real influence on its outcome, but which was not produced as evidence to the court hearing the case. "Trial by newspaper" is and remains a real danger to a fair and impartial disposal of an issue in the judicial process. If the present type of conduct were not punishable, a newspaper would be free to "convict" an accused, as it were, whereas the court may find her not guilty. The perception is then raised that the court's finding is wrong, whereas in reality it is correct.

manner in which the Supreme Court of Appeal in the *Midi Television* case 'has reconciled the competing interests of the freedom of the press and the public interest in a fair trial constitutes a welcome development of the law.'[310] Given the nature of the South African accusatory trial, its structural demands and how it functions, together with the procedural and evidential safeguards that are in place to ensure that an accused receives a fair trial, it may validly be argued that the potential benefits to the due administration of justice achieved by the *sub judice* doctrine are generally so slight that they do not justify the potential for the doctrine to be misused to the detriment of freedom of speech during the pendency of a case, at the precise time when the public interest in the matter would naturally be at its height,[311] and to stifle fair criticism of the judicial office.[312] Thus, a prior restraint of a media publication relating to a pending case and a possible contempt of court prosecution based on the *sub judice* rule, would generally be disproportionate measures to the objective of achieving a fair trial. The development and reformulation of the *sub judice* rule by Nugent JA in *Midi Television*[313] in accordance with the approach adopted in other democratic countries has been 'heralded as a victory for constitutionalism and *the subsequent positive spinoffs for freedom of expression and investigative journalism*. The flimsy and unsubstantiated pre-constitutional *sub judice* excuse will now not be tolerated, which is of substantial benefit to the

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> Furthermore, even if one assumes that the judge or magistrate is capable of leaving out of consideration information published in the press, and that he in fact does so, there is still the further consideration that "justice must not only be done, but must manifestly be seen to be done". Parties to a case, and even outsiders, must be satisfied that the court's conclusion is based upon information laid before the court in an admissible way only, and not upon information or comment concerning the merits of the issue published in the media. Once the media is allowed to publish information and comment on a pending case, there will always remain at least a suspicion in the mind of the public and of a party to the case that the court, in coming to its conclusion, was influenced by outside factors.'

It may be argued, however, that from a reasoned verdict, one would generally be able to establish whether a trial court placed any undue reliance on extraneous matter in reaching its decision.

Similar concerns to that of Snyman were expressed in *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245 para 63, in relation to the English *sub judice* rule (the well-known 'thalidomide case'), as follows:

> 'If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.'

[310] S Hoctor 'Contempt of Court' (2008) 21 *South African Journal of Criminal Justice* 101 104.

[311] *Bridges v California* 314 US 252 268 (1941).

[312] Hill (2001) *SAJHR* 589.

[313] In Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-139, the *Midi Television* judgment is described as a 'momentous decision' that has radically altered the South African contempt of court law.

protection of our constitutional democracy.'[314] After all, in the words of Hefer JA in *National Media Ltd and Others v Bogoshi*, 'we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion'.[315] It should be emphasised that 'in the absence of *clear evidence* of the damage that will be suffered, courts should as a matter of principle *be loathe to grant interdicts that will stifle speech, especially where the speech implicates matters of public concern*.'[316]

2.6 A stay of prosecution

A stay of prosecution under South African law is a remedy available to an accused where the accused is able to establish or demonstrate either that he or she '*will probably suffer trial-related prejudice*' if he or she is not granted a permanent stay or that 'there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate'.[317] The trial related prejudice that must be shown by an accused to warrant a stay of prosecution

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[314] J Stevenson 'Reformulation of *Sub Judice* Rule and Prior Restraint of Publications Resolved: A Victory for Press Freedom: Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape) 2007 9 BCLR 958 (SCA)' (2007) 28 *Obiter* 614 620 (my emphasis).

An interdict restraining a media publication is a 'draconian curtailment of free expression', since it prohibits, in advance of publication, matter 'from seeing the light of day'; a restraint of publication constitutes 'a pernicious kind of censorship'. It is therefore for good reason that the courts in general have not been favourably disposed to most forms of prior restraint, otherwise the press and the exercise of speech would *inter alia* be beholden to the government. It would thus only be in 'exceptional circumstances' that the content of speech may be restricted, such as where it is demonstrated that there is a real and substantial risk of prejudice resulting to the administration of justice, in terms of the *sub judice* rule as reformulated in the *Midi Television* case – see GE Devenish 'Prior judicial restraint and media freedom in South Africa - Some cause for concern' (2011) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*Journal of Contemporary Roman-Dutch Law*) 12 12-13, 20.

[315] 1998 4 SA 1196 (SCA) 1209H-I. Of course, in relation to legal matters, it would be naïve 'to think that journalists report only objectively, without any subjective angle or slant to advance a cause, to please their readers, listeners or viewers, or for that matter to out-sensationalise competitors to gain a larger audience. In a democracy that provides for the right to gossip it is a reality. One cannot always expect detailed and comprehensive accounts which all would regard as correct and fair… [T]he inevitability of sound bites and quotes that are sometimes regarded as "out of context" has to be accepted' - Van der Westhuizen (2008) *AHRLJ* 268. Nonetheless, South Africa's constitutionally-protected right to receive information entitles the public 'to expect at least a basic level of accuracy, understanding of the issues and procedures at stake, and fairness. Not striving to achieve this at all times is negligent, if not malicious, and in fact dangerous.' (*Ibid* 268).

[316] Milo, Penfold & Stein 'Freedom of Expression' in *CLOSA* 42-189 (my emphasis).

[317] *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) paras 10, 22 (my emphasis). See also *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) paras 41-42; *Wild and Another v Hoffert NO and Others* 1998 2 SACR 1 (CC) paras 26-27; *McCarthy v Additional Magistrate, Johannesburg* 2000 2 SACR 542 (SCA) para 44.

must be '*significant*'; barring a prosecution is likely '*only in a narrow range of circumstances*', 'where it is established that the accused has *probably suffered irreparable trial prejudice*'.[318] The accused must, moreover, show '*definite and not speculative prejudice*'; there must be a showing of '*actual prejudice*' – 'vague and conclusory allegations' are insufficient.[319] The reason for such a stringent test for the granting of a stay of prosecution is self-evident, as highlighted by the Constitutional Court: 'Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of [alleged prejudice] on the outcome of the case - is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct.'[320]

The Constitutional Court has made clear that irreparable trial related prejudice, in the context of the question of a stay of prosecution, refers to '*insurmountable damage*' to the fairness and integrity of a possible trial; put another way, 'to say that the trial has been irreparably prejudiced is to accept that there is *no way in which the fairness of the trial could be sustained*.'[321]

Where a stay of prosecution is lodged on the grounds of adverse pre-trial publicity, because it is averred that such would result in an accused not having a fair trial, it is not sufficient for an accused to simply aver or show that he or she is 'likely' to be prejudiced at trial as a result of the media coverage; the accused would be required to prove that there is 'irreparable trial related prejudice' and that the 'extraordinary circumstances' would justify such a 'drastic relief'.[322] An accused would need to prove that the stay in proceedings is 'the viable option', and would need to satisfy the court of the facts upon which he or she relies for the contention that the right to a fair trial has been infringed.[323] In terms of a stay of proceedings, the accused would 'have to prove that the adverse media coverage will *indeed* give rise to trial related prejudice that would lead to an unfair trial.'[324] The accused would

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[318] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) paras 38-39 (my emphasis). See also *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) para 16.
[319] *Zanner* supra para 16 (my emphasis).
[320] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 38, stated by Kriegler J for the Court on the question of a delay in the prosecution of the accused and the impact that such had on the accused's right to a fair trial, in particular the right to be tried within a reasonable time after having been charged.
[321] *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 68 (my emphasis).
[322] *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 25 (Court's underlining).
[323] *Ibid* para 24.
[324] *Ibid* para 93 (my emphasis).

also be required to prove that there are 'extraordinary circumstances' that are applicable in his or her case.[325] The accused would need to show that the pre-trial publicity was adverse, and if so, the media coverage 'would have to be prejudicial and would lead to [the accused] not having a fair trial.'[326] The accused would have to demonstrate '*a link* between the adverse media coverage and the effect that it would have on the evidence that would be presented during the trial, if any and how it would result in [the accused] not having a fair trial.'[327]

In the *Krion* pre-trial motion, Ngoepe JP held that an accused person may not apply for a permanent stay of prosecution on the grounds that he or she is 'likely' to be prejudiced at trial by external factors, such as *in casu* pronouncements by courts in parallel civil matters.[328] This is because such an argument '*assumes* that the trial court *will* commit an irregularity by allowing itself to be unduly influenced by those factors.'[329] Such an argument would simply be speculative, a conclusory allegation, which would be insufficient to found a stay of prosecution.

It is pertinent to emphasise that, as the Supreme Court of Appeal has said, 'there is in general not an *a priori* answer to the question whether a trial will be fair or not. Potential prejudice may be rectified during the course of the trial and the court may make preliminary rulings depending on how the case unfolds and may revoke or amend them. Irregularities do not lead necessarily to a failure of justice.'[330] In other words, it would generally be very difficult, if not impossible, to gauge before trial what effects or influence any potential prejudice may have on an accused's right to a fair trial or the outcome of the trial.[331] It is submitted that that can only really be determined as the trial unfolds. It is a question for the *trial judge* to determine.[332] As the Constitutional Court has appositely observed: '[F]airness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision.'[333] There is no such thing 'as fairness in a vacuum' – in determining what is fair, the context or prevailing circumstances are of primary

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[325] *Ibid* paras 93, 123.
[326] *Ibid* para 119.
[327] *Ibid* para 119 (my emphasis).
[328] *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 11.
[329] *Ibid* para 11 (my emphasis).
[330] *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 4 (footnote omitted).
[331] Compare *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999 2 SACR 13 (C) 25*h-i*.
[332] *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 4.
[333] *Key v Attorney-General, Cape Provincial Division, and Another* 1996 2 SACR 113 (CC) para 13.

importance.[334] In the context of an application for a stay of prosecution, it would have to be taken into account that any actual trial related prejudice can only properly be determined by a trial court, which would be steeped in the atmosphere of the trial.[335] Trial related prejudice does not mean 'prejudice in the air.'[336] Events at trial may demonstrate actual prejudice, but at the time that an application for a stay of proceedings is lodged, due process or fair trial claims are generally '"*speculative and premature*."'[337] It is submitted therefore that speculation as to the possible adverse effects of pre-trial publicity on the accused's right to a fair trial, such as the biasing effects it may have on the trial court in the adjudication of the case, will not suffice to warrant a stay of proceedings. The trial court would be best placed to assess the circumstances that exist in the context of pre-trial publicity and to decide whether the available procedures are sufficient to enable the court to reach its verdict with an unclouded mind, or whether, exceptionally, a temporary or even permanent stay of the prosecution is the only solution.[338]

In *Banana v Attorney-General*,[339] the Supreme Court of Zimbabwe was confronted for the first time with the question of a stay of prosecution predicated primarily on the contention that widespread pre-trial publicity adverse and hostile to an accused person may so indelibly prejudice the minds of the judge and assessors at the criminal trial as to negate the constitutional protection of a fair hearing before an independent and impartial court. Gubbay CJ, for the Court, pointed out that the test that was to be applied for the granting of a stay of proceedings in these circumstances, was whether the prejudice to the accused emanating from the media coverage in advance of trial 'was of such magnitude as "very effectually to poison the fountain of justice before it begins to flow"'.[340] Gubbay CJ added in this respect that 'an accused person who seeks an order prohibiting his prosecution on the ground that circumstances have occurred which would render it unfair (which include pre-trial publicity), must establish on a balance of probability that there is a real or substantial risk that by reason of such circumstances he could not obtain a fair

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[334] *S v Steyn* 2001 1 SACR 25 (CC) para 13; *S v Thebus and Another* 2003 2 SACR 319 (CC) para 111.
[335] *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999 2 SACR 13 (C) 25*i*.
[336] *Ibid* 25*h*.
[337] *Ibid* 26*a-h* (my emphasis).
[338] See *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 30G-H.
[339] *Ibid*.
[340] *Ibid* 34E.

trial.'[341] Gubbay CJ importantly held further that '[t]he real or substantial risk of partiality of the judge and assessors *has to be weighed against the backdrop of the developed system of safeguards that have evolved to prevent just such a contingency. Only when these built-in mechanisms are inadequate to guarantee impartiality will the test be satisfied and a fair trial rendered impossible of attainment*.'[342]

In light of this test or approach enunciated by Gubbay CJ, it is submitted that unless an accused can demonstrate on evidence that there is a real and substantial risk of pre-trial publicity having an adverse effect on his or her trial or a biasing effect on the trial court or the outcome of the case, which cannot be avoided by built-in procedural safeguards or judicial mechanisms designed to guarantee the accused a fair trial, a stay of prosecution based on such publicity would not be justified.[343] It is submitted that such a test is constitutionally valid when it is considered that, as made clear by the Constitutional Court:[344]

> The right to a fair trial requires a *substantive, rather than a formal or textual approach*. It is clear also that *fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires - fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime*.

This does not mean that the accused's rights should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution.[345] The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation.[346] Courts should within the confines of fairness actively discourage preliminary litigation.[347] Courts should

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[341] *Ibid* 34F.
[342] *Ibid* 34I (my emphasis).
[343] Compare also, for example, *Rattigan v Director of Public Prosecutions* (2008) 4 IR 639 para 50, where it was observed, on the question of a stay of prosecution based in part on adverse pre-trial publicity, that 'a court will only stop a trial if it is satisfied that *the normal safeguard procedures in a trial*, including the making of appropriate directions, *will not, in fact, achieve a fair trial*. In practice, this will *rarely* be the case.' (My emphasis).
[344] *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43 (footnote omitted) (my emphasis). See also *S v Jaipal* 2005 1 SACR 215 (CC) para 29; *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) para 21.
[345] *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 5.
[346] *Ibid* para 5.
[347] *Ibid* para 5.

further be aware that persons facing serious charges - and especially minimum sentences - have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'.[348]

Moreover, it should be underlined that '[t]o accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused could never receive a fair trial. *The result would be nothing less than judicial abdication*. *The proposition needs merely to be stated to convince of its unsoundness*.'[349]

It is submitted that the following further factors may generally also militate against the granting of a stay of prosecution:

- Courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. When a permanent stay of prosecution is sought this societal interest 'will loom very large.'[350]
- By providing for an independent prosecuting authority with the power to institute criminal proceedings,[351] the Constitution makes it plain that the effective prosecution of crime is an 'important constitutional objective', and indeed there is 'a pressing social need' for the effective prosecution of crime.[352]
- In South Africa's constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime. The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework. The

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348 *Ibid* para 5.
349 *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36I-37A (my emphasis).
350 *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 41.
351 See section 179(2) of the Constitution.
352 *S v Basson* 2004 1 SACR 285 (CC) para 33; *S v Zuma and Others* 1995 1 SACR 568 (CC) para 41; *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 13; *S v Thebus and Another* 2003 2 SACR 319 (CC) para 40; *S v Basson* 2007 1 SACR 566 (CC) para 144.

Constitution enables the State to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens. Thus, where, for example, a charge is quashed, the result is that the State cannot prosecute the accused for the offence, which in turn means that the constitutional obligation of the prosecuting authority and the State is obstructed. The constitutional import of such a consequence is particularly severe where the State is in effect prevented from prosecuting an offence aimed at protecting the rights of others.[353]

- It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of corrupt and fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the Government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society.[354]
- The nature of the crime is another relevant factor in the enquiry appertaining a stay of proceedings. Clearly, in a case involving a serious offence, the societal demand to bring the accused to trial is that much greater and the court should be that much slower to grant a permanent stay.[355] Of central significance will always be the nature of the offence: 'The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us, "Molato ga o bole" (Setswana) or "ical'aliboli" (isiZulu) - there are some crimes that do not go away.'[356]
- In a constitutional democracy, greater recognition must be given to the rights of victims of crime; victims of crime must be accommodated more effectively in the criminal justice system.[357] In an extra-curial address, the late former Chief Justice Pius Langa noted that '[i]n the face of high levels of crime, the

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[353] See *S v Basson* 2004 1 SACR 285 (CC) paras 31-33; *S v Basson* 2007 1 SACR 566 (CC) para 144.

[354] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 2 SACR 349 (CC) para 53.

[355] *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) para 21. See also *Bothma v Els and Others* 2010 1 SACR 184 (CC) paras 44-66.

[356] *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 77.

[357] See, for example, *S v Matyityi* 2011 1 SACR 40 (SCA) para 16.

> criminal justice system faces a serious challenge to ensure that victims have the satisfaction of knowing that those who harmed them or their loved ones are brought to justice.'[358] Langa observed that '[e]qual justice means that the fruits of justice are there for all to enjoy.'[359] Where that is denied, the vital goal of transformative constitutionalism may be undermined; for, one of the symptoms of inequality is a lack of access to substantive justice.[360] It is clear, then, that it is not only an accused whose interests must be protected by the criminal justice system; there must also be fairness to the public, as represented by the State, and 'fairness to the victims of the crime and their families.'[361]

Of course, the fact that a stay of prosecution may be refused by no means puts paid to an accused's constitutional rights to a fair trial.[362] Those rights and the duty to devise remedial relief for their infringement will continue throughout the trial.[363] After all, equally to the public interest in bringing criminals to book, is the public interest 'in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.'[364]

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[358] P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 355.
[359] *Ibid* 355.
[360] *Ibid* 355.
[361] *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA) para 32.
[362] *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999 2 SACR 13 (C) 26*b-d*.
[363] *Wild and Another v Hoffert NO and Others* 1998 2 SACR 1 (CC) para 36.
[364] *Key v Attorney-General, Cape Provincial Division, and Another* 1996 2 SACR 113 (CC) para 13.

CHAPTER 3

THE SOUTH AFRICAN CRIMINAL TRIAL IN AN ADVERSARIAL PARADIGM

[A] common law trial is and always should be an adversary proceeding.[1]

3. Introduction

It is axiomatic that in addressing the question of the possible impact of pre-trial publicity on the fairness of criminal proceedings in the South African legal system, pertinent contours (or the general form or structure) of the South African criminal trial, in an adversarial framework, ought to be considered. The adversary system is discussed as such is a defining feature of criminal justice in South Africa, and it is a fundamental procedural bedrock of a fair trial. An analysis is also included, in this context, of the meaning, application and normative value of the presumption of innocence doctrine, as such is seen as lying at the heart of the accusatory system.[2]

In this chapter, the value or utility of adversarial process in criminal procedure is assessed. This chapter explores certain ideological foundations and underlying assumptions of adversarial process as it is applied in the common-law criminal trial. The purpose of this exercise is to demonstrate that the structural demands and mode of adversarial or accusatorial process can cumulatively serve as a procedural safeguard that protects the accused's right to a fair trial in the face of adverse or prejudicial pre-trial publicity. For in essence, the nature of a trial in such a system is to focus the mind of the court on the evidence put before it by the parties rather than on prior publicity detrimental to the accused.[3]

In discussing the general structure of criminal trial procedure in a South African context, the aim is to explore the following main characteristics thereof:

- The adversarial (accusatorial) nature of the trial, in comparison with the inquisitorial mode of trial;
- The presumption of innocence;

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[1] *Hickman v Taylor* 329 US 495 516 (1947) (per Jackson J concurring).

[2] AS Goldstein 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure' (1974) 26 *Stanford Law Review* 1009 1017. See also *S v Baloyi* 2000 1 SACR 81 (CC) para 15; *S v Manamela and Another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 23.

[3] See *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38G-H.

- The ideal posture of the trial judge, as the trier of fact, under the adversary system;
- The function of the public prosecutor in adversarial process;
- The requirement that reasons must be given for verdicts (here the basic difference between our legal system and the jury system will be considered);
- The appointment and function of assessors, with whom the judicial officer may preside over a case.

3.1 The South African criminal trial under the common-law adversary system: An introduction

The real world of criminal procedure is ordinarily 'a struggle from start to finish.'[4] At the heart of enforcing the criminal law (or administering criminal justice), lies a normative antinomy of competing values. In *Key v Attorney-General, Cape Provincial Division, and Anothe*r, the Constitutional Court, per Kriegler J, held that '[i]n any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.'[5] In *S v Nkabinde* the aspect was crisply articulated thus by Combrink J:[6]

> In every democratic society, of which [the South African] young democracy is one, there, of necessity, exists a certain tension between the need, on the one hand, to investigate and prosecute a criminal for criminal acts and, on the other, the need to protect every individual, including an accused person, against excessive zeal on the part of organs of the State in their prosecution of the task to bring an accused criminal to book.

Sachs J in *S v Coetzee and Others* stated the matter as follows: 'There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become.'[7] Clearly, there are limitations and restrictions placed on the conduct of law enforcement officials and prosecutors in the

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[4] HL Packer *The Limits of the Criminal Sanction* (1968) 149.
[5] 1996 2 SACR 113 (CC) para 13.
[6] 1998 8 BCLR 996 (N) 1001F.
[7] 1997 1 SACR 379 (CC) para 220; reaffirmed in *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 81 n 92.

pursuit of crime control. As one writer succinctly puts it: 'Criminal procedure and evidential rules are now recognised as essential components of a liberal democratic society. As such, they are charged with restraining the power of the state to interfere in the lives of individuals while continuing to facilitate the punishment of crime.'[8] It is almost otiose to repeat that in combatting crime, the constitutional rights of the individual must nevertheless be respected.[9] In the Privy Council case of *McIntosh v Lord Advocate and Another*, citing with approval the Constitutional Court decision of *S v Coetzee and Others*,[10] it was crisply held that '[t]he general interest of the community in suppressing crime, however important, will not justify a state in riding roughshod over the rights of a criminal defendant'.[11] It is well established that '[j]ustice must be attained in a fair and impartial manner, within a system that both searches for truth and values the protection of individual rights.'[12] A balance must be achieved in the duty of the State to deal effectively with crime with its duty to guarantee accused persons the constitutional protection involved in a fair trial.[13] Measures taken to facilitate the attainment of the objective of protecting society through criminal prosecutions, must 'be weighed against the rights that are guaranteed by the Constitution which puts a high premium on the values of freedom and equality.'[14] Where a court fails to strike a balance between these two poles, a fair trial does not take place.[15] In *S v Baloyi*, the Constitutional Court, per Sachs J, noted that our 'Constitution insists that no-one should be arbitrarily deprived of freedom or convicted without a fair trial.'[16]

It is moreover a fundamental, and indeed oft-cited, principle both in our common law and constitutionally, that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly

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[8] S Summers 'Presumption of Innocence' (2001) *The Juridical Review* 37 38.

[9] In AJ Ashworth 'Concepts of Criminal Justice' (1979) *The Criminal Law Review* 412 422, it is pertinently said:

> 'Recognition of rights may in some instances reduce the efficiency of crime control. But the whole point of rights is that respect for them is thought worthwhile on principle: they promote values which are believed to be worth preserving in a civilised society.' (Footnote omitted).

[10] 1997 1 SACR 379 (CC) para 220.

[11] (2003) 1 AC 1078 para 31.

[12] D Layton 'The Prosecutorial Charging Decision' (2002) 46 *Criminal Law Quarterly* 447 449.

[13] Compare, for example, *S v Baloyi* 2000 1 SACR 81 (CC) para 26.

[14] *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 13.

[15] See *S v Nkabinde* 1998 8 BCLR 996 (N) 1001F-G.

[16] 2000 1 SACR 81 (CC) para 26 (footnote omitted). See too SE van der Merwe 'Trial principles and the course of the criminal trial' in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 329 332; *S v Nkabinde* 1998 8 BCLR 996 (N) 1001H: 'At the end of the day, a verdict of guilty cannot be returned if the court concludes that the trial, for whatever reason, has not been a fair one.'

and undoubtedly be seen to be done.'[17] In *S v Dzukuda and Others; S v Tshilo*, the Constitutional Court, per Ackermann J, held that: 'At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done.'[18] That justice must be seen to be done means that justice must be 'observed to be done', in other words, judicial proceedings ought generally to be conducted in the open and not in 'secret'.[19] But it also means that justice must appear to be done, particularly relating to perceptions of procedural fairness and fair and just decision-making and the court giving the appearance of being impartial.[20] Justice must therefore 'evidently' or recognisably be done.[21] As one court observed with reference to this maxim: 'It is important in our system of administration of justice that accused persons should never be left with the impression that they have had anything but a fair trial. They should never be given cause for feeling that the presiding judicial officer adopted anything but a calm, impartial attitude towards all the issues which he is called upon to decide.'[22] In *S v Le Grange and Others*, the Supreme Court of Appeal appositely held that: 'Fairness and impartiality [of the judicial officer] must be both subjectively present and objectively demonstrated to the informed and reasonable observer.'[23] Likewise, the same Court affirmed in *S v Roberts*: 'What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be "manifest to all those who are concerned in the trial and its outcome, especially the accused".'[24] One commentator makes the observation that the conducting of a trial where the

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[17] *R v Sussex Justices; Ex parte McCarthy* (1924) 1 KB 256 259. See also, for example, *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 11; *S v Jaipal* 2005 1 SACR 215 (CC) para 31; *S v Basson* 2007 1 SACR 566 (CC) para 26; *S v Rall* 1982 1 SA 828 (A) 831H-832A; *S v Kroon* 1997 1 SACR 525 (SCA) 531*f*; *S v Dube and Others* 2009 2 SACR 99 (SCA) para 8; *S v Bruinders* 2012 1 SACR 25 (WCC) para 80.

[18] 2000 2 SACR 443 (CC) para 11. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 31, where it was affirmed: 'The principle that justice must not only be done but also be seen to be done is well known, and has been recognised by this Court as at the heart of a fair criminal trial.' In *S v Basson* 2007 1 SACR 566 (CC) para 26, it was similarly observed: 'The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial.'

[19] D Meyerson 'Why Should Justice Be Seen to Be Done?' (2015) 34 *Criminal Justice Ethics* 64 67.

[20] *Ibid* 68-70. See also Steytler *Constitutional Criminal Procedure* 266, with reference to *S v Malindi and Others* 1990 1 SA 962 (A) 969H; *S v Kroon* 1997 1 SACR 525 (SCA) 531*d-f*. See too *S v Basson* 2007 1 SACR 566 (CC) para 27; *S v Sallem* 1987 4 SA 772 (A) 795A; *S v Roberts* 1999 2 SACR 243 (SCA) paras 25-26; *S v Collier* 1995 2 SACR 648 (C) 650*c-d*; *S v Mseleku and Others* 2006 2 SACR 237 (N) para 17.

[21] Meyerson (2015) *Criminal Justice Ethics* 68.

[22] *R v Leher* 1955 3 SA 130 (SR) 133G-H. See also Hahlo & Kahn *The South African Legal System and its Background* 49.

[23] 2009 1 SACR 125 (SCA) para 21.

[24] 1999 2 SACR 243 (SCA) para 25.

State must prove its case against the accused beyond a reasonable doubt before an independent and unbiased tribunal, and in an open proceeding that grants the accused the right of participation, is the 'substance' of the maxim that just must be seen to be done.[25]

The competing concerns, or 'equally compelling claims', of society in the conviction and punishment of the guilty, on the one hand, and the protection of entrenched human rights accorded to accused persons, on the other,[26] also find expression in the well-settled constitutional principle that the concept of a fair trial embraces fairness not only to the accused but also to society as whole, which has a real interest in the outcome of a case.[27] The Constitutional Court pointed out in *S v Shaik and Others* that 'fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment', adding that:[28]

> A fair trial also requires fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.

In *National Director of Public Prosecutions v King*, Harms DP, for a Full-Bench of the Supreme Court of Appeal, observed that although the latter finding in *Shaik's* decision 'does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime', the purpose of the fair trial provision is, nevertheless, 'not to make it impracticable to conduct a prosecution.'[29]

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[25] HL Ho 'The Presumption of Innocence as a Human Right' in P Roberts & J Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (2012) 259 273. See also HL Ho 'Liberalism and the Criminal Trial' (2010) *Singapore Journal of Legal Studies* 87 91.

[26] See, for example, *S v Tandwa and Others* 2008 1 SACR 613 (SCA) para 117; *S v Shikunga and Another* 1997 2 SACR 470 (NmS) 484*d-e*; *S v Shuma and Another* 1994 2 SACR 486 (E) 489*h-i*, recognising that the term 'interests of justice' is a 'wide concept', encompassing 'the interests of the individual accused, as well as - or as against - the wider interests of society.'

[27] See *S v Sonday and Another* 1994 2 SACR 810 (C) 820*f*. See also Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 332, where, with reference to *Sonday's* case, it is noted that: 'Trial fairness is not confined to the position of the accused, but extends to society as a whole, precisely because society has a real interest in the outcome of a case'.

[28] 2008 1 SACR 1 (CC) para 43, citing *S v Jaipal* 2005 1 SACR 215 (CC) para 29, where it was similarly found: 'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

See also, for example, *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA) para 32, where it was held:

> 'It is not only an accused whose interests must be protected by the criminal-justice system. There must be fairness to the public, represented by the State, as well. There must be fairness to the victims of the crime and their families.'

[29] 2010 2 SACR 146 (SCA) para 5.

If the government fails to deal effectively with crime, that is if it fails to 'bring the necessary will and skill to bear upon the problems of the administration of justice', this 'could well result in the anarchy and chaos which flow from vigilante action.'[30] Ackermann J articulated the point thus, in *S v Makwanyane and Another*:[31]

> [I]n a constitutional State individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the State, in the constitutional State compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa. 'The need for a strong deterrent to violent crime' is underscored by [Chaskalson P] in his judgment as is the duty of the State, through the criminal justice system, to ensure that offenders will be apprehended and convicted, for these steps are conditions precedent to punishment.[32]

The Constitutional Court has underlined that 'the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective.'[33] Where, therefore, the State is precluded from prosecuting an accused for an offence, 'the constitutional obligation of the prosecuting authority and the State… is obstructed.'[34] The import of such a consequence may be particularly severe because 'the State is in effect prevented from prosecuting an offence aimed at [for instance] protecting the right to life and security of the person.'[35] In remarks germane to this aspect, the Constitutional Court affirmed in *S v Basson*:[36]

> In our constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime. The constitutional obligation upon the State to

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[30] *S v Schrich* 2004 1 SACR 360 (C) 368*d-e*. The Court in *Schrich* added: 'Secure and satisfied citizens do not need to resort to vigilantism.' (*Ibid* 368*e*). See too, for example, *S v Dikqacwi and Others* (SS49/2012) 2013 ZAWCHC 67 (15 April 2013) paras 4-6 *SAFLII* <http://www.saflii.org/za/cases/ZAWCHC/2013/67.pdf> (accessed 05-06-2014).

[31] 1995 2 SACR 1 (CC) para 168.

[32] Compare also *Chief Lesapo v North West Agricultural Bank and Another* 2000 1 SA 409 (CC) para 22, where Mokgoro J, for the Constitutional Court, appositely held:

> 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.' (Footnote omitted).

[33] *S v Basson* 2004 1 SACR 285 (CC) para 33.

[34] *Ibid* para 33.

[35] *Ibid* para 33.

[36] *Ibid* paras 31-32 (footnote omitted) (my emphasis).

> prosecute those offences which threaten or infringe the rights of citizens is of *central importance in our constitutional framework*.

Likewise, in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*, the same Court, per Langa DP (as he then was), found:[37]

> It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the Government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society…

Similarly, Moseneke J (as he then was) espoused the principle as follows, in *S v Thebus and Another*:[38]

> Effective prosecution of crime is a legitimate, 'pressing social need'. The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread violent crime is deeply destructive of the fabric of our society'. There is a real and pressing social concern about the high levels of crime.[39]

A further tension in the administration of criminal justice can, moreover, develop. It was seen in the previous chapter that criminal cases can and frequently do generate considerable, or widespread, public and related media interest. It was observed that adverse media coverage surrounding a pending criminal trial can give rise to a 'collision between the opposing forces underlying, on the one hand, the principle of open justice and the right of citizens to the free flow of information and, on the other hand, the right of an accused person to a fair trial', and may as a result lead to trial related prejudice.[40] As Gubbay CJ held in *Banana v Attorney-General*:[41]

> [I]t cannot be gainsaid that media reporting of a judicial process, or in advance of it, may, in exceptional circumstances, be so irresponsible and prejudicial as to make the unfairness

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[37] 2000 2 SACR 349 (CC) para 53.

[38] 2003 2 SACR 319 (CC) para 40 (footnotes omitted).

[39] See also *S v Zuma and Others* 1995 1 SACR 568 (CC) para 41; *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 13.

[40] Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-42B, with reference to *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) paras 5-7. See too *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) paras 5, 12-13. Compare also *Nebraska Press Association v Stuart* 427 US 539 551-554 (1976).

See also the discussion in *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In re S v Pistorius; Media 24 Ltd and Others v Director of Public Prosecutions, North Gauteng and Others* 2014 1 SACR 589 (GP); *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA), as to the similar position that may arise with the televising and broadcasting on the radio of judicial proceedings.

[41] 1999 1 BCLR 27 (ZS) 32D-E.

> irreparable and the administration of justice impossible. If that were to occur then there is, quite literally, nowhere to go. The court will have no option but to grant a stay of proceedings; for it is more important to retain the integrity of the system of justice than to ensure the punishment of even the vilest offender…

A meaningful balance must be struck between the competing rights of freedom of expression and open justice, on the one hand, and the accused's right to a fair trial, on the other, in order that each right may find 'proper expression and enjoyment without being unduly limited.'[42] Where these respective rights have the potential of being mutually limiting – in that the full enjoyment of the one necessarily curtails the full enjoyment of the other and vice versa – a court must necessarily reconcile them.[43] They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by the limitation of rights clause contained in section 36 of the Constitution.[44] 'Accordingly, freedom of expression and the fair administration of justice, which are both essential to the proper functioning of any true democracy, should as far as possible be harmonised with one another.'[45]

A distinguished professor of law at Stanford University, Herbert L Packer, stated that the criminal process is 'a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear (or to keep it from coming to bear) on persons who are suspected of having committed crimes.'[46] The author referred to it as 'the rules of law that govern the apprehension, screening, and trial of persons suspected of crime', adding that '[i]t consists at least

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[42] *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In re S v Pistorius; Media 24 Ltd and Others v Director of Public Prosecutions, North Gauteng and Others* 2014 1 SACR 589 (GP) para 19.

[43] See *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 9.

[44] *Ibid* para 9. See also Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 9-10.

[45] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 42: '[I]t is not a matter of determining which right is more deserving so that courts may declare a victor and jettison the loser.'

[46] Packer *The Limits of the Criminal Sanction* 149.

as importantly of patterns of official activity that correspond only in the roughest kind of way to the prescriptions of procedural rules.'[47]

Packer described the criminal process, in general, as a 'struggle', and commented thus on the aspect:[48]

> People who commit crimes appear to share the prevalent impression that punishment is an unpleasantness that is best avoided. They ordinarily take care to avoid being caught. If arrested, they ordinarily deny their guilt and otherwise try not to cooperate with the police. If brought to trial, they do whatever their resources permit to resist being convicted. And even after they have been convicted and sent to prison, their efforts to secure their freedom do not cease. It is a struggle from start to finish.

In the South African legal system too, any person associated with the administration of criminal justice would have to acknowledge that such a description of criminal procedure best describes the ordinary state of affairs in bringing offenders to book.[49]

SE van der Merwe notes that '[c]rime is a reality of life, especially in South Africa; and each country needs rules, principles, mechanisms and state structures to prevent, detect, cope with and control criminal behaviour.'[50] The writer adds that '[c]riminal procedural rules play a pivotal role in this regard.'[51] Van der Merwe affirms that 'the three main purposes served by criminal procedure are as follows':[52]

> First, criminal procedure must provide a process that vindicates substantive criminal law goals. This procedural mechanism must determine substantive guilt reliably, authoritatively, and in a manner that promotes the criminal law's sentencing objectives. Second, criminal procedure must provide a dispute resolution mechanism that allocates scarce resources efficiently and that distributes power among state officials. Finally, criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes. Criminal procedure can serve this function by articulating fair process norms that attempt to validate the state's exercise of coercive power over its citizens.[53]

Van der Merwe observes that all these - the State's duty to enforce criminal law, the allocation of power to State officials, the articulation of fair process norms - are

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[47] *Ibid* 149.
[48] *Ibid* 149.
[49] Compare, for instance, *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 5.
[50] SE van der Merwe 'A basic introduction to criminal procedure' in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 3 6. Van der Merwe was formerly Professor of Law, University of Stellenbosch.
[51] *Ibid* 6.
[52] *Ibid* 6-7.
[53] Quoting with approval, P Arenella 'Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies' (1983) 72 *The Georgetown Law Journal* 185 188.

subject to the supremacy of the South African Constitution.[54] The author goes on to state that constitutional provisions (and especially those contained in the Bill of Rights) form a dominant source of criminal procedure in South Africa.[55]

A trial, then, should be viewed as 'central to the institutional framework of criminal justice', in that '[i]t provides the procedural link between crime and punishment, and is the forum in which both guilt/innocence and sentence are determined.'[56] A criminal trial in a South African context has broadly been described as 'a state-sponsored public, judicial and primarily oral hearing in terms of which the alleged criminal liability of an accused must in the public interest be determined by an impartial adjudicator on the basis of constitutional, statutory and common-law rules and principles of fairness which promote reliable and acceptable outcomes in convicting and punishing the guilty, while protecting the innocent from incorrect conviction and wrongful punishment.'[57] The following description of a criminal trial was also recently given by the Supreme Court of Appeal, per Ponnan JA:[58]

> A court is a place where citizens can take their disputes in the knowledge that the rule of law will be applied. It is governed by rules of evidence and procedures designed to seek out the truth, not in a general way, but in the context of specific dispute resolution and administration of justice. These rules also endeavour to ensure the fairness of the trial process. Moreover, a criminal trial follows a well-established order, with the prosecutor in a criminal case trying to establish, through the presentation of evidence, the guilt of the accused beyond a reasonable doubt. With each witness, there is the opportunity for direct examination followed by cross-examination and re-examination. Objections are ruled on by the judge. The formality of the setting and the proceedings contributes to the dignity and decorum of the courtroom and serves as a constraint.

NC Steytler[59] crisply articulates the fundamental purpose of the criminal trial thus:[60]

> The fundamental aim of the criminal trial can be described in the broadest terms as the attainment of 'justice', encompassing the establishment of criminal liability and the

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[54] Van der Merwe 'A basic introduction to criminal procedure' in *Criminal Procedure Handbook* 7.

[55] *Ibid* 7.

[56] Preview or Preamble in A Duff, L Farmer, S Marshall & V Tadros (eds) *The Trial on Trial: Volume 1: Truth and Due Process* (2004).

In *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 4 SA 298 (SCA) para 24, the Supreme Court of Appeal, per Brand JA, held that '[w]hat is considered at the criminal trial is a determination on all of the evidence presented in the case of the guilt or lack thereof of the accused person'.

[57] Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 331.

[58] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 50 (footnotes omitted).

[59] At the time of writing, Steytler was Senior Lecturer in Law, School of Law, University of Natal, Durban.

[60] NC Steytler *The Undefended Accused on Trial* (1988) 1.

> determination, if necessary, of an appropriate penalty, in a manner which is fair to all parties involved.

In a separate work, Steytler summarises the main objectives of the criminal trial as follows:[61]

> (a) The court proceedings must perform a truth-finding function – the outcome of the trial must be that the guilty are convicted and the innocent acquitted.
> (b) The truth-finding process must be fair in respect of protecting both the rights of the accused and the interests of society.
> (c) The two preceding objectives must be accomplished in an efficient and effective manner.

One commentator notes that a criminal trial is not simply a method of determining guilt or a means of bringing criminals to justice, a process whereby the State must publicly account for its request to have a person convicted and punished for an offence by presenting sufficient evidence to justify its assertion that the person is guilty and deserving of an appropriate sentence. It is also a process of 'doing justice to accused persons' in the form of a fair trial or due process, as a necessary precondition to imposing punishment under criminal law on the guilty.[62] It is for this reason that a trial is indispensable in the administration of criminal justice, where individual liberty is at stake.[63]

Notions of legality and due process or a fair procedure 'are central to the very definition of a trial.'[64] The 'justice of a verdict is internally related to the justice of the procedures which produce it.'[65] Antony Duff[66] argues that '[t]he aim of a criminal trial is not merely to reach an accurate judgment *on* the defendant's past conduct: it is to communicate and justify that judgment – to demonstrate its justice – *to* him and to others. In this context at least, if justice is not both seen and shown to be done, it is not and cannot be done at all.'[67] Duff writes:[68]

> A verdict of 'Guilty' does not simply express a judgment on the defendant's past conduct: it communicates that judgment to him and to the community; and it expresses a condemnation

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[61] N Steytler 'Making South African criminal procedure more inquisitorial' (2001) 5 *Law, Democracy & Development* 1 1.
[62] Ho (2010) *Singapore Journal of Legal Studies* 99.
[63] *Ibid* 87-90.
[64] J McEwan 'Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial' in A Duff, L Farmer, S Marshall & V Tadros (eds) *The Trial on Trial: Volume 1: Truth and Due Process* (2004) 51 55. The writer observes in this regard that the criminal trial has a significance beyond the identification of offenders and the selection of measures to ensure they do not offend again. (*Ibid* 55).
[65] RA Duff *Trials and punishments* (1986) 119.
[66] Tenured Professor of the Law School Faculty, University of Minnesota, and Professor Emeritus in the Department of Philosophy, University of Stirling.
[67] Duff *Trials and punishments* 115 (author's emphasis).
[68] *Ibid* 118.

> of his conduct which he should accept as being justified by the trial which preceded it. What makes that verdict just is not simply the fact that he did commit the offence charged, but that the charge has been proved against, and to, him by a rational process of argument in which he was invited to participate. Like moral blame, a criminal conviction must justify to the accused the condemnation which it expresses.

A trial is aimed at arriving at a just or an accurate verdict or outcome; it involves due process or a fair procedure that is concerned with maximising correct outcomes and minimising erroneous or wrong outcomes.[69] But it 'also involves the justice of the procedure itself.'[70] The justice of a conviction cannot be separated from the procedures through which it is obtained.[71] A criminal who is convicted of an offence of which he or she is indeed guilty, but after a trial whose proceedings were unjust and improper (ie where the accused was, for example, denied a fair hearing), is unjustly convicted.[72] Due process or a fair trial 'is supposed to express our feeling that convictions ought not to be obtained in ways that offend our sense of justice'; fidelity to a fair trial 'shows our deep commitment to the values of fair play and fair treatment',[73] and gives recognition to the rights of the accused. The ends do not justify morally undesirable means or unjust procedural practices. The moral costs of torture, coerced confessions, and in many instances illegally obtained evidence, and the like, far outweigh any possible benefit of obtaining convictions.[74] As the Supreme Court of Appeal appositely pointed out in *S v Tandwa and Others*: 'But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order.'[75] Fair trial infractions, such as a court which is not impartial or does not appear to be impartial or where an accused is not allowed sufficient time and facilities to prepare a defence or where cross-examination by an accused is unduly curtailed or where an accused

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[69] D Resnick 'Due Process and Procedural Justice' in JR Pennock & JW Chapman (eds) *Due Process* (1977) 206 217.
[70] *Ibid* 217.
[71] See Duff *Trials and punishments* 115.
[72] *Ibid* 115.
[73] Resnick 'Due Process and Procedural Justice' in *Due Process* 217-218.
[74] *Ibid* 218.
[75] 2008 1 SACR 613 (SCA) para 121.

is not afforded adequate opportunity to present his or her case, would also offend our sense of justice and undermine the reliability of the outcome of the trial,[76] and indeed duly constitute failures of justice that vitiate trial proceedings. After all, the constitutional right to a fair trial requires criminal trials to be conducted in accordance with 'notions of basic fairness and justice'.[77] The right to a fair trial embraces a concept of 'substantive fairness'.[78] An object of a trial must be a fair hearing since the right to a fair trial focuses on the importance of procedural fairness, such being a long cherished value in democratic societies.[79] The right to a fair trial 'recognises that before the state can impose a criminal sanction on a person, that person must have been afforded a fair trial.'[80] The State may not deprive its citizens of liberty in a manner which is procedurally unfair.[81] The rule of law also requires the conducting of orderly trials and trials which are procedurally fair, where rules of evidence and procedure are applied, and where the integrity of the judicial process is preserved.[82] The rule of law in this context demands 'justice according to law'.[83]

The trial process 'must of necessity be regulated by detailed and perhaps very technical rules', which in turn 'must always be interpreted and applied in the context of at least seven ['interrelated'] fundamental principles' governing a criminal trial, namely 'trial fairness', 'legality', 'judicial impartiality', 'equality of arms', 'judicial control', 'orality', and 'finality'.[84] SE van der Merwe points out that these principles are also interwoven with or closely linked to the adversarial (accusatorial) nature of the South African trial system.[85] Indeed, Nico Steytler writes that '[f]air trial proceedings should be adversarial, guaranteeing the autonomy [or legal laissez-faire] of each party to the dispute and their full participation in the proceedings.'[86]

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[76] Resnick 'Due Process and Procedural Justice' in *Due Process* 219-221.
[77] See, for example, *S v Zuma and Others* 1995 1 SACR 568 (CC) para 16.
[78] *Ibid* para 16.
[79] *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 186.
[80] *Ibid* para 186.
[81] *Ibid* para 159. See also *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC) para 145, where it was held:

> '[N]o one [may] be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution.'

[82] See J Rawls *A Theory of Justice* (1971) 238-239.
[83] B Beinart 'The Rule of Law' (1962) *Acta Juridica* 99 104.
[84] Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 331-332.
[85] *Ibid* 331.
[86] Steytler *Constitutional Criminal Procedure* 215. See also GC Hazard Jr *Ethics in the Practice of Law* (1978) 121, 129.

Steytler continues in this regard: 'Although there is no specific provision in the Bill of Rights, one of the most fundamental rights to a fair trial is an accused's right to be heard before any decision affecting his or her rights or interests is taken by the court.'[87] On this score, the author cites[88] for instance *S v Zuma and Others*, where it was pertinently held:[89]

> It is fundamental… that, for a trial to be fair, a presiding officer must not come to any final conclusions adverse to the accused until all of the evidence has been led. To do otherwise would be to breach the *audi alteram partem* rule and the rule that justice must be seen to be done. In short it would be to prejudge the matter…

Adversary proceedings are classified by Steytler as one of the '[u]nlisted principles of a fair trial'; one, in other words, which is not expressly articulated in section 35(3) of the Constitution.[90] The author views adversarial process as a 'key' principle forming 'the *bedrock* of a fair trial'.[91] In the Constitutional Court decision of *S v Manamela and Another (Director-General of Justice intervening)*, it was held that adversarial process, which was developed under the common law, has been subsumed into the Bill of Rights.[92] It is also said that many adherents of the common-law tradition believe that the adversarial trial 'is the embodiment of procedural justice.'[93]

Joachim Herrmann[94] observes that '[i]n most countries the administration of criminal justice follows one of two models: the adversary or accusatorial model, or the inquisitorial model', and that '[w]hile the former is the model of the Anglo-American countries, *ie* the Common Law world, the latter can be found on the European continent, *ie* in the Civil Law countries.'[95] CR Snyman[96] has noted that South African criminal procedure is to 'a large extent based on, or derived from, the English model of criminal procedure, which is mainly accusatorial in character';

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87 Steytler *Constitutional Criminal Procedure* 215.
88 *Ibid* 215 n 95.
89 1996 2 SACR 339 (N) 340*i*.
90 Steytler *Constitutional Criminal Procedure* 215.
91 *Ibid* 215 (my emphasis).
92 2000 1 SACR 414 (CC) para 23. See also *Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others* 1994 2 SACR 734 (E) 758*e-f*, where it was similarly recognised, albeit more obliquely, that adversarial process is firmly embedded in South Africa's system of criminal justice and is now enshrined in the Constitution.
93 McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 51.
94 At the time of writing, Herrmann was Professor of Law, University of Augsburg.
95 J Herrmann 'Various Models of Criminal Proceedings' (1978) 2 *South African Journal of Criminal Law and Criminology* 3 3 (author's italics).
96 Snyman is Research Fellow and former Professor of Criminal and Procedural Law, University of South Africa.

indeed, South Africa is described by the author as forming part of the 'Anglo-American accusatorial system'.[97]

Likewise, SE van der Merwe indicates that '[t]here are basically two systems of evidence: the Anglo-American (or so-called strict or common-law) system and the Continental (or so-called free or civil-law system)', and that the 'South African law of evidence belongs to the Anglo-American "family".'[98] The author remarks further that '[m]ost of the principles of the Anglo-American law of evidence stem from the English system of adversarial (accusatorial) trials'.[99] It has similarly been pointed out elsewhere that in our legal system, 'the way the trial is conducted, the methods of proof, the treatment of precedents, as well as the courts structure and the activities and position of judges and lawyers are all clearly based on English models'.[100]

3.2 The nature of adversarial / accusatorial process

According to a leading expounder, and recognised as one of the most incisive and influential voices in the comparative study, of adversarial and inquisitorial models of trial process, Mirjan Damaška,[101] '[t]he term *adversary system* sometimes characterizes an entire legal process, and sometimes it refers only to criminal procedure', and that '[i]n the latter instance it is often used interchangeably with "accusatorial procedure," and is juxtaposed to the "inquisitorial," or "non-adversary," process.'[102] Damaška indicates, however, that there is 'no precise understanding' of the institutions and arrangements denoted by the expressions, adversary and non-adversary or inquisitorial process, because of the 'many divergences' or variations between and within such procedures.[103] Nonetheless, since it is trite that the 'South African criminal trial system is essentially accusatorial (adversarial) in nature',[104] core

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[97] CR Snyman 'The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems' (1975) 8 *The Comparative and International Law Journal of Southern Africa* 100 101.

[98] SE van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 3 8 (para 1 4).

[99] *Ibid* 8 (para 1 4).

[100] K Zweigert & H Kötz *Introduction to Comparative Law* 3 rev ed (1998) 235.

[101] Sterling Professor Emeritus of Law and Professorial Lecturer in Law, Yale Law School.

[102] M Damaška 'Adversary System' in J Dressler (ed in chief) *Encyclopedia of Crime & Justice: Volume 1* 2 ed (2002) 25 25 (author's italics).

[103] *Ibid* 25-30; M Damaška 'Models of Criminal Procedure' (2001) 51 *Zbornik* 477 483-484, 503.

[104] Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 335. See also, for example, *S v Bruinders* 2012 1 SACR 25 (WCC) para 60.

characteristics that are commonly associated with adversary process need to be highlighted. For such process, as this thesis will later seek to argue, may conceivably serve as a built-in procedural safeguard that insulates the fairness of the trial from hostile pre-trial publicity. Despite the fact that South Africa does not have a jury system, this thesis shall refer extensively to literature and case-law that deal with the Anglo-American adversarial system, given that, as mentioned above, South African trial procedure in both civil and criminal cases is essentially based on, or derived from, such a model of the administration of justice.[105] As Mirjan Damaška observes, in defining adversarial process:[106]

> [T]he adversary system is clearly indifferent to the variations in court structure and the temporal organization of proceedings. A struggle between litigants can be decided either by professional or by lay judges, and litigants can confront each other either in a single round of the day-in-court trial or in several serial rounds of a trial-by-stages. As a result, the effects of the Anglo-American adversary system on fact-finding arrangements may be analyzed independently of both procedural concentration and the bifurcation of the trial court.[107]

It should at the outset be briefly explained what in essence is generally meant by an adversary system in contrast with an inquisitorial system, before specific aspects of the former are expanded on. It is submitted that the distinction between these concepts is an important one, as will later become evident.

The adversary mode of trial has been crisply defined by Mirjan Damaška as follows:[108]

> By *adversary* I mean a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive. In the fact-finding domain, this implies that the litigants and their counsel decide what facts shall be subject to proof. It further implies that litigants and their counsel are entrusted with seeking evidentiary material, preparing it for use at trial, and presenting it in court.

Damaška, elsewhere, outlines adversarial criminal procedure thus:[109]

> [S]everal characteristics are commonly associated… with the adversary criminal process. These include a relatively passive tribunal…; the presentation of evidence by the parties

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[105] In C Roodt 'A Historical Perspective on the Accusatory and Inquisitorial Systems' (2004) 10 *Fundamina* 137 138, it is also noted that traditional English adversarial procedure is 'marked by several striking features that played an important role in shaping South African criminal procedure.'

[106] MR Damaška *Evidence Law Adrift* (1997) 74-75.

[107] By bifurcation of the trial court is meant a court comprised of a jury (or so-called 'lay adjudicators' or 'amateur judges') determining issues of fact and a professional judge deciding the admissibility of evidence – see, for example, Damaška *Evidence Law Adrift* 26-27, 46-48. See also Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 30, where it is said that the adversary type trial organised around the notion of a contest 'can plainly take place with or without a jury.'

[108] Damaška *Evidence Law Adrift* 74 (footnote omitted) (author's italics).

[109] Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 25.

through their lawyers, who proceed by direct questioning and cross-examination of witnesses; the representation of state interests by one of the parties, the prosecutor; a presumption that the defendant is innocent until proved guilty; and the principle that he cannot be forced to testify against himself.

SE van der Merwe captures the contours of the adversarial trial system as follows:[110]

> The accusatorial (adversarial) trial procedure - which finds its symbolic roots in the early ritual of trial by battle - has three leading features: the parties are in principle responsible for the presentation of evidence in support of their respective cases; the adjudicator is required to play a passive role; and much emphasis is placed upon oral presentation of evidence and cross-examination of witnesses. The adversarial model proceeds from the premises that greater approximation of the truth is possible if litigants are allowed to present their own evidence in a process which guarantees not only cross-examination of an opponent who testifies but also all witnesses called by such opponent. This explains the emphasis upon "orality". And cross-examination - which has been referred to as "the greatest legal engine ever invented for the discovery of truth" - is a vital procedural right in a system which makes it technically possible for a party to present only evidence which is favourable to his case. The right of parties to cross-examine explains why the adversarial trial model can to some extent afford and maintain the relative inactivity of the adjudicator.

PJ Schwikkard[111] provides the following pertinent summary of the essential characteristics of adversarial process:[112]

> The adversarial model is party centred, it is the parties that are responsible for the gathering and presentation of evidence. The parties are placed in opposition to one another; consequently, the process is frequently described as a contest or a duel and unfortunately tends to attract descriptions incorporating sporting metaphors. The presiding officer's passive role is equated with that of an umpire ensuring compliance with the rules of a game and declaring a winner at the end of time. Presiding officers have very limited powers regarding the questioning and calling of witnesses and *the consequent lack of intervention is seen as important in ensuring their impartiality*. The limited powers that judges have are further curtailed in practice by *the court's absence of knowledge of the case. The absence of knowledge is seen as a guarantor of neutrality*… There is a strong preference for oral evidence, due to a belief that the veracity of the evidence is best established through cross-examination.

The trial that follows the accusatory model is indeed party-dominated. The parties, the State (represented by the prosecutor) and the accused, are responsible for the

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[110] Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 11-12 (para 1 5 2) (footnote omitted).

[111] Schwikkard is Professor in the Department of Public Law, University of Cape Town.

[112] PJ Schwikkard *Possibilities of convergence: An outside perspective on the convergence of criminal procedures in Europe* (2008) 12 (my emphasis). Schwikkard observes that although South African criminal procedure is described as adversarial, it has a number of features that are more usually associated with inquisitorial systems. (*Ibid* 7). This aspect is dealt with in the next chapter.

collection of their own evidence and the presentation thereof in their respective cases (ie the State's case and the defence case) before the trial court. The trial court is comprised of either a judicial officer (a judge or magistrate) or a jury. In South Africa, a criminal trial is presided over by a judge or magistrate sitting alone or with assessors.[113] It is the judge or magistrate, or judge or magistrate along with the assessors, who decide on the factual question of the guilt or innocence of the accused. The court structure in South Africa is unitary and not bifurcated; the judicial officer decides on both questions of fact and law or the admissibility of evidence. As stated above, a jury is not used in South Africa's legal system. The accused has the right to be presumed innocent, and this entails that the State has a duty to begin in adducing evidence to prove the charge against the accused and the State bears the onus of proving the guilt of the accused beyond a reasonable doubt. All the accused need do is to raise a reasonable doubt to escape conviction. The police must investigate the charge laid against the accused and must then proceed to present the case docket (or dossier) containing witness statements and other real or documentary evidence to the prosecutor, who in turn must decide on the basis of the contents of the docket whether to institute a prosecution against the accused and on what charge(s) and which forum the trial is to be conducted in. The judicial officer has no say in this process. The case docket is not presented to the presiding judicial officer before the trial commences; the case docket is, as it were, the prosecutor's brief. In South Africa, the accused is generally entitled to disclosure of the case docket to enable him or her to prepare for trial and for purposes of cross-examining State witnesses where discrepancies arise between the witnesses' oral evidence in court and their police statements. The prosecutor and the accused determine the issues at trial to be decided on. The prosecutor and the accused are entitled to limit the issues of the contest by pleadings, plea-bargaining, and admissions. They decide the order in which the evidence will be presented to the court and it is they who question the witnesses and cross-examine the opponent's witnesses to test the veracity of evidence. Since the accused is a party in the case, neither the prosecutor nor the judicial officer has a right to put questions to him or her as long as he or she decides not to testify. The trial court is required to render its decision primarily on the basis of the evidence and submissions presented by the parties.

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[113] This aspect is discussed in the next chapter. Assessors, particularly comprised of lay persons, are seen as a so-called 'mini jury'.

Trial proceedings are generally conducted in public, or in open court, and witnesses are to give their evidence orally (*viva voce*). The evidence on which the court's decision is required to be based must be given on oath or upon a solemn affirmation in lieu of an oath or upon a serious admonition to speak the truth.

In seeking to ascertain the 'truth',[114] a 'dialectic' process of dispute and challenge is followed in the contest between the prosecutor and the accused, with

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[114] In M Damaška 'Truth in Adjudication' (1998) 49 *Hastings Law Journal* 289 290-301, the writer deals with the question of whether truth or objective knowledge can be discovered in adjudication in light of the post-modern view of reality, which posits a disjunction of language from external references (ie where words do not correspond to external reality) and which recognises no reality other than what one subjectively chooses to make of it, where, in other words, everything is relative and there is no objective reality. (*Ibid* 290). Damaška argues that it seems obvious that adjudication cannot draw on this notion of post-modernism. (*Ibid* 290). The writer explains:

> 'When we engage in social practices such as adjudication, we presuppose a world beside our statements. And as factfinders, we embrace a vision of the world in which there is reality beyond language. It is these common-sensical attitudes that make attempts to establish empirical events meaningful: if there are no constraints on discourse aiming at something beyond itself, the practice of fact-finding becomes pointless. In short, while "postmodern" thought may be usefully unsettling for some intellectual pursuits, it is of little use in evidence law. Profound skepticism cannot account for existing fact-finding arrangements, and it does not provide workable ideas for their transformation.' (*Ibid* 290).

Damaška points out that according to conventional understanding, 'fact-finding involves establishing a congruence between our statements about the world and the world itself. In other words, the conventional understanding accords with some version of the correspondence theory of truth', according to which truth consists of a relationship between words and the world or what is actually the case. (*Ibid* 291). Adjudication involves an inquiry as to whether testimony or a version of events matches with reality. The trier of fact is 'expected to accept a story as true when it is amply supported by items of evidence relating to the facts of the case. And what these small foot soldiers of verity are expected to achieve is to establish that a match exists between factual propositions woven into the fabric of a story and the way the world really is.' (*Ibid* 291-292). Damaška opines that these common-sense assumptions on which factual inquiries in adjudication are predicated should be retained and that pursuit of the truth or an aspiration to objective knowledge is not misconceived or impractical in adjudication, because otherwise it is unclear how justice could be properly administered. (*Ibid* 297, 301). Needless to say, knowledge of socially constructed phenomena, such as the speed of a vehicle, can be accurately determined. (*Ibid* 297).

Damaška similarly observes in a separate paper, M Damaška 'Rational and Irrational Proof Revisited' (1997) 5 *Cardozo Journal of International and Comparative Law* 25 37, that even though 'post-modern' philosophers brand the ascribing to words the capacity to represent reality or what is really the case, even if socially constructed, as 'a vulgar illusion', and that accordingly so should our attempts be viewed in reconstructing reality in the courtroom, 'fact-finding makes no sense unless a variant of the view is embraced that assumes some sort of a "match" between our statements about the world and the world itself.' Damaška adds that '[f]ailing this assumption, a trap door opens from under all Western evidentiary systems.' (*Ibid* 37). Damaška goes on to note that this radical break between common sense adjudicative practices and dominant epistemological theories of truth need not last very long, and proceeds to claim that '[p]resently fashionable theories could soon prove to be oversubtle fads, or even a form of intellectual pathology, without impact on such eminently practical activity as is fact-finding.' (*Ibid* 38).

Likewise, in Damaška *Evidence Law Adrift* 95, the author crisply argues that: '[U]nless some variant of the view that truth is a matter of correspondence to facts is accepted, our present evidentiary arrangements are deprived of meaning. Where "the covenant between word and world" is broken, it makes no sense to worry about accuracy in fact-finding or about judgments that fail to reflect the truth.'

In C Menkel-Meadow 'The trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 *William and Mary Law Review* 5 23, it is acknowledged that whatever problems may

each party endeavouring to prove its case in an independent way.[115] Two conflicting versions or hypotheses (or one-sided accounts) are presented to the trier of fact, that of the State and that of the accused. Like a car driving at night, 'two narrow beams' illuminate the world of the adjudicator.[116] The trier of fact gets a 'stereoscopic' view of the alleged offence.[117] Each party tries to decimate or undermine the case of the other party by pointing out its weaknesses. Both the prosecutor and the accused constantly demonstrate to the court that different answers can be given to the charge. What results is a binary or polarised, kaleidoscopic fragmentation of the facts.[118] It is as if a 'checker' of light and dark patches are held over reality; all that gets down in the record is that seen through the light patches.[119] The parties can manipulate the truth and contribute to witness bias, making it difficult to determine the truth.[120] Except for the duty resting on prosecutors to disclose exculpatory facts and to assist the court in arriving at the truth, the 'parties cannot be expected to present evidence that goes against their interests', and thus 'trials become a forum where partisan versions of the facts are portrayed as the truth. To come to a reasonable assessment, the adjudicator (who has no independent knowledge about the available evidence) must therefore allow the parties to contradict and undermine each other's evidence.'[121] In addition to such factors, stringent rules of procedure and evidence (for example, exclusionary rules of evidence) which govern the fact-finding process also act as so-called 'filters' of what is termed the 'judicial' or 'legal' truth, such that one can speak of 'an illusion of truth' that is thereby created.[122]

The prosecution and the accused (or defence) do not have the same rights or duties. As mentioned above, the prosecutor must prove the case against the accused beyond a reasonable double. The accused, on the other hand, need merely raise reasonable doubt either in the State's case itself or in giving evidence to

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inhere in ascertaining the truth or knowing what really happened in a post-modern context, 'the legal system must find facts and make decisions if it is to maintain any semblance of order.'

115 See Herrmann (1978) *SACC* 6.

116 Damaška *Evidence Law Adrift* 92.

117 Herrmann (1978) *SACC* 6.

118 See Frank *Courts on Trial* 86.

119 *Ibid* 86.

120 See, for example, Roodt (2004) *Fundamina* 155.

121 S De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in C Stahn & G Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) 405 410.

122 C Roodt 'Fact finding, fairness and judicial participation in criminal proceedings' (2003) 44 *Codicillus* 68 69. See also P Devlin *The Judge* (1979) 62: 'The rules of evidence constitute another impediment to a full presentation of the facts.'

obtain an acquittal. There is no onus on an accused to prove his or her innocence. The accused has a right to remain silent and not to testify in the proceedings. Moreover, the prosecutor may not prosecute in single-minded pursuit of a conviction; the prosecutor rather has to present all the relevant facts to the court and to see that justice is done. Where the accused is defended, the prosecutor must disclose exculpatory evidence to the defence. Where the accused is unrepresented, the prosecutor is duty-bound to present facts favourable to the accused to the trial court. The accused, however, may act purely in a partisan way, that is, he or she may adopt an adversarial attitude to the prosecution and he or she is under no obligation to give assistance to the prosecution. The accused may fight for an acquittal with all legitimate means.

In South Africa, the presiding officer's role at the adversary trial is mainly passive. He or she has to listen to the evidence and arguments presented to him or her by the parties, and give a verdict according to such evidence and submissions. The judicial officer, nonetheless, is not compelled to be totally inactive. He or she may rule on the admissibility of evidence and on the propriety of the conduct of the parties. The presiding officer may also intervene to promote expedition of the trial. Moreover, according to South African criminal procedure, judicial officers are entitled to put supplementary questions to witnesses and the accused and to call witnesses that were not called by either of the parties, witnesses, that is, whose evidence is essential to the just decision of the case (in which case the presiding officer is obliged to call the witness) or whose evidence is desirable for the purpose of assisting the court to arrive at a right decision. However, judicial officers may not call witnesses from the outset, but may only do so in order to bring evidence before the court which has been omitted by mistake or is necessary to cure a technical deficiency. The judicial officer is not permitted to call witnesses to prove the State's case or, in other words, to make a case for the prosecution where none existed before. The trial court is required to be impartial. Judicial impartiality applies not only to the decision itself but also to the process by which the decision is made.

The common-law trier of fact 'must be a complete *tabula rasa* at the start of the trial.'[123] This means that in the accusatorial trial, the trier of fact must start hearing the case 'totally unprepared' and 'ignorant about the evidence' he or she will

[123] De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 410.

be asked to evaluate.[124] In the accusatorial system, the adjudicator should hear about the existence of every piece of evidence for the first time at trial.[125] This ensures that the trier of fact has no preconceived ideas about the case before he or she hears the first evidence.[126] It is submitted that it also ensures that the trier of fact does not enter the trial with bias and prevents a prejudgment of the guilt of the accused before the trial commences. As a consequence of such ignorance and lack of preparation the judicial officer's control over the hearings must necessarily be reactive rather than active. This presupposes that the parties can take charge of the proceedings; it would not be workable to have a passive adjudicator as well as passive parties.[127]

It is clear from the afore-going, that '[a] hallmark of the adversarial trial is that it is the parties who determine which issues will be tried and what evidence the court will hear.'[128] A leading feature, then, of the adversary system is that 'a court's decision rests primarily on the evidence and argument advanced by the parties'.[129] In the main, the arbiter in such a system bases his or her decision on the evidence produced by the parties. The evidence which he or she accepts has been called the 'procedural' or 'formal' truth - as opposed to 'material' truth - 'in the sense that it is based solely upon the evidence which the parties have decided to put before the court.'[130] CR Snyman notes that in accusatorial process, the arbiter 'merely relies on what he has been told by the parties' in order to give his verdict.[131] Mirjan Damaška points out that in the adversarial trial, the court's judgment is 'a decision between the contestants.'[132] Indeed, it can be said that the basis or essence of the adversary system is, as Lon L Fuller observed, that each party 'is accorded *a participation in the decision that is reached*, a participation that takes the form of presenting proofs

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[124] *Ibid* 410.
[125] *Ibid* 410 n 28.
[126] *Ibid* 410 n 27.
[127] *Ibid* 410. See generally, for example, M Damaška 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506 563-564; Herrmann (1978) *SACC* 5; Steytler *The Undefended Accused on Trial* 4-5, on the essential features of the accusatorial trial.
[128] McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 56.
[129] Steytler *Constitutional Criminal Procedure* 302.
[130] Steytler *The Undefended Accused on Trial* 5; Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 12 (para 1 5 2).
[131] Snyman (1975) *CILSA* 108. Snyman adds that since the parties can 'manipulate' the truth to favour their own cases, the final verdict of the judicial officer cannot be described as reflecting the material truth, but at most it can be described as 'formal truth'.
[132] Damaška (1973) *University of Pennsylvania Law Review* 582.

and arguments.'[133] In a separate work, Fuller made the observation that the term 'adjudication' may be defined 'as a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor', adding that:[134]

> [A]djudication is a process of decision in which the affected party - "the litigant" - is afforded an institutionally guaranteed participation, which consists of the opportunity to present proofs and arguments for a decision in his favor. Whatever protects and enhances the effectiveness of that participation, advances the integrity of adjudication itself. Whatever impairs that participation detracts from its integrity.

Thus, a fair trial or due process under the adversary system 'requires that persons to be affected by a decision should have some formally guaranteed opportunity to *influence* that decision.'[135] This for instance is given effect by the *audi alteram partem* rule (in accordance wherewith everyone whose rights are affected by a decision has the right to be heard) or the constitutional right to adduce and challenge evidence. While the right to participate in decision-making is also an essential ingredient of inquisitorial systems, the fundamental difference in the adversary system is that the court's decision rests mainly on the evidence and argument presented by the participating parties.[136] Party participation or influence in the decision that is reached is therefore far greater in adversarial proceedings than in the inquisitorial trial.[137] Indeed, the adversary system 'is predicated on the assumption that parties will protect their own interests through their vigorous participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision.'[138] The

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[133] LL Fuller 'The Adversary System' in HJ Berman (ed) *Talks on American Law* (1961) 30 41 (my emphasis). Fuller was Professor of Law at Harvard University.

[134] LL Fuller 'Collective Bargaining and the Arbitrator' (1963) *Wisconsin Law Review* 3 19.

[135] Steytler *The Undefended Accused on Trial* 6 (my emphasis).

[136] *Ibid* 6.

[137] See also, for example, Herrmann (1978) *SACC* 5-6; RS Summers 'Comment: "On the adversary system and justice"' in R Bronaugh (ed) *Philosophical Law: Authority, Equality, Adjudication, Privacy* (1978) 122 125; HH Jescheck 'Principles of German Criminal Procedure in comparison with American Law' (1970) 56 *Virginia Law Review* 239 248-250; G van Kessel 'Adversary Excesses in the American Criminal Trial' (1992) 67 *Notre Dame Law Review* 403 516-517; McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 56, noting that advocates of the adversarial trial 'praise its emphasis on party participation and control'; WT Pizzi & M Montagna 'The Battle to establish an Adversarial Trial System in Italy' (2004) 25 *Michigan Journal of International Law* 429 435, pointing out that in the inquisitorial system the parties 'play a supplemental role in the conduct of the trial' whereas the trial judge is in control of the trial; S Landsman *Readings on Adversarial Justice: The American Approach to Adjudication* (1988) 38, observing that party control of the proceedings in the inquisitorial system is minimised and although the parties in such system initiate the proceedings and participate in the inquiry, 'they are never allowed to control the fact-gathering process.'

[138] Steytler *Constitutional Criminal Procedure* 302.

arbiter in such a system must therefore give opportunity to both parties 'to present their cases as best as they know how, and in the best possible way.'[139]

Whatever label one wishes to attach to the concept of 'truth' determined or discovered in the dialectical process of the adversarial trial, it is submitted that an important distinctive feature of the adversary system is that the trier of fact in his or her quest for the truth 'is *restricted* to the material presented by the parties'.[140] Contrast this with the position of the trial judge in inquisitorial systems who can find out what he or she wants to know.[141] Not only is the judge in an inquisitorial trial in full control of the presentation of evidence, 'but he or she is also much freer in the scope of his or her action.'[142] More than formal rules of evidence, 'subjective conviction' on the part of the judge in the non-adversary trial 'determines the credibility and relative weight of information.'[143] Thus, in the adversary system 'the arbiter is confined', while the inquisitorial judge is not.[144] Mirjan Damaška observes that although fact-finders in the adversary system are responsible for the ultimate decision, 'they are dependent on evidence and witnesses selected by the parties. *They have little - if anything - to say about the choice and arrangement of the information on which their decision will turn*. *Rather than forging their own path to understanding, they must rely on others for what they hear and see*. This required passivity is all the more remarkable since ideally fact finders come to court as tabulae rasae - that is, without any prior knowledge of the facts of the case.'[145] Damaška explains why it is not difficult to see that this dependence on information supplied by the parties at trial is related to the adversary system: '[F]or if the triers of fact obtained their information independently of the competitive and rule-bound courtroom inquiry, it would be difficult for them to decide which side established a better evidentiary case and thus deserved to win. *They would be inclined, instead, to side with the party whose version of events better accounts for the information they acquired by their own efforts in tapping the sources of information or by some other fact-finding efforts of their own*.'[146]

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[139] *S v Ismail* 2006 1 SACR 593 (C) para 30.
[140] Devlin *The Judge* 61 (my emphasis).
[141] *Ibid* 61.
[142] Roodt (2003) *Codicillus* 69.
[143] *Ibid* 69.
[144] Devlin *The Judge* 61.
[145] Damaška *Evidence Law Adrift* 89 (my emphasis).
[146] *Ibid* 89 (my emphasis).

Lon L Fuller emphasises that 'the bond of participation by the litigant is most secure' when the arbiter rests his or her decision wholly on the evidence and argument actually presented to him or her by the parties. Fuller notes, however, that in practice it is not always possible to realise this ideal. Even where all the considerations on which the decision rests were touched on by the parties in argument, the emphasis in the court's judgment may be very different. Nevertheless, while the ideal of a 'perfect congruence' between the arbiter's view of the issues and that of the parties is unattainable, this is no excuse for a failure to work toward the achievement of the closest approximation of it. For if this congruence is absent, that is, if the grounds for the decision fall completely outside the framework of the evidence and argument, making all that was discussed or proved at the hearing irrelevant, then the adjudicative process becomes a sham, as the parties' participation in the decision loses all meaning.[147]

There must fundamentally be a link between the arbiter's decision and the evidence and arguments presented by the parties. For fair adjudication, the parties must have a voice in the adjudicative process, *a fortiori* where each party would know more about his or her own case than anyone else and having a stake in the outcome, could be expected to bring forth any favourable information that 'impartial investigators' might overlook.[148] Giving the parties a voice 'helps to ensure that the court has full information on which to base its decision.'[149] Indeed, giving reasons for a decision helps each party to establish whether the decision is based on relevant substantive and procedural rules, and that each party's evidence and submissions were considered by the arbiter.[150] Party control over the development and presentation of the case under the adversary model 'clearly satisfies the requirement that the parties have a voice in the litigation.'[151] Whilst the presiding judge under the

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[147] LL Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 388.

[148] See EE Sward 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 *Indiana Law Journal* 301 310.

[149] *Ibid* 310.

[150] *Ibid* 310.

[151] *Ibid* 312. Sward indicates, all the same, that parties in inquisitorial systems also 'have a substantial voice in the proceedings, even though they do not control the investigation and presentation of evidence.' (*Ibid* 314). However, Sward's article focuses on civil procedure (*ibid* 301 n 2). In JH Langbein 'The German Advantage in Civil Procedure' (1985) 52 *The University of Chicago Law Review* 823 824, it is similarly remarked in comparing German and American *civil* procedure, that both are adversary systems and that apart from fact-gathering, lawyers for the parties in the German system play a major and broadly comparable role as their American counterparts. However, it is pointed out that in respect of criminal procedure, adversarial components are 'thoroughly subordinated' in the Continental, inquisitorial tradition which obtains in Germany. (*Ibid* 824 n 4).

inquisitorial system would of course permit the parties to make out their respective cases and may rely on the parties to do so, it is nonetheless for the judge to say what it is that he or she wants to know.[152]

What is the implication of these principles pertaining to party participation in the decision-making process under the adversary system, in the context of adverse pre-trial publicity? It goes without saying that the parties in such a system would *focus* the arbiter's mind on the evidence and submissions they present to court, 'rather than on prior publicity detrimental to the accused.'[153] It is submitted that this may prevent the court's decision from being tainted or influenced by pre-trial publicity, perhaps more so than in a non-adversarial system where the trial judge, in the words of Damaška, forges his or her own path to understanding or where the trial judge, as Lord Devlin put it, is free to find out what he or she wants to know.[154] This is perhaps all the more likely when it is considered that in the typical inquisitorial or civil law trial, where control over the process is shifted from the parties to the court, the court 'enjoys greater discretion in the evaluation of the evidence' and 'is free to weigh up the relative value of conflicting evidence, acting independently of the proposals and motions of the parties'.[155] Added to this, '[t]he inquisitorial character of the procedure generally implies that judges are generally not bound by any formal rule in the evaluation of the facts *but are to decide on the basis of their "internal conviction"* (*intime conviction*).'[156]

As alluded to above, a central feature of adversarial process is that the arbiter is required to be impartial, which must always be actual and seen,[157] or as one judge noted writing extra-curially, 'both felt and exhibited.'[158] As was argued in *S v Rudman and Another; S v Mthwana*: 'The essential characteristic of the adversary system is that the presiding judicial officer appears as an impartial arbiter between the parties.'[159] The Constitutional Court has affirmed that in accusatorial process an impartial judicial officer is to preside over and keep the scales even in the contest

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[152] See Devlin *The Judge* 54.
[153] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38G-H.
[154] Devlin *The Judge* 61.
[155] F Parisi 'Rent-Seeking through Litigation: Adversarial and Inquisitorial Systems compared' (2002) 22 *International Review of Law & Economics* 193 196.
[156] *Ibid* 196 (my emphasis). In this regard, see also, for example, GEP Brouwer 'Inquisitorial and Adversary Procedures – a Comparative Analysis' (1981) 55 *The Australian Law Journal* 207 209, 218.
[157] See, for example, *S v Sallem* 1987 4 SA 772 (A) 795A.
[158] ME Frankel 'The Adversary Judge' (1976) 54 *Texas Law Review* 465 468.
[159] 1992 1 SA 343 (A) 348F.

between the prosecution and the accused.[160] The Appellate Division similarly expressed itself thus on the aspect: 'A judicial officer should ever bear in mind that he is holding a balance between the parties, and that fairness to both sides should be his guiding star, and that his impartiality must be seen to exist.'[161] Judicial impartiality is critical in the adversarial trial: a contest between two parties (or as it were, 'two partialities') implies concomitant impartial adjudication.[162] It may be said, as Mirjan Damaška opines, that when account is taken of the fact that the outcome of a case is uncertain and correct results or the determination of the truth can be elusive, what the parties in an adversarial proceeding expect most of all is for the arbiter to approach the case with a neutral, objective, or impartial attitude.[163] Boštjan M Zupančič[164] argues that in adversarial adjudication 'truth finding is secondary to the ideals of impartiality and conflict resolution', and procedural fairness.[165] The essential demand of the conflict-solving process under the adversary system is that the parties to the dispute must be treated equally by the adjudicator.[166] After all, the impartiality of the adjudicator 'presupposes two "partialities"'.[167] Justice must not only be done but be seen to be done. The arbiter in an adversarial trial should not be conceived of as being in any sense allied with, or prejudiced to, a party.[168] The arbiter should not be seen to be siding with a party to the dispute.[169] Damaška explains that:[170]

> Since proof-taking divides into two contrary cases managed by counsel for the parties, the court's sharing of evidentiary burdens with either party is difficult to organize or even to conceive. For if the judge were to take a substantial role in evidence-gathering, his activity instantly would translate as help offered to one side in a conflict – that is, as prejudice, bias, and an abdication of judicial neutrality. Nor can it be otherwise in a fact-finding scheme in which two litigants compete to make their respective evidentiary "cases," and the court then

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160 See *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 55.
161 *S v Sigwahla* 1967 4 SA 566 (A) 568G.
162 BM Zupančič 'Truth and Impartiality in Criminal Process' (1982) 7 *Journal of Contemporary Law* 39 42-43, 50-51, 79, 82, 115; BM Zupančič 'Adjudication and the Rule of Law - "Power of Logic" v. "Logic of Power" - "Rule of Law" v. "Law and Order"' (2003) 5 *European Journal of Law Reform* 23 99.
163 MR Damaška *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986) 135-136.
164 At the time of writing, Zupančič was a judge of the European Court of Human Rights in Strasbourg.
165 Zupančič (2003) *European Journal of Law Reform* 99-100.
166 Damaška *The Faces of Justice and State Authority* 124.
167 *Ibid* 124.
168 See T Eckhoff 'Impartiality, Separation of Powers, and Judicial Independence' (1965) 9 *Scandinavian Studies in Law* 11 40.
169 Compare, for example, *S v Wood* 1964 3 SA 103 (O) 105G.
170 Damaška *Evidence Law Adrift* 82.

> decides who was more successful in meeting the standard set in this endeavor ("who has made a better case").

The triad arrangement of the adversarial trial, ie the two contesting parties and the trial court, makes clear that the presiding judicial officer is not a party to the suit and that he or she should act in a way that does not unduly favour, or show bias against, a party.[171] Impartiality presupposes a principally passive adjudicator in adversarial process.[172] Decision-maker passivity is seen by proponents of adversarial process as the best device for counteracting bias and promoting neutrality.[173] A trial judge who actively injects him- or herself in the proceedings or the examination of evidence places his or her neutrality at risk: he or she 'appears to be putting on the case for one of the parties.'[174] As was famously held in *Yuill v Yuill*: 'A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.'[175] A trial judge who associates him- or herself too closely with the conduct of the case, denies him- or herself the full advantage enjoyed by a trial judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his or her position of relative detachment, the way the balance tilts.[176]

Impartiality on the part of the arbiter in the adversary system is the quality of keeping an open mind until judgment, that is, until all relevant information has been presented by both parties in the case.[177] A further essential element of impartiality in the adversarial framework is that '[t]he controversy must be decided *entirely* on the basis of the information presented by the parties because the adjudicator must

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171 See Eckhoff (1965) *Scandinavian Studies in Law* 40.

172 See Zupančič (1982) *Journal of Contemporary Law* 42. See also Zupančič (2003) *European Journal of Law Reform* 97: 'The basic requirement of impartiality is passivity of adjudication.' This helps to prevent the formation of an early hypothesis in the case on the part of the arbiter. Whoever is charged with finding out the truth through his or her own investigation is contaminated with the hypothesis he or she must create in order to be able to investigate at all. For this reason, the arbiter ought to remain the essentially 'passive receptor' of two opposing hypotheses. (*Ibid* 97-98).

173 Damaška *Evidence Law Adrift* 95.

174 *Ibid* 89.

175 (1945) 1 All ER 183 (CA) 189A-B; cited with approval in *S v Rall* 1982 1 SA 828 (A) 832C-D; *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 28.

176 See *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 28.

177 Zupančič (1982) *Journal of Contemporary Law* 79.

remain *passive* and cannot engage in independent truth finding'.[178] Impartiality of the arbiter 'helps to ensure that the decision is based on the merits of the controversy and not on any bias - negative or positive - on the part of the judge.'[179] Impartiality may thus be defined as:[180]

> … such an attitude of the adjudicator that guarantees that the conflict is going to be decided on intrinsic rather than on extrinsic considerations. This means that the case will be decided on the basis of the information presented by the parties - information that is legally relevant - and not on extrinsic considerations such as, for example, race, religion, political orientation, national origin or any other such extrinsic aspect of the case. Impartiality is, consequently, a question of specific psychological attitudes towards the problem confronting the adjudicator. This attitude could be seen on two levels. The first, namely, the willingness to decide the case on strictly intrinsic considerations can be seen as an absence of overt bias; the second is the ability of the decision-maker to take into consideration *all* the information presented by the parties. In the latter case, the requirement obviously is that the adjudicator *remains undecided* for as long as possible because to remain undecided is to remain receptive to all the information. In other words, since the decision can be defined as a refusal to consider any information contrary to the direction of the decision, the ability to continue to receive information is essentially the ability to remain undecided.

Impartiality, then, entails *inter alia* the ability to see the case from two different sides.[181]

Impartiality is also displayed when it is left to the parties to investigate the facts, present evidence and clarify the issues at trial, and where both parties are given the same or equal opportunity to argue and to introduce evidence in support of their contentions.[182] Impartiality is moreover displayed when the decision-maker bases his or her decision on predetermined normative premises, ie established rules, principles or precedents, which contribute to the drawing of lines between relevant and irrelevant factors, personal or subjective and otherwise.[183]

Mirjan Damaška remarks that the adversary presentation of evidence by battling lawyers 'has been so successfully popularized around the world by novels, films, and television that its association with English-speaking justice is by now part of global popular culture.'[184] According to the author, '[i]t is generally recognized - at

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[178] *Ibid* 85 (author's emphasis).
[179] Sward (1989) *Indiana Law Journal* 308.
[180] Zupančič (2003) *European Journal of Law Reform* 95 n 162 (author's emphasis).
[181] *Ibid* 98.
[182] See Eckhoff (1965) *Scandinavian Studies in Law* 13-14, 40-41.
[183] *Ibid* 17-18.
[184] Damaška *Evidence Law Adrift* 1.

least in legal circles - that this process of proof-taking, pregnant with potential for drama and coup de théâtre, has no exact parallel in legal proceedings outside the orbit of the common law.'[185] Damaška notes that when the question of fact-finding in the adversary system is discussed, the trial role of the litigants' counsel immediately claims attention and tends to take centre stage.[186] Such is hardly surprising, Damaška observes, given that '[t]his role is the most visible and most dramatic connecting link between the Anglo-American fact-finding method and the party-driven process: it is the stuff movies and television dramas are made of.'[187] The dramatic and highly publicised Oscar Pistorius trial,[188] where counsel for the State and the accused indeed took centre stage and where the trial court was essentially a passive receptor, so to speak, of two opposing evidentiary cases or versions of the events in question, can be regarded as an archetypal accusatorial trial, where the trier of fact is not a jury.

Nico Steytler remarks that the adversary system is best illustrated by comparing it with the inquisitorial mode of procedure.[189] The author notes that the main difference between the two systems is the role which the judicial officer plays in the proceedings.[190] In contradistinction to adversarial process, which is party-driven or party-centred or based, the inquisitorial system is judge-centred.[191] This is by virtue of the fact that the judicial officer in the latter system plays the 'central'[192] and 'most active role' by conducting the trial proceedings to their conclusion.[193] It is the judicial officer in the inquisitorial system who decides which witnesses to call and the order in which evidence is to be taken, and who conducts the examination of the witnesses personally in an attempt to establish the truth.[194] To that end, the accused, in a criminal case, may also be questioned by the judicial officer.[195] In criminal proceedings, the prosecutor and the defence may, after examination of a

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185 *Ibid* 1.
186 *Ibid* 75.
187 *Ibid* 75.
188 *S v Pistorius* 2014 JDR 2127 (GP); *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA).
189 Steytler *The Undefended Accused on Trial* 4.
190 Steytler (2001) *Law, Democracy & Development* 2.
191 *Ibid* 2.
192 De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 410.
193 Steytler *The Undefended Accused on Trial* 4.
194 *Ibid* 5.
195 *Ibid* 5.

witness by the judicial officer, suggest further questions and may themselves ask supplementary questions.[196] The prosecutor and the defence may also suggest the taking of further evidence.[197] Joachim Herrmann points out that since in the inquisitorial trial almost all questioning of the witnesses is done by the judicial officer, the distinction between examination-in-chief and cross-examination of witnesses is unknown.[198] Herrmann observes further that questions to test the reliability of a witness and the accuracy of his or her statements are put by the judicial officer in the course of his or her comprehensive interrogation.[199] Herrmann also indicates that the judicial inquiry into the facts in criminal proceedings includes the questioning of the accused; the accused is interrogated by the judicial officer because he or she is considered a valuable source of information.[200] Indeed, other commentators observe that the inquisitorial trial begins with the interrogation by the presiding judge of the accused in relation to his or her background and the charge(s) and evidence with reference to the case dossier which resides with the judge during the trial (the accused, who is not put on oath, may at this stage of the proceedings give a narrative account of his or her version), whereafter the prosecutor, without cross-examining, and defence counsel may ask additional questions either directly to the accused or through the presiding judge.[201] Contrast this with the common-law accusatorial trial, where the accused cannot take the stand, even if he or she wishes to do so, before the prosecution has established a *prima facie* case.[202] In the inquisitorial trial there is no requirement that the prosecution must establish a credible case before the defence introduces its evidence, because strictly speaking there is no 'prosecutor's case' or 'witnesses for the prosecution'.[203] The civil-law non-adversary trial is in the nature of an official inquiry presided over by the judge, in

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196 *Ibid* 5.
197 *Ibid* 5.
198 Herrmann (1978) *SACC* 5. See also Schwikkard *Possibilities of convergence* 13.
199 Herrmann (1978) *SACC* 5.
200 *Ibid* 5.
201 See, for example, Goldstein (1974) *Stanford Law Review* 1018; Jescheck (1970) *Virginia Law Review* 247; Damaška (1973) *University of Pennsylvania Law Review* 528-529; RB Schlesinger 'Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience' (1976) 26 *Buffalo Law Review* 361 367, 379; Van Kessel (1992) *Notre Dame Law Review* 423; Brouwer (1981) *The Australian Law Journal* 217, noting that in the French inquisitorial system, the trial begins with the questioning of the accused by the presiding judge. The accused has the right to remain silent, but almost always agrees to speak – see Damaška (1973) *University of Pennsylvania Law Review* 527; Van Kessel (1992) *Notre Dame Law Review* 423.
202 See Damaška (1973) *University of Pennsylvania Law Review* 528.
203 *Ibid* 525, 528. See also Parisi (2002) *International Review of Law & Economics* 196.

terms whereof the judge is in control of or responsible for the fact-finding process, where he or she decides which witnesses to call and adduces the evidence which becomes the court's evidence.[204] The bulk of the questioning comes typically from the bench and it is the presiding judge who begins the examination of witnesses.[205] The presiding judge interrogates the accused and the witnesses and 'bears the responsibility for the completeness and correctness of the proof.'[206] In light of this procedure which characterises the inquisitorial trial, there is no obstacle to the presiding judge beginning the proof-taking process by the interrogation of the accused, and this is in fact the rule in inquisitorial systems.[207] The accused is used as an evidentiary source before any other evidence is examined at trial.[208] Herrmann states that the prosecution and the defence play comparatively minor roles in the inquisitorial trial: it is only after the judge has finished questioning a witness or the accused that they may suggest to the judge the putting of additional questions or may ask supplementary questions themselves. They may also merely suggest that the judge take or adduce further evidence.[209] Nonetheless, after all the evidence has been heard, the prosecutor and the defence do have the right to address the court.[210] Herrmann makes the observation that the inquisitorial procedure 'is to be considered a quasi-scientific search for the truth rather than a dispute. Like a historian, the judge collects and analyses facts. He tries to draw an objective and comprehensive picture of the alleged offence by integrating the arguments and evidence of the prosecution and of the defence. The essence of the inquisitorial trial may be called a seeking of the truth by integration.'[211] In the latter respect, Mirjan Damaška similarly notes that in the inquisitorial procedural tradition:[212]

> … the division of proof-taking into two evidentiary versions of the case [present in adversarial process] is unknown: proof-taking is always structured as a single integrated inquiry presided over by the bench. According to prevailing practice, the Continental judge first invites

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[204] See Damaška (1973) *University of Pennsylvania Law Review* 525.
[205] *Ibid* 525.
[206] Jescheck (1970) *Virginia Law Review* 248, adding that in the German system a common request by the prosecutor and the defence to examine a witness or the accused 'is never made because cross-examination has not yet become popular' in such system (*ibid* 248-249).
[207] See Damaška (1973) *University of Pennsylvania Law Review* 528-529.
[208] *Ibid* 529.
[209] Herrmann (1978) *SACC* 5-6.
[210] *Ibid* 6.
[211] *Ibid* 6.
[212] Damaška *Evidence Law Adrift* 93 (footnote omitted).

> witnesses to present a narrative account, and only then begins to question them; parties are permitted to ask questions only after the extensive bench examination has been completed. Even those few jurisdictions that have lately converted to a version of party-conducted examination combine this alien technique with deference to uninterrupted narrative accounts. Independent from two partisan searchlights, then, this mode of inquiry casts a more diffuse light on the facts of the case, a light that comes closer to the one illuminating extrajudicial factual inquiries.

Thus, it may be said that unlike in the adversarial trial, where a 'fission of proof-taking' into two opposing or partisan evidentiary cases takes place, which in itself is 'a major cause of deviation from normal modes of transmitting information', a more 'ordinary fact-finding practice' is followed in the inquisitorial system.[213] The adversarial trial may, in the circumstances, be regarded as a party-driven 'bilateral' procedure, whilst the inquisitorial trial may be called a judge-controlled 'unilateral' process.[214] According to PJ Schwikkard, perhaps the most striking distinction between the adversarial and inquisitorial procedural models 'is the absence of the theoretical contest in inquisitorial systems. Instead inquisitorial proceedings are conceived of as an official inquiry directed at establishing the truth.'[215]

CR Snyman describes the inquisitorial or 'continental' approach to criminal procedure as follows:[216]

> In sharp contrast to [the accusatorial system], the continental judge plays a much more active role during (and sometimes before) the trial. It is he who, at the actual trial, introduces and elicits the evidence by first questioning the witnesses or the accused. Only after he had examined them, does he, upon demand, permit the prosecutor and the defence to put questions to the witnesses. He is in no way bound merely to consider the facts and evidence adduced by the parties, but must (in accordance with the original meaning of the term *inquisitio* - a searching after) himself see to it that the information and considerations necessary to decide the issue are investigated and borne out at the trial.

Snyman observes that because of his or her wide powers, the inquisitorial judge searches for the 'material' truth, whereas the judge in the accusatorial system is

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[213] *Ibid* 91-94. In Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 13 (para 1 5 2), it is similarly remarked that:

> 'It may be said - at the risk of over-simplification - that the inquisitorial procedure is a natural system of fact-finding in the sense that it dispenses with technical rules and is applied in our everyday activities. For example, a father inquiring into a dispute between his children acts inquisitorially in the sense that he will not merely rely upon information which the "parties" are prepared to submit; nor, for that matter, will he follow or adopt evidential rules which tell him in advance that he may not even receive certain "evidence".'

[214] Zupančič (2003) *European Journal of Law Reform* 87.

[215] Schwikkard *Possibilities of convergence* 13. See also Damaška (1973) *University of Pennsylvania Law Review* 564.

[216] Snyman (1975) *CILSA* 103.

merely bound to search for the 'formal' truth, because he or she merely relies upon the information placed before him or her by the parties.[217] Nico Steytler says in the latter regard that '[t]he adversary system is predicated upon adjudication on the formal truth, that is, on evidence that the parties choose to produce in court. A system predicated on material truth places an onus upon the judicial officer, before coming to a decision, to establish the truth by his own endeavours; he is thus not reliant on the evidence presented by the litigants. In the adversary system, however, there is no overriding duty on a judicial officer to establish the material truth and it is sufficient for him to rely on the formal truth. His participation in the production of evidence is therefore limited to the clarification of the formal truth.'[218] The inquisitorial model 'proceeds from the premises that a trial is not a contest between two opposing parties but essentially an inquiry to establish the material truth.'[219] However, the assumption or belief that a truly unbiased and non-partisan search for the truth can be achieved or that objective, substantive or 'material' truth can necessarily be ascertained in inquisitorial systems has been questioned.[220]

Mirjan Damaška provides the following instructive outline of the constitutive elements of the inquisitorial or non-adversary mode of trial:[221]

> Under this variant, there are no separate witnesses for the prosecution and the defense. All witnesses are evidentiary sources of the bench, and it is the judge, not the parties, who has the primary duty to obtain information from them. The parties are not supposed to try to affect, let alone to prepare, the witnesses' testimony at trial. "Coaching" witnesses comes dangerously close to various criminal offenses of interfering with the administration of justice.
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> At trial, the witness is first asked by the judge to present a narrative account of what he knows about the facts of the case. His story will be interrupted by questions from the bench only to help the witness express himself, to clarify a point, or to steer the witness back from the labyrinth of utter irrelevancy. Only when this very informal communication comes to

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[217] *Ibid* 103. The parties in the adversary system can 'manipulate' the truth with one-sided accounts to win a case, so that a coherent picture of the facts or 'material' truth does not emerge. (*Ibid* 108).

[218] Steytler *The Undefended Accused on Trial* 172-173 (footnote omitted). See also Steytler (2001) *Law, Democracy & Development* 3, where it is observed that in the inquisitorial system 'the court establishes the "material" truth in contradistinction to the "formal" or "party-centered" truth produced in the adversarial system (that which the parties have presented in a partisan manner).'

[219] Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 12 (para 1 5 2). See also Steytler (2001) *Law, Democracy & Development* 3.

[220] See E Grande 'Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth' in J Jackson, M Langer & P Tillers (eds) *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (2008) 145 147; T Weigend 'Is the Criminal Process about Truth?: A German Perspective' (2003) 26 *Harvard Journal of Law & Public Policy* 157 157-161.

[221] M Damaška 'Presentation of Evidence and Factfinding Precision' (1975) 123 *University of Pennsylvania Law Review* 1083 1088-1090 (footnotes omitted).

> an end does the judge proceed to the interrogation. But even this interrogation process may sometimes strike an Anglo-American observer as more of an informal conversation than a rigorous succession of questions and short answers. Some of the questions go to the credibility of the witness and serve, to a moderate extent, as a functional equivalent of cross-examination. When the interrogation from the bench has been completed, the two parties are permitted to address questions to the witness, in an attempt to bring out omitted aspects favorable to them, or to add emphasis to certain points on which testimony has already been obtained. In brief, the bulk of information is obtained through judicial interrogation, and only a few informational crumbs are left to the parties.
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> But how can the judge effectively interrogate? It stands to reason that there can be no meaningful interrogation unless the examiner has at least some conception of the case and at least some knowledge about the role of the witness in it. Thus, under the nonadversary mode of developing evidence, the judge is typically given a file (dossier) containing summaries of what potential witnesses know about the case *sub judice*.
>
> It is easy to see what lies at the core of the described manner of presenting evidence. The decisionmaker is active; he uses the informational sources himself. Information does not reach him in the form of two one-sided accounts; he strives to reconstruct the "whole story" directly.
>
> After the proof-taking phase of the trial is over, the predominantly unilateral style of proceeding comes to an end. Then summations of facts and legal argumentation must be presented. Each side makes his own one-sided assessment of the evidence heard and advances his legal arguments. Exchange is permitted, but the defense must have the last word. Before the bench retires, the defendant is given the chance to make a final statement, which usually contains a potpourri of what can be classified as testimonial statements and exhortations to render certain decisions.[222]

Where the judge has charge of the fact-finding activities which 'reduces adversary tensions', the threat of one-sided distortions of information from the parties 'appears less immediate', and thus the need to subject means of proof to testing through cross-examination 'becomes less compelling'.[223] Under the inquisitorial model, it is of no import which side of a lawsuit is favoured by an item of evidence; what counts is only whether the item in question helps to further the factual inquiry.[224] It is said that '[t]he absence of a right to cross-examine also explains why the inquisitorial

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[222] For additional reading on inquisitorial process, see, for example, W Zeidler 'Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure' (1981) 55 *The Australian Law Journal* 390; Brouwer (1981) *The Australian Law Journal* 207; Van Kessel (1992) *Notre Dame Law Review* 421-425; Schlesinger (1976) *Buffalo Law Review* 364-369; Jescheck (1970) *Virginia Law Review* 239; Roodt (2004) *Fundamina* 139-141.

[223] Damaška *Evidence Law Adrift* 80. See also E Grande 'Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe' (2016) 64 *The American Journal of Comparative Law* 583 613.

[224] See Damaška *Evidence Law Adrift* 83.

procedure puts the written word - as a means of receiving evidence - to greater use than the adversarial system.'[225] Moreover, whereas rules on the burden of proof are essential for a bilateral contest in the adversary system in order to determine who, as it were, has won the contest, such rules are less appropriate for unilateral fact-finding in inquisitorial systems where judges are themselves required to piece together the evidence and construct a unitary view of the facts.[226] In the latter instance, the judge's job is 'less aptly described' as considering whether the plaintiff's or prosecutor's version of the events matches up to the required standard of proof.[227]

Mirjan Damaška points out that in defining proof sufficiency standards in relation to inquisitorial systems, 'most Continental legislation places a comparatively striking emphasis on the *subjective conviction* of the factfinder.'[228] The arbiter in the inquisitorial system must him- or herself form a 'subjective belief' or *intime conviction* (an inner, subjective or personal conviction) or *freie richterliche Überzeugung* (free judicial persuasion, conviction or belief) about the facts in question.[229] Indeed, Damaška remarks that it is more likely that a fact-finder will reach a state of 'personal conviction' where he or she him- or herself shapes the factual inquiry rather than merely evaluating 'a database' developed by warring adversaries.[230] The principle of

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[225] Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 12 (para 1 5 2). See also, for example, Schwikkard *Possibilities of convergence* 13. In Steytler (2001) *Law, Democracy & Development* 2, it is mentioned that in the inquisitorial system, evidence in a case dossier (or case docket), containing witnesses' statements and other evidential materials and which is filed with the presiding judge, 'is often given a higher value than the oral statement a witness may later make in court'. In N Jörg, S Field & C Brants 'Are Inquisitorial and Adversarial Systems Converging?' in P Fennell, C Harding, N Jörg & B Swart (eds) *Criminal Justice in Europe: A Comparative Study* (1995) 41 50, it is pointed out that because of the crucial importance of the dossier in inquisitorial jurisdictions, 'the public hearing [in such systems] is often much more a verification of its contents, the results of the pre-trial investigation, than the culmination of a contest. Hearsay evidence, being not regarded as fundamentally unreliable, is generally accepted. The same applies to expert written testimony. Why summon witnesses or experts if their statements or findings are laid down in clear and unambiguous reports?'

[226] See J Jackson & S Doran *Judge without jury: Diplock Trials in the Adversary System* (1995) 69.

[227] *Ibid* 69. For similar observations in this regard, see Damaška *Evidence Law Adrift* 82-84.

[228] M Damaška 'Atomistic and Holistic Evaluation of Evidence: A Comparative View' in DS Clark (ed) *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990) 91 97 (my emphasis).

[229] See Jackson & Doran *Judge without jury* 69; CE Foster 'Burden of Proof in International Courts and Tribunals' (2010) 29 *Australian Year Book of International Law* 27 33-34, stating that the civil-law judge is to decide whether he or she is personally persuaded by the evidence. See also C Engel 'Preponderance of the Evidence versus *Intime Conviction*: A Behavioral Perspective on a Conflict between American and Continental European Law' (2009) 33 *Vermont Law Review* 435 435, noting that the standard of proof in Continental law in both civil and criminal cases is *intime conviction*. The writer further observes that in civil-law countries, 'proof is understood as a strictly subjective impression in the judge's mind', whilst in American law proof is an 'objective concept.' (*Ibid* 436).

[230] Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 101.

intime conviction concerns a free evaluation of proof and does not entail the adoption of any specific standard of proof, let alone the standard of proof beyond a reasonable doubt, being the required standard of proof in the common-law criminal trial.[231] *Intime conviction* excludes the application of rules of legal proof (ie rules determining in general and binding terms the probative force of specific items of evidence), instead 'vesting the court with the power to determine the weight of proofs on the basis of a discretionary evaluation.'[232] *Intime conviction* excludes the application of legal standards of proof but does not prescribe by itself any positive standard of proof.[233] The traditional formula of *intime conviction* 'stresses the value of the subjective "intimate" persuasion of the single judge, relying mainly upon her individual and even emotional beliefs. It does not mean by itself, however, that such beliefs must be based upon a particularly high standard of proof: what is required is that the judge be "intimately" and individually persuaded of something. Roughly speaking, *it does not matter whether the judge has specially strong rational and evidentiary bases (in terms of probability) to believe what she believes*. Her deep individual conviction has to be well-rooted in her feelings, in order to produce a "moral certainty" or a *preuve morale* about the facts of the case. This does not mean reliance upon any clear standard of proof: it means to rely just upon the personal conscience of the judge. This conception of the evaluation of proofs may well be stated in terms of "truth", "moral certainty" or alike, but these are idealized and wishful-thinking ways to define the final outcome of the decision on the facts, rather than clear definitions of the standards that are or should be applied by courts.'[234]

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[231] M Taruffo 'Rethinking the Standards of Proof' (2003) 51 *The American Journal of Comparative Law* 659 666.

[232] *Ibid* 666. '[E]valuation of proofs [in this system] is left to the free discretion of the judge' (*ibid* 669).

[233] *Ibid* 666.

[234] *Ibid* 667 (footnote omitted) (my emphasis). Contrast this with the common-law system which downplays subjective conviction or inner persuasion as a decisional criterion, applying instead objective standards of proof and normative rules relating to the weighing and assessment of evidence in the decision-making process – see Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 92-94. However, in VP Hans & CM Germain 'The French Jury at a Crossroads' (2011) 86 *Chicago-Kent Law Review* 737 755, it is observed that 'the decision based on *intime conviction* is not best viewed as the expression of a feeling, but rather as a considered opinion based on the charges, evidence, and defenses presented by the parties.' For a similar observation, see JD Jackson & SJ Summers *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (2012) 69-70. Yet, the 'subjective' or 'inner persuasion' standard still obtains in decision-making in inquisitorial systems – see Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 92, 97. In Damaška *Evidence Law Adrift* 21, 40, it is pointed out that the free system of proof that prevails in civil-law countries entails that the fact-finder is free from binding legal rules concerning the analysis of evidence, and 'personal conviction' still applies 'among evidentiary standards for the court's decision.'

In respect of the German system, it is said that the free 'conviction' on which the trial judge must base his or her decision on the facts 'is connected with a feeling that the chosen solution is obvious' ('Evidenzgefühl'), and such conviction presupposes 'a volition' by the judge.[235] One commentator opines that 'it does not seem wholly safe to state that the judge must base his decision on the points of fact upon his conviction.'[236] The writer explains:[237]

> Suppose that a judge follows this course of reasoning: "It is true that the evidence produced in the action is not of sufficient strength, but nevertheless I am perfectly convinced of the accused's guilt, and consequently I vote for condemnation." What, really, is the content of this judge's conviction? Obviously, it is not that the evidence has the required strength. But in that case he ought to have thought: "Personally, I am convinced of the accused's guilt, but since the evidence is not sufficient he must be acquitted."

It is submitted that a further problem that may arise with a decision which is based on a subjective belief or conviction in the civil-law free proof system, is that such a decision may be more susceptible to intuitive decision-making or cognitive biases, such as confirmation bias, hindsight bias or an inability to ignore inadmissible evidence, and heuristics (cognitive shortcuts or rules of thumb), than in the common-law system where objective standards of proof and strict rules of evaluating evidence govern the fact-finder's decision-making.[238] It is not inconceivable that unconscious influences or implicit biases could play a greater role in a decision based on the arbiter's subjective impression of proof than a decision premised on external yardsticks applicable to the assessment of evidence.[239] It is further submitted that the problem may be aggravated by the fact that in inquisitorial systems, the arbiter is, as Mirjan Damaška puts it, 'relatively free to fashion factual hypotheses as he likes, and is not limited to using only those informational sources that are suggested [or

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[235] See PO Ekelöf 'Free Evaluation of Evidence' (1964) 8 *Scandinavian Studies in Law* 47 66 n 9.

[236] *Ibid* 66.

[237] *Ibid* 66.

[238] See Jackson & Summers *The Internationalisation of Criminal Evidence* 72-73, where it is indicated, in the context of Continental European evidential traditions, that empirical research suggests that knowledge of evidence which is to be excluded means that the judge 'will inevitably take this into account in the decision-making process.'

Writing from a South African perspective, Willem H Gravett, in Gravett (2017) *SALJ* 53, provides an analysis of the various ways in which heuristics and cognitive biases of various sorts can affect or substitute for more rational or deliberative judicial decision-making. See also, for example, Peer & Gamliel (2013) *Court Review* 114, for a crisp review of accumulating evidence on the matter, particularly in relation to judges (the cognitive fallacies or illusions and biases that might affect their judicial decisions).

[239] For a discussion on the impact of implicit biases on judicial decision-making, see, for instance, JF Irwin & DL Real 'Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity' (2010) 42 *McGeorge Law Review* 1.

filtered] by the parties', as in the adversarial trial;[240] where the presiding judge, in other words, is free to find out what he or she wants to know.[241]

A striking feature of inquisitorial process is, moreover, that the trial judge has full access to the case docket or dossier, which is compiled by an investigating judge or by a prosecutor who has the power to interview witnesses.[242] The dossier 'is an open document and lays the foundation for the trial.'[243] On the basis of the dossier, the judge determines which witnesses to call and conducts their questioning.[244] The dossier in inquisitorial systems is regarded as a single common case file 'that contains a pre-prepared version of the truth.'[245] There may be potential dangers in exposing the trial judge to a case docket before trial. The case docket is comprised of affidavits or depositions by witnesses and other documentary or real evidence. The docket may contain evidence that may be deemed inadmissible at trial, such as a confession or hearsay or illegally or unconstitutionally obtained evidence or a record of an accused's previous convictions. Such inadmissible evidence may be highly prejudicial to an accused. While from a formalist or positivist point of view it is assumed that judges by their training and experience are able to disabuse their minds of inadmissible evidence and decide a case solely on the basis of the admissible evidence and submissions of counsel presented at trial, judges are human too[246] and some commentators are sceptical of the notion that judges are better equipped to disabuse themselves of unduly prejudicial *evidence* than lay adjudicators.[247] Some argue in light of empirical research, that 'it is legitimate to

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[240] Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 100.

[241] See Devlin *The Judge* 61.

[242] See, for example, Schwikkard *Possibilities of convergence* 13; Van Kessel (1992) *Notre Dame Law Review* 421-423; Brouwer (1981) *The Australian Law Journal* 212-216; Jörg, Field & Brants 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe* 46-47, 50.

[243] Steytler *The Undefended Accused on Trial* 5.

[244] See Steytler (2001) *Law, Democracy & Development* 2. See also De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 411, where it is noted that the inquisitorial trial judge uses the dossier 'as the basis for organising the trial and especially the calling of evidence.'

[245] Roodt (2004) *Fundamina* 140.

[246] See, for example, Frank *Courts on Trial* 146 *et seq*.

[247] See, for example, Schwikkard *Possibilities of convergence* 27; Damaška *Evidence Law Adrift* 50. See also Peer & Gamliel (2013) *Court Review* 116, referring to a study which showed that judges were not different from inexperienced jurors in being influenced by inadmissible evidence in reaching their verdicts. The study suggests that judges, as with jurors, cannot easily disregard inadmissible evidence in the decision-making process, although they know they should. The writers explain that in the study, both judges and jurors 'read about a product-liability case including (or not including) biasing material and were either instructed (or not) to disregard this piece of inadmissible evidence.

question whether judges can really be expected to ignore evidence which they have already seen.'[248] Mirjan Damaška observes in this respect, in relation to civil-law inquisitorial systems: 'Even when a party is successful in alleging a violation of an evidence rule, the exclusion of information obtained in judge-driven examination is an infrequent sanction in Continental courts. The demand to exclude probative information to which the factfinder already has been exposed is criticized as conducive to undesirable, artificial decisionmaking. One cannot unbite the apple of knowledge: *factum infectum fieri nequit* [a thing done cannot be undone].'[249] According to Damaška, 'an aura of unreality surrounds' the demand that the trial judge, who must decide on both law or the admissibility of evidence and fact, must disregard relevant but inadmissible evidence that he or she has been exposed to during the trial in reaching his or her decision.[250]

Even though in many inquisitorial jurisdictions a reasoned judgment must be given by the trial judge which is always subject to supervision by an appellate court,[251] some commentators argue that it is 'debatable whether the duty to provide a reasoned verdict can really be said to restrict a judge's discretion' or prevent the judge from having undue regard to inadmissible evidence in making a decision.[252] It is said that although a reasoned verdict enables scrutiny of the reasons for the judgment, and thus of the evidence that was relevant to the conviction, 'there is nevertheless the possibility that judges could disguise, be it knowingly or subconsciously, their reliance on evidence that they were not supposed to use.'[253]

Both jurors' and judges' verdicts depended heavily on whether the biasing material was included, but these decisions were not altered if that evidence was deemed as inadmissible.' (*Ibid* 116). For details of the study, see S Landsman & RF Rakos 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation' (1994) 12 *Behavioral Sciences and the Law* 113. For a similar study that shows the difficulty which judges, like lay jurors, have in ignoring inadmissible evidence in decision-making, see AJ Wistrich, C Guthrie & JJ Rachlinski 'Can judges ignore inadmissible information? The difficulty of deliberately disregarding' (2005) 153 *University of Pennsylvania Law Review* 1251.

[248] Jackson & Summers *The Internationalisation of Criminal Evidence* 73.

[249] Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 95-96. See also Damaška *Evidence Law Adrift* 48-50.

[250] Damaška *Evidence Law Adrift* 49.

[251] See, for example, Damaška *Evidence Law Adrift* 50-51; Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 97; Jackson & Summers *The Internationalisation of Criminal Evidence* 70; Grande (2016) *The American Journal of Comparative Law* 607-608, 613, 616; Schwikkard *Possibilities of convergence* 13, noting that '[w]here lay participation is accommodated in inquisitorial systems, the lay assessors sit with the professional judge and together with the judge give reasons for their findings.'

[252] Jackson & Summers *The Internationalisation of Criminal Evidence* 73.

[253] *Ibid* 73. For a contrary view, see V Waye 'Judicial fact-finding: Trial by Judge alone in serious criminal cases' (2003) 27 *Melbourne University Law Review* 423 441.

In this respect, Thomas Weigend[254] points out apropos inquisitorial criminal procedure in Germany:[255]

> In Germany, professional judges sitting on a criminal court are usually aware even of "excluded" facts (e.g., a defendant's coerced confession) because they will have examined the prosecutor's file before trial. Exclusion thus requires judges to delete the relevant information from their minds and to base their judgment on a fiction rather than on the facts known to them. Even if a judge is willing to obey the command of the law and disregard excluded information, it is psychologically difficult for him to make a decision he knows to be unrelated to the "real" facts of the case. Judges may thus try to reach a verdict which can be reconciled with the "real" facts, knowing that they must not mention some of these facts in the oral or written explanation given for the judgment. Exclusion of evidence thus just makes it more difficult for the court to *justify* a decision which may well have been influenced by the "excluded" evidence.[256]

Given the perceived 'unreality' or impracticability of excluding probative evidence from one's mind that one has been exposed to, Mirjan Damaška is of the view that the unitary court structure in Continental systems would explain the weakening or absence of exclusionary rules of evidence in such jurisdictions.[257] The admissibility of evidence is decided by the ultimate fact-finder, 'who inevitably comes into contact with tainted information. And when this information is persuasive, the professional judge has as much trouble ignoring the acquired knowledge as do amateur adjudicators. In the final analysis, then, it is the problem of unbiting the apple of knowledge that best accounts for the relaxation of exclusionary rules'.[258] Damaška opines that despite the shield of an exclusionary rule, inadmissible information would still reach the trial judge, remain lodged in his or her mind, and influence the outcome of the trial.[259] It is therefore hardly surprising to find that in inquisitorial process '[t]here is essentially a free system of evidence',[260] where all relevant

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[254] At the time of writing, Weigend was professor of criminal law and criminal procedure at the University of Cologne.

[255] T Weigend 'Germany' in CM Bradley (ed) *Criminal Procedure: A Worldwide Study* 2 ed (2007) 243 254 (author's emphasis).

[256] See also Grande (2016) *The American Journal of Comparative Law* 608; RC Park 'An Outsider's View of Common Law Evidence' (1998) 96 *Michigan Law Review* 1486 1489, crisply stating *inter alia* that excluding evidence 'is not the same thing as forgetting.'

[257] Damaška *Evidence Law Adrift* 48-49. See also Park (1998) *Michigan Law Review* 1489; Jackson & Summers *The Internationalisation of Criminal Evidence* 72.

[258] Damaška *Evidence Law Adrift* 50.

[259] *Ibid* 49.

[260] Steytler *The Undefended Accused on Trial* 5. See also, for example, Damaška *Evidence Law Adrift* 93; Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 95-96; Brouwer (1981) *The Australian Law Journal* 220; Jescheck (1970) *Virginia Law Review* 244-245. See too Grande (2016) *The American Journal of Comparative Law* 605-608,

evidence is considered and exclusionary rules are avoided.[261] Contrast this with the common-law trial where strict rules as to the admissibility and evaluation of evidence are followed.[262]

Perhaps a more intractable problem that may arise with judicial exposure to the case docket before trial is that the trial judge's mind may be prejudiced or unduly influenced at the commencement of the trial by the records contained in the docket, resulting in judicial bias.[263] The presiding judge in the inquisitorial system may prejudge the issues or form early or initial hypotheses of the reality he or she will seek to reconstruct at trial, based on the contents of the case docket, hypotheses that may be difficult to dislodge. Mirjan Damaška explains in this regard that:[264]

> Being somewhat familiar with the case, the judge inevitably forms certain tentative hypotheses about the reality he is called upon to reconstruct. More or less imperceptibly, these preconceptions influence the kinds of questions he addresses to witnesses. More importantly, there is an ever-present danger that the judge will be more receptive to information conforming to his hypotheses than to that which clashes with them. Although the resulting dangers to accurate decisionmaking are somewhat decreased by the fact that judges are usually aware of this distorting psychological mechanism, the shortcomings of this arrangement cannot be entirely eliminated.[265]

It is submitted that Damaška correctly regards this as a shortcoming in the non-adversary mode of trial.[266] Damaška also argues that the implication of the presiding judge's obligation in inquisitorial jurisdictions to study the case docket in advance of trial so as to prepare him- or herself for his or her proof-taking tasks (ie the

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noting the functional difference between exclusionary rules of evidence in European civil-law systems and Anglo-American systems, and that in the Continental context, the trier of fact is not insulated from the impact of inadmissible evidence, but is required not to consider it in the decision-making process.

[261] See Steytler (2001) *Law, Democracy & Development* 2. Mirjan Damaška indicates that especially in criminal trials, the rejection of reliable evidence is disfavoured in civil-law jurisdictions: 'it interferes with the truth-seeking process and should be permitted only in exceptional situations.' - Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 96. According to the author, '[v]ery few Continental countries adopted rules requiring that the decisionmaker disregard credible evidence if improperly obtained, although such rules often have been advocated by academic lawyers… The potential of such rules to interfere with the freedom of belief formation at trial is quite limited: they seldom if ever require that information derived from illegally obtained evidence also be excluded.' (*Ibid* 96).

[262] See Steytler *The Undefended Accused on Trial* 4.

[263] See, for example, M Panzavolta 'Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System' (2005) 30 *North Carolina Journal of International Law and Commercial Regulation* 577 587; E Grande 'Italian Criminal Justice: Borrowing and Resistance' (2000) 48 *The American Journal of Comparative Law* 227 243.

[264] Damaška (1975) *University of Pennsylvania Law Review* 1092 (footnote omitted).

[265] See also CR Callen 'Cognitive Strategies and Models of Fact-Finding' in J Jackson, M Langer & P Tillers (eds) *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (2008) 165 170.

[266] Damaška (1975) *University of Pennsylvania Law Review* 1091.

interrogation of witnesses), is that the judge – who is also the fact-finder – would not arrive at the decision in the case exclusively on the basis of the evidence and information conveyed to him or her during the trial.[267] Indeed, Damaška points out that even though modern Continental legislation 'proclaims its adherence to the idea that only information brought out at the trial should be used in arriving at the judgment', records of prior proof-taking as contained in the case docket 'continue to find their way to the trier of fact', and '[t]o decide a case solely on evidence as adduced at the trial is still a rare event in Continental practice.'[268] Moreover, where the trial court in an inquisitorial system is comprised of more than one judge sitting with lay adjudicators or a jury, material from the case docket 'can easily affect the whole panel of [the] trial court.'[269] Damaška explains that while the presiding judge is prohibited from explicitly communicating to his or her colleagues what he or she has learned from the case docket, transmission of knowledge derived from the docket can nevertheless occur in a myriad of other ways: a certain tone of voice, a pause, or subtle biases of demeanour may provide important cues to other members of the panel.[270] Other members of the panel can also be influenced by insights the presiding judge has derived from the docket, even if he or she refuses to explain these insights by referring to their source.[271] In other words, the presiding judge's questions may reveal ideas triggered by the case docket, without giving the other panellists the opportunity to assess them against the docket.[272]

It must be underscored that early hypothesis formation inherent in the inquisitorial system where the presiding judge investigates, as it were, the truth him- or herself,[273] has serious ramifications in the fact-finding sphere.[274] Damaška observes in this respect that judges in such a system:[275]

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[267] Damaška *Evidence Law Adrift* 72.
[268] *Ibid* 71.
[269] *Ibid* 72.
[270] *Ibid* 72.
[271] *Ibid* 72.
[272] See Callen 'Cognitive Strategies and Models of Fact-Finding' in *Crime, Procedure and Evidence in a Comparative and International Context* 170.
[273] See Zupančič (2003) *European Journal of Law Reform* 97-98. In Jackson & Doran *Judge without jury* 65, it is appositely observed that: 'Psychological insight suggests that it is very difficult for active investigators to suspend judgment and weigh evidence dispassionately. There is a distinct risk that an interventionist judge will favour a particular theory or hypothesis and pursue it relentlessly to the exclusion of others.' (Footnote omitted). See also Fuller 'The Adversary System' in *Talks on American Law* 39-40.
[274] Zupančič (2003) *European Journal of Law Reform* 87-88, 97-99, in relation to criminal procedure.
[275] Damaška *Evidence Law Adrift* 95-96.

> … inevitably begin much earlier to form some tentative hypotheses about the reality they seek to reconstruct. And because people assimilate information selectively, their reality hypotheses - even if only tentative - make them more receptive to evidence that confirms these early-formed hypotheses.

Similarly, Elisabetta Grande[276] points out that '[e]ven genuinely disinterested third parties inevitably form early hypotheses of the reality they seek to reconstruct. "Because people assimilate information selectively", their initial hypothesis makes them more receptive to evidence confirming it. Consequently, they will interpret in an unconsciously biased way the information they assume in order to ascertain the truth.'[277] As another commentator notes, they will view evidence confirming the early hypotheses 'more favorably than they otherwise might.'[278] A judge who takes an active role in the development of the case 'might come to a decision too early and, consciously or unconsciously, stop looking for evidence or argument contrary to his conclusion.'[279] There may be a prejudgment of issues and a lack of due diligence in pursuing opposing facts.[280]

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[276] At the time of writing, Grande was Professor of Comparative Law, Piemonte Orientale University.

[277] Grande 'Dances of Criminal Justice' in *Crime, Procedure and Evidence in a Comparative and International Context* 147 (footnote omitted). See also RS Nickerson 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 *Review of General Psychology* 175 176, where it is indicated that people may proceed in a biased fashion to select evidence or interpret evidence in a way that confirms their hypotheses or claims even 'in which they have no material stake or obvious personal interest' or 'when they are indifferent to the answer to a question in hand.'

[278] Callen 'Cognitive Strategies and Models of Fact-Finding' in *Crime, Procedure and Evidence in a Comparative and International Context* 170.

[279] Sward (1989) *Indiana Law Journal* 313.

[280] *Ibid* 314. Ellen E Sward comments, however, that:

> 'Perhaps for this reason, inquisitorial systems have additional checks to counter this kind of bias in the decisionmaker. One is the opportunity that the parties have to suggest avenues of investigation - in other words, parties in inquisitorial systems have a substantial voice in the proceedings, even though they do not control the investigation and presentation of evidence. Another check is the fact that inquisitorial systems generally have at least one level of *de novo* review, so that any fact missed by the original judge may be brought forth on review.'

(*Ibid* 314). (Footnote omitted). (At the time of writing, Sward was Associate Professor of Law, University of Kansas School of Law).

However, the appellate procedure may not necessarily prevent trial judges from favouring or being more receptive to evidence that accords with their initial hypotheses, and in justifying their decisions, judges may disguise cognitive biases - compare Grande (2016) *The American Journal of Comparative Law* 608; CM Bradley 'The Exclusionary Rule in Germany' (1983) 96 *Harvard Law Review* 1032 1063-1064. In their decisions, judges can justify acceptance of the evidence that confirms their early hypotheses, giving more weight thereto, and seek to justify the rejection of evidence that does not support such hypotheses by holding that such evidence is unreliable and/or untrustworthy. As one writer puts it, in discussing the phenomenon of belief perseverance and confirmatory bias: '[W]hen faced with complex and ambiguous evidence, we emphasize the strength and reliability of confirming evidence but the weaknesses and unreliability of disconfirming evidence.' – M Rabin 'Psychology and Economics' (1998) 36 *Journal of Economic Literature* 11 28. With confirming evidence, we suspect that the fact-finder would rapidly reduce the complexity of the information and remember only a few well-chosen supportive impressions. With disconfirming evidence, the fact-finder would continue to reflect upon any information that suggests less damaging

It is said that '[o]nce we hold a particular view or hypothesis, we are more likely to search for, and remember, information that confirms our beliefs, preconceptions, and hypotheses, regardless of whether that information is true or not. Concomitantly, we tend to miss, ignore, or dismiss evidence that contradicts our pre-existing beliefs, preconceptions, and hypotheses.'[281] Psychologists describe this ubiquitous phenomenon as 'confirmation bias'.[282] Willem H Gravett[283] observes that '[t]he potential of confirmation bias to affect judges when they hear and evaluate evidence in court is obvious. Trials are often drawn out, complex affairs. The risk exists that judges may reach a tentative decision early during the process, and then be biased in favour of evidence that confirms their prior hypotheses, and disregard evidence that does not conform to their pre-existing assumptions.'[284]

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alternative interpretations. Indeed, the fact-finder may even come to regard the ambiguities and conceptual flaws in the data opposing his or her hypotheses as somehow suggestive of the fundamental correctness of those hypotheses. (*Ibid* 28).

The tendency to interpret or evaluate subsequent evidence in a biased fashion so as to maintain initial hypotheses, beliefs, preconceptions or predilections, includes 'a propensity to remember the strengths of confirming evidence but the weaknesses of disconfirming evidence, to judge confirming evidence as relevant and reliable but disconfirming evidence as irrelevant and unreliable, and to accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically.' – CG Lord, L Ross & MR Lepper 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence' (1979) 37 *Journal of Personality and Social Psychology* 2098 2099. Greater probative value would be given to evidence that bolsters, confirms or is consistent with the fact-finder's initial hypotheses or beliefs, and conversely, less weight would be given to evidence which contradicts such hypotheses or beliefs. (*Ibid* 2099). Giving greater weight to evidence or information that is supportive of existing beliefs or opinions than to information that runs counter to them, does not necessarily mean ignoring or neglecting counter-indicative information, but means being less receptive to it than to supportive evidence, where, that is, one is more likely, for example, 'to seek to discredit it or to explain it away.' - Nickerson (1998) *Review of General Psychology* 178. Confirmation bias may not simply entail ignoring or missing disconfirming evidence or facts, but involve a more nuanced approach to such evidence.

It is submitted that trial court findings pertaining to the acceptance of certain evidence and the rejection of other evidence might be difficult to have set aside on appeal or review. A judgment can be constructed in such a way that it can withstand appellate scrutiny, particularly considering that 'it is rarely, if ever, in a judge's interest to have a decision overturned' (see Callen 'Cognitive Strategies and Models of Fact-Finding' in *Crime, Procedure and Evidence in a Comparative and International Context* 173), and it is not a given that the appellate court would necessarily disagree with the trial court's findings, even on a careful examination of the record or re-adjudication of the merits. While the trial judge may have discredited evidence or discounted or explained such evidence away because it was inconsistent with an early hypothesis formed, the record would show that the judge led and considered all available relevant evidence, including that of the accused, in arriving at a 'personal conviction' on the merits. There may also still be a presumption in favour of the correctness of the conclusions reached by the trial court - see Jackson & Doran *Judge without jury* 70.

[281] Gravett (2017) *SALJ* 69-70 (footnote omitted).

[282] *Ibid* 70, with reference to Nickerson (1998) *Review of General Psychology* 175.

[283] Gravett is a Senior Lecturer, Department of Procedural Law, University of Pretoria.

[284] Gravett (2017) *SALJ* 73. See also Peer & Gamliel (2013) *Court Review* 115:

> 'Confirmation bias can also affect judges when they hear and evaluate evidence brought before them in court. Specifically, judges might be biased in favor of evidence that confirms their prior hypotheses and might disregard evidence that does not correspond with their previous assumptions.'

The common-law system, however, gives each side to the dispute the ability to challenge beliefs that fact-finders have formed that might otherwise go unchallenged.[285] In such a system, the '*advocacy of an alternative theory would dissipate the effect of initial belief formation on the search process*.'[286] The judge-driven system in inquisitorial jurisdictions would '*seem to have no explicit requirement for development of alternative theories. Some of the features of adversarial systems most likely to lead to the development of alternative hypotheses that will offset the initial beliefs are missing from judge-driven systems*.'[287] Mirjan Damaška observes that the testing of evidence in the adversary system is more forceful than in inquisitorial systems, by virtue of searching cross-examination that challenges not only the reliability but also the credibility of the witness' evidence.[288] Indeed, observers from Anglo-American countries are struck by the absence of elaborate means of challenging a witness' credibility in Continental proceedings.[289] The examination of a witness in a civil-law jurisdiction is thus not as searching as with adversarial cross-examination.[290] Among other things, the parties in an inquisitorial trial 'may be very reluctant to open a new line of questioning with the witness, for fear of offending the court', whose responsibility it is to adduce the witness' evidence.[291]

Another commentator notes that '[p]roof through evidence requires hypothesis; hypothesis requires a preliminary mind-set; if an active judge-interrogator develops the proof, his preliminary mind-set too easily can become his final decision; therefore, it is better to have conflicting preliminary hypotheses and supporting proofs presented by the parties so that the judge's mind can be kept open until all the evidence is at hand.'[292]

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[285] Callen 'Cognitive Strategies and Models of Fact-Finding' in *Crime, Procedure and Evidence in a Comparative and International Context* 172.
[286] *Ibid* 172 (my emphasis).
[287] *Ibid* 172 (my emphasis).
[288] M Damaška 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 *The American Journal of Comparative Law* 839 846.
[289] *Ibid* 846, citing B Kaplan, AT von Mehren & R Schaefer 'Phases of German Civil Procedure' (1958) 71 *Harvard Law Review* 1193 1236. See also Damaška *Evidence Law Adrift* 80-81. The requirement in inquisitorial systems is the chance to lead rebuttal evidence rather than immediate, 'in your face' challenges to evidence proffered by a witness. (*Ibid* 81). In the adversary system, cross-examination is crucial as the opponent calls witnesses in his or her favour.
[290] Callen 'Cognitive Strategies and Models of Fact-Finding' in *Crime, Procedure and Evidence in a Comparative and International Context* 172.
[291] *Ibid* 172.
[292] Hazard *Ethics in the Practice of Law* 121.

The tendency of the inquisitorial trial judge to form early reality hypotheses is exacerbated in the case of the presiding judge, who, as has been seen, studies the dossier or case docket in advance of trial.[293] Having read the case docket, the judge, in a criminal case, may form an initial hypothesis, or have a more or less fixed or firm notion, of the guilt of the accused and adduce evidence on that premise in what is a unilateral process;[294] the judge may hold on to the presumption of guilt throughout the trial which may lead to a wrong conviction.[295] This is all the more likely in view of the fact that in inquisitorial jurisdictions the trial is often much more a verification of the contents of the dossier than the culmination of a contest.[296]

A further, and indeed main, point of criticism that can be levelled against inquisitorial criminal procedure is, as CR Snyman indicates:[297]

> … the double role which the judge must necessarily fulfil. He has to be both the detective, himself searching for the material truth and especially all facts and circumstances necessary to build up a case against the accused, and, at the same time, the arbiter who must objectively evaluate all these facts and considerations. These two functions of the judge contradict each other. It is difficult for the judge to be completely unprejudiced against the accused, if he virtually has to be both prosecutor and judge at the same time. Even if one defends the German system with the argument that the judge also actively has to look for circumstances in the accused's favour, one still has the position that in the eyes of the accused, the judge is not wholly impartial, but is rather associated with the state prosecuting authorities, of which he is seen to be merely a representative. The judge is regarded by the accused as his opponent.

As Boštjan Zupančič asserts: '[T]he European investigating judge is a contradiction in terms: either he investigates, or he is a judge.'[298] 'Too close a co-operation between the prosecution and the court detracts from that impartiality which should mark the judge.'[299] It may be argued that the judge in the inquisitorial trial can hardly be seen to be impartial where he or she puts the charge to, or brings the accusation

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[293] See Damaška *Evidence Law Adrift* 102 n 57.

[294] See H Dünnebier, W Gollwitzer, M Kohlhaas, W Sarstedt & K Schäfer *Löwe-Rosenberg Die Strafprozeßordnung und das Gerichtsverfassungsgesetz: Erster Band* 22 ed (1971) 135. See also K Sessar 'Wege zu einer Neugestaltung der Hauptverhandlung' (1980) 30 *Zeitschrift für die gesamte Strafrechtswissenschaft* 698 701-702; B Schünemann 'Zur Reform der Hauptverhandlung im Strafprozeß' (1978) *Goltdammer's Archiv für Strafrecht* 161 167, 172-173; C Roxin *Strafverfahrensrecht: ein Studienbuch* 24 ed (1995) 321; C Roxin 'Die Reform der Hauptverhandlung im deutschen Strafprozeß' in H Lüttger (ed) *Probleme der Strafprozeßreform* (1975) 52 54-55.

[295] See Zupančič (2003) *European Journal of Law Reform* 87.

[296] See Jörg, Field & Brants 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe* 50.

[297] Snyman (1975) *CILSA* 107-108 (footnote omitted).

[298] Zupančič (2003) *European Journal of Law Reform* 99.

[299] GW Paton & DP Derham *A Textbook of Jurisprudence* 4 ed (1972) 601.

against, the accused and him- or herself leads the evidence against the accused.[300] Indeed, one can hardly dispute that the accused in such a system would in light of such judicial activity regard the presiding judge as biased against him or her, in other words, as his or her adversary at trial.[301] The fact that the presiding judge would naturally also have to lead the exculpatory evidence and be required to objectively assess the evidence would not ameliorate the tainted image of the judicial officer, as lacking impartiality.[302]

3.3 The shortcomings of adversarial / accusatorial process

It is perhaps necessary first to deal with deficiencies or limitations of accusatorial process before proceeding to consider its pertinent advantages. It may seem counter-intuitive, but in considering a striking defect of adversarial procedure, namely the so-called truth deficit, one may better appreciate that such a procedure is primarily concerned with the fairness of the trial and judicial impartiality, which is an important factor in showing its utility in conceivably serving as a procedural safeguard in the face of adverse pre-trial publicity. Moreover, in order for the adversary system to work properly or function optimally, there has to be equality of arms. It is then the latter aspect as well as the question of whether adversarial process is conducive to the determination of truth that will be focused on here.[303]

3.3.1 Adversarial process and the pursuit of the truth: Alice in Wonderland

> [I]t is more important to retain the integrity of the system of justice than to ensure the punishment of even the vilest offender…[304]

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[300] J Herrmann *Die Reform der deutschen Hauptverhandlung nach dem Vorbild des anglo-amerikanischen Strafverfahrens* (1971) 366-368.

[301] *Ibid* 366-368.

[302] *Ibid* 367.

[303] In Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 12 (para 1 5 2), the following points of criticism are levelled against the adversarial trial system: '*First*, it "presupposes for success some equality between the parties; when this is lacking the 'truth' becomes too often simply the view of the powerful". *Secondly*, its very essence - the notion of opponents engaged in a forensic duel - can generate unnecessary conflict which is not necessarily conducive to the resolution or settlement of a dispute. *Thirdly*, much of the outcome of a case depends upon the ability, wit, energy, ruthlessness and even permissible rudeness which the cross-examiner might display. *Fourthly*, the "selfish" and partial manner in which parties are allowed to present evidence and the fact that the adjudicator may only in limited circumstances call witnesses may inevitably lead to a situation where the "procedural" or "formal truth" can be promoted at the expense of the "material truth".' (Footnotes omitted).

[304] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 32E.

Former Deputy President of the Supreme Court of Appeal, LTC Harms, in an extra-curial paper, noted that '[t]he main object of a trial is to determine the truth.'[305] It is also said that the accusatorial system 'is based on the premise that truth-finding is enhanced if the prosecution and defence are responsible for presenting their respective cases.'[306] Lord Devlin pointed out in this respect that: 'The English say that the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light… [T]wo prejudiced searchers starting from opposite ends of the field will between them be less likely to miss anything than the impartial searcher starting in the middle.'[307] There are divergent views, however, as to whether the adversarial trial model in contrast with that of the inquisitorial system is best suited to the development of the truth or to fact-finding. Joachim Herrmann writes that 'representatives of both the adversary and the inquisitorial systems claim the superiority of their proceedings, but… thus far, the question whether an adversary or an inquisitorial trial is better equipped for ascertaining the truth has not yet been answered in a satisfactory way.'[308]

It is beyond the scope of the present thesis to fully examine whether the adversary system, when juxtaposed with the inquisitorial trial procedure, is in fact ineffective in producing accurate verdicts, as several commentators would claim,[309] or whether it can be justified as a mechanism (or the best or optimal means of procedure) for determining 'truth', however difficult it may be, epistemologically, to define such a concept.[310] Yet, in traversing salient points on this question, one may glean how the adversary system, at least in theory, safeguards and promotes, or reinforces, procedural fairness and judicial impartiality; a system in which impartiality is claimed to be placed above accuracy of result (or stated differently, if 'one equates

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[305] LTC Harms 'Demystification of the Inquisitorial System' (2011) 14 *Potchefstroom Electronic Law Journal* 2/240 2/240. See also, for example, HC Nicholas 'Credibility of Witnesses' (1985) 102 *The South African Law Journal* 32 32, where it is said: 'The prime object of a trial court is the ascertainment, so far as that is possible, of the truth as between conflicting versions of the facts.'

[306] Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 335.

[307] Devlin *The Judge* 60-61.

[308] Herrmann (1978) *SACC* 17. The writer (*ibid* 12) bases this contention on the fact that the adversary and inquisitorial systems are not the result of scientific inquiry into which of the two models is better equipped for fact-finding. The claims by proponents of both systems that each one is the best procedure for fact-finding, are based on popular conviction and speculation rather than empirical research. But, as shown below, the adversary model is widely seen as being less committed to truth.

[309] See, for instance, FC Zacharias 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?' (1991) 44 *Vanderbilt Law Review* 45 51, 54-55.

[310] See, for example, BL Gershman 'The Prosecutor's Duty to Truth' (2001) 14 *Georgetown Journal of Legal Ethics* 309 311 n 6.

accuracy of outcomes with the attainment of justice', and 'equal treatment with fairness', pure adversarial process 'values fairness above justice').[311] For in a laissez-faire state, where adversarial or 'conflict-solving process' essentially defines its administration of justice, and in terms whereof the respective parties to a lawsuit are to be treated as autonomous, and indeed the master of each party's individual, opposing case (*dominus litis*) - that is, where a party is entitled to conduct his or her case as he or she pleases subject to constitutional, procedural and evidential rules - it is a paramount task of the state to provide a proper forum for the settlement of conflicts, 'whose very legitimacy rests on its image of neutral conflict resolver.'[312] Since citizens of such a state 'realize that the outcome of the lawsuit is uncertain and that correct results can be elusive… what they expect from the decision maker most of all is equality of treatment – a neutral, objective, or impartial attitude.'[313] Mirjan Damaška notes in this regard:[314]

> [H]ere, the [trial court's] detachment includes minimal interference with the way in which disputants manage the forensic combat. Adjudicators merely preside over the disputation of the adverse parties and intervene in the process only insofar as intervention is required to monitor and to ensure the fair disposition of incidental controversies. The verdict follows the close of the contest, and if the contest was fair and the decision maker has not compromised his neutrality, the loser has little reason to suspect the legitimacy of his defeat. He has mainly himself to blame for the adverse decision, and even if he rebels, society as a whole maintains its faith in the neutral administration of justice.

As Damaška elsewhere points out:[315]

> [M]ost authorities would probably concede… that neutrality – the duty to remain impartial – outweighs whatever benefits might accrue to the justice system if the judge actively participated in the pursuit of the truth. This position is easy to understand: in a legal process whose ultimate objective is conflict resolution, the adjudicator is first and foremost a neutral arbiter.

And in addressing the question of what the status of truth values are in a proceeding whose paramount objective is dispute resolution, Damaška says:[316]

> It seems clear that dispute-resolvers must tame their impulse to establish historic verity: they cannot become independent and energetic seekers after the truth without endangering the impartiality essential to their conflict-solving role. Even if they observe the limits imposed on

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311 Damaška *The Faces of Justice and State Authority* 136.
312 *Ibid* 135.
313 *Ibid* 135-136.
314 *Ibid* 79-80.
315 Damaška *Evidence Law Adrift* 123-124 (footnote omitted).
316 *Ibid* 121.

> their inquiries by party allegations, admissions, and stipulations, their single-minded quest for verity can lead to the discovery of evidence engendering further turmoil, aggravating rather than absorbing the underlying difficulty.

Commentators debunk the notion that the adversary trial, as a competitive contest or dispute between two rivals over the question of what actually transpired (ie historical fact), is the best way to discover the truth. In this regard, CR Snyman makes the following crisp observations:[317]

> The Anglo-American accusatorial system, on the other hand, has again been branded as being too much of a *Parteiverfahren* - a contest between two parties opposing each other. In order to give his verdict, the judge merely relies on what he has been told by the parties, and they, in order to favour their own cases, can "manipulate" the truth. The result is that the final verdict of the judge cannot be described as reflecting the material truth, but at most - so it has been described - the "formal truth". In many instances especially in the United States, the aim of each party is merely to "win the case", regardless of whether the outcome of the case is in accordance with truth and real justice. The adversary system is furthermore regarded as unable to afford a coherent picture of the facts of a case, because of the one-sided presentation of the evidence by the parties. Mention is also frequently made in this criticism of the dicta of Anglo-American judges and lawyers in which a trial is placed on the same footing as a game of sport, in which the "judges sit in court, not in order that they may discover the truth, but in order that they may answer the question 'How's that'?"[318]

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[317] Snyman (1975) *CILSA* 108 (footnotes omitted) (author's italics).

[318] See too, for example, Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 26, where it is stated *inter alia*:

> 'The traditional Anglo-American concept of the adversary system has often been criticized by lawyers from other cultures. It has been vigorously questioned whether the clash of two zealous partisans represents the best instrument of discovering the truth. Moreover, the ample opportunities for the defendant to escape conviction have been said to exist mainly for those able to retain high-powered counsel.'

In a separate work, Damaška (1975) *University of Pennsylvania Law Review* 1093-1094, the author calls attention, *inter alia* as follows, to a few of what he terms 'the most salient shortcomings' or 'cognitive costs of the adversary arrangements' (that is to say, 'pitfalls that lie in the tactical wake of letting two adversaries control the development of evidence at trial'), 'assuming, at all times, that the parties are not engaging in unethical practices':

> 'It may be in the narrow interest of only one party, or in the common interest of both, that some items of information which the witness possesses do not reach the adjudicator - even though their relevancy in the quest for the truth is beyond dispute. Evidence unsupportive of one's case has no function in the adversary litigation process, nor do matters which the parties decide to leave out of the disputation. And, as the witness is limited to answering relatively narrow and precise questions, much information may effectively be kept away from the decisionmaker who presumably is responsible for finding the truth within the limits of the charge. Accordingly, the factual basis for the decision may be incomplete.
>
> But there are much more important costs of the development of evidence through rival use of informational sources. The damage to testimony inflicted by the preparation of witnesses is very serious. Parties can hardly be expected to interview the potential witnesses in relatively detached ways that minimize the damage of interrogation to memory images. During the sessions devoted to "coaching," the future witness is likely to try to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's

In a similar vein, LTC Harms states incisively:[319]

> The adversarial trial has been compared to American football. The main object of the game is to block the other side from progressing. Every minute or so the game comes to a stop. The game of rugby is another example: if something goes wrong, you may have a scrum, a lineout, a free kick, or a penalty kick. The players cannot know all the rules. They are even sometimes too complicated for the referee. And you keep your impact players, like your defence, until the last minute or so in reserve.
>
> If we look for the truth, do we look for the objective truth or do we look for a sanitised truth? Continental jurists believe that one should determine the 'material truth', the actual facts. In order to find this truth, they argue, the matter cannot be left in the hands of the prosecution and the defence. If it is, a skewed picture is presented to the court. Evidence which is material is not led. Agreements on fact seldom reflect the true facts. In other words, our system permits the parties to determine the facts on which the court has to make a

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expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.

Another important cost accompanies the cross-examination technique, which, with its challenge to the credibility of witnesses, is a two-edged sword. As Judge Frankel has noted, it is "to a considerable degree... like other potent weapons, equally lethal for heroes and villains." Even with the best of intentions on the cross-examiner's part, reliable testimony may easily be made to look debatable, and clear information may become obfuscated.' (Footnotes omitted).

In R Eggleston 'What is Wrong with the Adversary System?' (1975) 49 *The Australian Law Journal* 428 431-433, it is similarly shown how the supposed search for the truth in the adversary system is undermined by witnesses being 'manipulated' in favour of one side or the other, honest witnesses being discredited or being trapped into telling a lie through cunning cross-examination, lying witnesses made to appear as honest, and the suppression of material evidence.

In ME Frankel 'The Search for Truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031 1036-1037, it is asserted:

> 'We are unlikely ever to know how effectively the adversary technique would work toward truth if that were the objective of the contestants. Employed by interested parties, the process often achieves truth only as a convenience, a byproduct, or an accidental approximation. The business of the advocate, simply stated, is to win if possible without violating the law. (The phrase "if possible" is meant to modify what precedes it, but the danger of slippage is well known.) His is not the search for truth as such. To put that thought more exactly, the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.
>
> Certainly, if one may speak the unspeakable, most defendants who go to trial in criminal cases are not desirous that the whole truth about the matters in controversy be exposed to scrutiny. This is not to question the presumption of innocence or the prosecution's burden of proof beyond a reasonable doubt. In any particular case, because we are unwilling to incur more than a minimal risk of convicting the innocent, these bedrock principles must prevail. The statistical fact remains that the preponderant majority of those brought to trial did substantially what they are charged with. While we undoubtedly convict some innocent people, a truth horrifying to confront, we also acquit a far larger number who are guilty, a fact we bear with much more equanimity.'

See further, for instance, Zacharias (1991) *Vanderbilt Law Review* 54-55 nn 41-43; Zupančič (1982) *Journal of Contemporary Law* 41; Zupančič (2003) *European Journal of Law Reform* 99-100, where it is indicated that the truth-finding function of a trial has a 'secondary nature' in American [adversarial] criminal procedure, which 'is apparent in its preference for the exclusionary rule, the consequence of which is that people truly found to be guilty will go unpunished in order that the ideals of impartiality and procedural fairness are preserved.'

[319] Harms (2011) *Potchefstroom Electronic Law Journal* 2/240-3/240.

> decision. Our judgments are based on assumed facts; on part of the facts; make-belief, an Alice in Wonderland story. We formalise truth and we know it.
>
> On the other hand, it is a myth to believe that in any system the material truth can always or even usually be established. Truth is not absolute. A trial is not a scientific experiment. The process of finding truth must also be reasonable, fair and cost-effective; truth must be found within a reasonable time and it must be presented within a trial of manageable proportions.

One writer indicates that the judge under the adversary system 'does not ascertain the truth in any real sense.'[320] What he or she does is to make a decision that appears to him or her to be justifiable on the material presented to him or her by the parties.[321] This material is often incomplete and the judge has nothing to do with the collection and presentation of the material.[322]

It is felt that where under the adversary system the judicial officer relies on the parties to unearth the truth, this is in itself 'a barrier to unearthing the truth, a situation that is not made any easier when the accused is unrepresented.'[323] 'Since witnesses are called to support a particular side, the tendency of witness loyalty and bias cannot be ruled out.'[324] 'Since each party "owns" its evidence in the adversarial contest, the parties may be selective in the presentation of their evidence, keeping away vital evidence that is damaging to their case and are openly bias[ed] in their conduct of the case.'[325] 'Ultimately, the judicial officer is left to depend on what counsel, the witnesses and exclusionary rules allow to be filtered into the system.'[326]

Christa Roodt[327] notes that the premise of the adversarial system is that such a system will result in a more accurate investigation of the facts compared to the inquisitorial system because the 'self-interest' of the parties in obtaining a favourable result 'is a better motivation than official duty. A climactic, head-on clash of proofs in a structured forensic setting is believed to best assist in the discovery of truth, as the judge is provided with the information needed to resolve the conflict or "appoint the

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[320] R Eggleston *Evidence, Proof and Probability* 2 ed (1983) 32.
[321] *Ibid* 32.
[322] *Ibid* 32.
[323] RJV Cole 'Between judicial enabling and adversarialism: The role of the judicial officer in protecting the unrepresented accused in Botswana in a comparative perspective' (2010) 11 *University of Botswana Law Journal* 81 85. See also D Erasmus 'Ensuring a Fair Trial: Striking the Balance between Judicial Passivism and Judicial Intervention' (2015) 26 *Stellenbosch Law Review* 662 664.
[324] Cole (2010) *UBLJ* 85.
[325] *Ibid* 84.
[326] *Ibid* 85.
[327] At the time of writing, Roodt was Associate Professor, Department of Jurisprudence, University of South Africa.

winner" in the interest of the parties.'[328] Roodt argues, however, that in the adversary system 'the brief of the police and the defence lawyer is not to seek out the truth, and what constitutes truth is often subject to negotiation by the parties. Incentives to distort or conceal evidence can arise because partisan interest is in winning and not in truth. If witnesses are coached, cross-examination becomes abusive, and if the accumulation of wealth of the legal representative involved is a primary factor, then a "truth deficit" can arise.'[329] Roodt is further of the opinion that '[t]he problem could be that truth-finding is a much-neglected goal of the accusatory system, or that truth becomes an inconsistent side-effect where institutional weakness prevails or the system is exclusively bent on fairness in the sense of granting completely equal advantages to the opposing sides.'[330] Roodt observes that the accusatory system 'does tend to allow calculated use of adversarial techniques to obfuscate or defeat the truth and delay adjudication. Partisans who gather evidentiary material can manipulate and contribute to witness bias, rendering it difficult to determine the truth. Consequently, the pure accusatory system does not always provide the neutral decision-maker with the information needed to resolve a dispute in the interest of the parties and society.'[331] Roodt espouses the view that '[w]hile two-sided partisanship is distinctly better than one-sided partisanship, it remains a poor substitute for truth seeking.'[332]

Jenny McEwan[333] remarks that '[a] dialectic system of proof, consisting of two sides conducting a dispute, could conceivably be an effective way of discovering the truth. But in the English system, the risk remains that the most effective advocate, rather than the truth, will win the day.'[334] McEwan observes further that advocates in

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[328] Roodt (2004) *Fundamina* 154. In RW Cosman 'Trial and Court Procedures in Canada' in C Platto (ed) *Trial and Court Procedures Worldwide* (1991) 213 217, it is similarly observed:

> 'The justification for the adversarial system rests upon two premises. The first premise is that the adversarial system will result in a more thorough and accurate investigation of the facts than the inquisitorial system. Parties, motivated by self-interest, are likely to be more diligent in presenting and critically evaluating all of the relevant evidence than a disinterested [judicial] official motivated only by official duty. The second premise is that in an adversary proceeding, the judge is more likely to reach the correct decision because, during the proceedings, he or she will not acquire a bias towards one conclusion or the other. The judge will be able to remain completely disinterested in the outcome until all of the proof has been elicited and complete arguments from both parties have been made.'

[329] Roodt (2004) *Fundamina* 154.

[330] *Ibid* 154.

[331] *Ibid* 155.

[332] *Ibid* 155, with reference to JH Langbein *The Origins of Adversary Criminal Trial* (2003) 332.

[333] At the time of writing, McEwan was Professor of Law, Keele University.

[334] J McEwan *Evidence and the Adversarial Process – The Modern Law* 2 ed (1998) 9.

adversarial trials 'not only control what the issues are to be and which witnesses and other evidence are to be produced, but also limit what is said by those witnesses, over whom they have strict editorial control. Thus the material available to the tribunal of fact is selected by the advocates, who can then in court control the narration. Witnesses are not entitled to add material which has not been asked for to their account, and so counsel can manipulate them to obtain the (for counsel) most favourable or least damaging version of the facts… [T]rials probably are little more than highly stylised dramatisations of reality. Clearly, some theatrical gestures by advocates and even some brilliant lines of questioning have little to do with the development of a coherent story… There seems to be a large measure of agreement that lawyers are there to present highly selective versions of the case.'[335]

Effectively in adversarial process the trial court is required to evaluate competing narratives presented by the respective parties and then decide which story is more persuasive.[336] 'It is thus "common wisdom that the quality of advocacy" can have an important bearing on the result.'[337] 'It should come as no surprise, then, that lawyers who fashion trial narratives are far more concerned with victory than with accurate factfinding; accurate factfinding is "not the governing principle for the lawyer." Lawyers have a tremendous amount of autonomy in deciding how to prepare and present a case; they are "motivated to present... only such evidence as is favorable to [their] position" and seek to exclude harmful evidence even when its "value in the quest for the truth is beyond dispute." In the "showmanship" of trial, the lawyer is actually "compelled to keep the truth hidden" if the truth is not helpful to her client.'[338]

It is so that in South African criminal procedure the trite principle is that the prosecutor is not an advocate or attorney representing a client, but stands in a special relation to the court in terms whereof his or her role is not merely to obtain a conviction but to assist the court in ascertaining the truth;[339] the prosecutor's position is that of 'truth-seeker'.[340] Prosecutors also 'have a duty towards the accused to ensure that an innocent person is not convicted. In this regard they have a duty to

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[335] *Ibid* 11.
[336] AS Pollis 'Trying the Trial' (2016) 84 *The George Washington Law Review* 55 66.
[337] *Ibid* 66.
[338] *Ibid* 66 (footnotes omitted).
[339] See *S v Jija and Others* 1991 2 SA 52 (E) 67J-68A; *S v Shaik and Others* 2008 1 SACR 1 (CC) para 67; *S v Maliga* 2015 2 SACR 202 (SCA) para 20.
[340] *S v Shaik and Others* 2008 1 SACR 1 (CC) para 67.

disclose, in certain circumstances, facts harmful to their own case.'[341] In *S v Rozani; Rozani v Director of Public Prosecutions, Western Cape and Others* it was held that:[342]

> In contrast to the position in some countries, in South Africa it has never been a matter of the prosecution being expected to 'win at all costs' against the defence. Other considerations may apply in civil matters. But it is inappropriate and in bad taste even to speak of a criminal trial being 'won' or 'lost' by the prosecution. Such an attitude on the part of a prosecutor is unhealthy and dangerous. The State either secures a conviction, or it does not do so. It is the overriding duty of the prosecuting authority, not to 'win' convictions, but to see to it that justice is done: this may, of course, include the acquittal of accused persons whose guilt cannot be proved beyond reasonable doubt. A prosecutor is expected at all times to act in a manner which is responsible and fair to the accused, and to be candid and open with the court. Hence it is said that it is the duty of a prosecutor to place all the material before the court which is at his disposal, provided that it is relevant and admissible.

Yet, it is also recognised that in adversarial criminal proceedings such as in South Africa, 'it is inevitable that prosecutors will be partisan. They conduct the case for one of the two sides in a trial, namely the state, as representing the citizenry. They often carry out their prosecutorial functions vigorously and zealously. A prosecutor's role in a criminal prosecution therefore makes it inevitable that he or she would be perceived to be biased. Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong view, that accused persons are guilty.'[343] The Supreme Court of Appeal has moreover noted that:[344]

> In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court, and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly, but fairly and dispassionately, to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses, with a view to discrediting such evidence for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa…[345]

It cannot be denied that any prosecutor would want to win his or her case by obtaining a conviction, holding a strong view that an accused person is guilty. 'Even good prosecutors who strive to do the right thing may discover that their quest to do

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[341] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13. See also the remarks in *S v Ledwaba* GDP 08-01-2018 case no A96/2016 para 56.
[342] 2009 1 SACR 540 (C) 549*h*-550*a*. See also *Porritt* supra para 11, noting that the prosecutor's role 'excludes any notion of winning or losing.'
[343] *Porritt* supra para 13 (footnote omitted).
[344] *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 11 (footnote omitted).
[345] See also *S v Masoka and Another* 2015 2 SACR 268 (ECP) paras 12-13.

justice suddenly conflicts with the rigorous demands of the adversary system. The temptation for a prosecutor to believe that his job is to win is always present for people trained in the adversarial ethic.'[346] Indeed, the prosecutor's 'working environment' may cause him or her to view his or her job 'in terms of convictions rather than the broader achievement of justice.'[347] Prosecutors in South Africa are required by the National Prosecuting Authority to meet conviction targets, and when it comes to performance assessments a weighty consideration is the number of cases which prosecutors have successfully prosecuted.[348] This may give rise to the danger expressed by the Supreme Court of Appeal of prosecuting 'in single-minded pursuit of a conviction.'[349] I venture to submit that it may also result in the suppression and distortion of evidence or the truth. This is all the more so where a prosecutor may buckle under pressure when antagonised by abusive defence counsel, when, that is, a prosecutor succumbs to the so-called 'combat effect', such being regarded as a 'striking defect' of adversary criminal procedure.[350] John H Langbein[351] describes this 'combat effect' as a truth-impairing incentive of the adversary system.[352] Langbein explains that '[i]n an Anglo-American trial, the job of each adversary is to win the courtroom struggle. Winning often entails tactics that distort or suppress the truth, for example, concealing relevant witnesses, withholding information that would help the other side, preparing witnesses to affect their testimony at trial (coaching), and engaging in abusive cross-examination.'[353] 'Adversary procedure entrusts the responsibility for gathering and presenting the evidence upon which accurate adjudication depends to partisans whose interest is in winning, not in truth.'[354] The adversary 'combat effect' dynamic invites 'distortion and suppression of the evidence, by permitting abusive and misleading cross-

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[346] Gershman (2001) *Georgetown Journal of Legal Ethics* 351.

[347] GT Felkenes 'The Prosecutor: A Look at Reality' (1975) 7 *Southwestern University Law Review* 98 109.

[348] In K Bresler '"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions' (1996) 9 *Georgetown Journal of Legal Ethics* 537 541-542, it is argued that the worst thing about prosecutorial 'score-keeping' of 'wins' and 'losses' is that it is 'unprofessional', when it is considered that '[t]he most notable and noble principle of prosecution directs prosecutors to seek justice, not convictions.'

[349] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.

[350] See Langbein *The Origins of Adversary Criminal Trial* 1.

[351] Langbein is Sterling Professor Emeritus of Law and Legal History and Professorial Lecturer in Law at Yale Law School.

[352] Langbein *The Origins of Adversary Criminal Trial* 1.

[353] *Ibid* 1.

[354] *Ibid* 332.

examination, the coaching of witnesses, and the concealment of unfavourable evidence.'[355] The distortion or suppression of the truth may especially happen where an accused is unrepresented and the prosecutor neglects to bring to the attention of the trial court evidence favourable to the accused, or where subsequent to disclosure the prosecutor becomes aware of or ought reasonably to suspect that there is exculpatory evidence not known to the defence and fails to inform the defence of such.[356] Moreover, '[t]he dominant and partisan role of the parties in adversarial proceedings increases the possibility of misleading evidence being introduced.'[357]

Bennett L Gershman[358] provides a detailed analysis of how prosecutors may undermine the search for truth at trial.[359] Gershman notes that a 'prosecutor may impede the truth-finding process in several ways: (1) distorting the truth by attacking the defendant's character, misleading and misrepresenting facts, and engaging in inflammatory conduct; (2) subverting the truth by making false statements and presenting false evidence; (3) suppressing the truth by failing to disclose potentially truth-enhancing evidence or obstructing defense access to potentially truth-enhancing evidence; and (4) other truth-disserving conduct that exploits defense counsel's misconduct and mistakes and prevents introduction of potentially truth-serving defenses.'[360] Gershman indicates that 'a prosecutor can subvert the truth through lying outright', and that a 'prosecutor's own false statements are a paradigmatic example of the prosecutor's corruption of the truth-seeking function of a trial.'[361] After all, it goes without saying that:[362]

> An impartial, informed, and wise decision presupposes that the person deciding a case has been given the truth. To furnish him with a lie is to mock impartiality, to mislead rather than to inform, and to stultify the decisional process rather than to make it an exploration leading to mature judgment.

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[355] *Ibid* 332. See also Brouwer (1981) *The Australian Law Journal* 208, where it is observed that Continental lawyers:

> '… are critical of the adversary system because it places the pre-trial investigations and the presentation of the court case in the hands of the parties concerned. This, it is felt, can lead to the suppression and distortion of evidence, thus preventing the court from having available to it all the facts of which it should be aware.'

[356] See *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 13.

[357] PJ Schwikkard 'Hearsay' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 287 288 (para 13 2 1).

[358] At the time of writing, Gershman was Professor of Law, Pace Law School.

[359] Gershman (2001) *Georgetown Journal of Legal Ethics* 315, 316-333.

[360] *Ibid* 315 (footnotes omitted).

[361] *Ibid* 325.

[362] JT Noonan Jr 'The purposes of advocacy and the limits of confidentiality' (1966) 64 *Michigan Law Review* 1485 1488.

Gershman writes that the prosecutor has an affirmative duty to assist the defence in discovering the truth through discovery rules.[363] Gershman observes that 'a prosecutor has both a negative duty to refrain from conduct that impedes the search for truth and an affirmative duty to protect and promote the search for truth. A prosecutor who proceeds with a case without being personally convinced of the defendant's guilt violates these duties and creates an unacceptable risk that an innocent person will be convicted.'[364] According to Gershman, the pursuit of truth may be undermined where a prosecutor fails to critically evaluate the *prima facie* evidence in the decision-making process of proceeding with a prosecution or in preparing for trial.[365]

Gershman furthermore argues that 'a prosecutorial culture that advocates winning and maintains won-loss statistics not only discourages a critical examination of truth but encourages misconduct as well.'[366]

Mirjan Damaška points out that 'Anglo-American courts often proclaim the ascertainment of the truth or the achievement of the correct result as the basic aim of criminal proceedings',[367] and that on the surface of things there are few indications that the predominantly conflict-solving vision of adjudication in the Anglo-American procedural environment - applicable in all branches of adjudication - produces the effect of a reduction in the relative importance of fact-finding accuracy across the board.[368] In this regard, the author refers[369] to the United States Supreme Court decision of *Williams v Florida*.[370] Damaška, however, argues that proclamations of a trial not being about winning or losing, with the discovery of the truth supposedly being the basic purpose of all trials, 'should not be taken at face value.'[371] The writer

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[363] Gershman (2001) *Georgetown Journal of Legal Ethics* 315, 334-335.
[364] *Ibid* 316.
[365] *Ibid* 337-350.
[366] *Ibid* 351. In Bresler (1996) *Georgetown Journal of Legal Ethics* 543, it is likewise said in dealing with the question of what is wrong with prosecutors counting convictions: 'A prosecutor protective of a "win-loss" record has an incentive to cut constitutional and ethical corners to secure a guilty verdict in a weak case - to win at all costs.' Moreover, '[a] prosecutor who counts convictions also has a countervailing incentive to drop weak [or hard-to-prove] cases. The prosecutor may decline, dismiss or otherwise refuse to try cases that, although supported by probable cause and sufficient evidence to convict, would nonetheless be difficult cases in which to secure convictions. A prosecutor could attempt to justify doing so on the grounds that he or she is not seeking convictions, but is avoiding them.' (*Ibid* 543-544). (Footnote omitted).
[367] Damaška *Evidence Law Adrift* 111 n 69.
[368] *Ibid* 122-123.
[369] *Ibid* 111 n 69.
[370] 399 US 78 82 (1969). See too, for instance, *Berger v United States* 295 US 78 88 (1935).
[371] Damaška *Evidence Law Adrift* 123.

indicates that '[t]hey are made most often in arguing against the notion that trials are similar to a game or a sporting event.'[372] Damaška claims that 'the very use of these metaphors testifies to pressure inherent in… adversary trials to neglect historic verity for the sake of achieving a result: "winning" the case.'[373]

While a basic underlying tenet of adversarial process is that truth 'will most often and most completely emerge through the tension between two equally armed advocates aggressively asserting their strongest positions', that is to say, '"is best discovered by powerful statements on both sides of the question"', and that to become properly acquainted with the truth we must first have disputed against it,[374] David Luban[375] argues that '[n]o trial lawyer seriously believes that the best way to get at the truth is through the clash of opposing points of view', for '[i]f a lawyer did believe this, the logical way to prepare a case for trial would be to hire two investigators, one taking one side of every issue and one taking the other.'[376] Luban opines that while the assumption is that two adversary accounts will cancel out,

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[372] *Ibid* 123.

[373] *Ibid* 123.

[374] JS Silver 'Equality of Arms and the Adversarial Process: A New Constitutional Right' (1990) *Wisconsin Law Review* 1007 1035. In Hazard *Ethics in the Practice of Law* 121, it is indicated that one theory of adjudication in the adversary system is that 'party presentation [of evidence] will result in the best presentation, because each party is propelled into maximum effort in investigation and presentation by the prospect of victory; in contrast, a judge-interrogator [which in a most basic sense, essentially characterises the inquisitorial system] is only interested in getting through the day and through his caseload.' In RA Posner 'An Economic Approach to the Law of Evidence' (1999) 51 *Stanford Law Review* 1477 1492, it is argued 'how competition might conduce to optimal evidence gathering': 'It might do this not only by inducing greater efforts by each side to find supporting evidence but also by inducing greater efforts to find the flaws in the other side's evidence.' See also Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 26, where it is observed: 'The adversary system is extolled not only because of the protection it accords the accused, but also because its competitive style of presenting evidence and argument is thought to produce a more accurate result than an "inquisitorial" alternative, where the judge monopolizes proof-taking. According to this view, the judge who conducts an apparently nonpartisan inquiry cannot truly keep an open mind and lacks sufficient incentives to do a proper job.' See too Zacharias (1991) *Vanderbilt Law Review* 53-54, n 36, where it is noted that in the adversary system 'the assumption is that aggressive, competitive lawyering, guided exclusively by client interests, produces appropriate results. This emphasis on adversary process stems initially from the view that legal combat is the best method for arriving at truth.' 'Arguably, the adversary system parallels the methodology of hard science, in which scientists expose their conclusions to peers who attempt to discredit the findings. A point-counterpoint process ferrets out erroneous positions and keeps the proponents of a theory on their toes.' Similarly, in MH Freedman 'Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course' (1968) 21 *Journal of Legal Education* 569 570, the following observation is made: 'The adversary system presupposes that the most effective means of determining truth is by placing upon a skilled advocate for each side the responsibility for investigating and presenting the facts from a partisan perspective. Thus, the likelihood is maximized that all relevant facts will be ferreted out and placed before the ultimate fact-finder in as persuasive a manner as possible.' See also MH Freedman *Lawyers' Ethics in an Adversary System* (1975) 3-4.

[375] Luban is University Professor and Professor of Law and Philosophy at Georgetown University.

[376] D Luban 'The Adversary System Excuse' in D Luban (ed) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1983) 83 96.

leaving the truth of the matter, 'there is no earthly reason to think this is so; they may simply pile up the confusion.'[377] Mirjan Damaška points out in this regard that 'fact-finding difficulties' arise from 'the method of introducing evidence in two clashing cases, each presented in the most favorable light', where '[t]he role of rhetorical argumentation increases, skillful cross-examination reduces the credibility of almost any testimony, and the identification of uncontroversial propositions is made harder.'[378] Other commentators also observe that the common and traditional assumption within adversarial culture that real equality of the parties and the dialectical process of persuasion involved in courtroom procedure will somehow lead to truth emerging, in other words that partisan manipulation of evidentiary materials, even under equality of arms, can put an independent and impartial judge in a position to determine truth, is 'at best unproven, and at worst highly implausible.'[379] Research suggests that although in 'evenly balanced cases adversarial process is better at establishing facts and combating internal and external bias', in 'uneven cases the impact of evidence is distorted, making a weak case appear stronger than it is.'[380] It is not inconceivable therefore that in the accusatory system the prosecutor's skill, or better performance on the part of the prosecutor, can result in the conviction of an innocent accused,[381] which is more likely where the accused is unrepresented or has inefficient or inept defence counsel. It is felt that this reality 'is consistent with the core of the adversary process: advocates are meant to do their best.'[382] Guilty verdicts, it is said, can represent not only the cumulative effect of the strength of the evidence, but also 'the persuasiveness of the prosecutor's presentation throughout the trial.'[383]

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[377] *Ibid* 94. See also G Goodpaster 'On the Theory of American Adversary Criminal Trial' (1987) 78 *The Journal of Criminal Law and Criminology* 118 124, noting that there is no empirical evidence indicating that 'the truth might emerge if the mutual and misleading distortions of the two equally matched and similarly purposed adversaries annihilated each other, like a collision of particles in a cyclotron, leaving historical fact behind as a trace particle.'

[378] Damaška (1998) *Hastings Law Journal* 306.

[379] Jörg, Field & Brants 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe* 42-43; McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 63. However, in Herrmann (1978) *SACC* 15, it is argued that: 'In England, in many American courts of today, and also in other countries the adversary trial is an orderly search for the truth.'

[380] McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 63, with reference to the empirical research on seeking and transmitting facts discussed in J Thibaut & L Walker *Procedural Justice: A Psychological Analysis* (1975) 28-40.

[381] See Zacharias (1991) *Vanderbilt Law Review* 52, n 27: 'The prosecutor's skill at any stage of the proceedings may contribute to the conviction of an innocent defendant.'

[382] *Ibid* 52.

[383] *Ibid* 52 n 27.

The distinguished American legal philosopher and legal realist, Jerome Frank, opined that 'unquestionably' the view that the best way for a court to discover the facts in a case is to have each side to the dispute strive as hard as it can, in a keenly partisan spirit, to bring to the court's attention the evidence favourable to that side, 'contains a core of good sense.'[384] Frank explained that:[385]

> The zealously partisan lawyers sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked. Apart from the fact element of the case, the opposed lawyers also illuminate for the court niceties of the legal rules which the judge might otherwise not perceive. The "fight" theory, therefore, has invaluable qualities with which we cannot afford to dispense.

'But frequently', Frank noted, 'the partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it.'[386] Frank then proceeded to demonstrate how, as he put it, 'the fighting spirit' in adversarial courtroom procedure has been allowed 'to become dangerously excessive.'[387] The author observed, for instance, that '[t]his is perhaps most obvious in the handling of witnesses',[388] and amplified the point *inter alia* as follows, with reference to several commentators:[389]

> In a book by Henry Taft… we are told: "Counsel and court find it necessary through examination and instruction to induce a witness to abandon for an hour or two his habitual method of thought and expression, and conform to the rigid ceremonialism of court procedure. It is not strange that frequently truthful witnesses are... misunderstood, that they nervously react in such a way as to create the impression that they are either evading or intentionally falsifying. It is interesting to account for some of the things that witnesses do under such circumstances. An honest witness testifies on direct examination. He answers questions promptly and candidly and makes a good impression. On cross-examination, his attitude changes. He suspects that traps are being laid for him. He hesitates; he ponders the answer to a simple question; he seems to 'spar' for time by asking that questions be repeated; perhaps he protests that counsel is not fair; he may even appeal to the court for protection. Altogether the contrast with his attitude on direct examination is obvious; and he creates the impression that he is evading or withholding." Yet on testimony thus elicited courts every day reach decisions affecting the lives and fortunes of citizens.

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[384] Frank *Courts on Trial* 80. See also RW Millar 'The Formative Principles of Civil Procedure – I' (1923) 18 *Illinois Law Review* 1 16, where it is likewise remarked that the interested 'striving of two contending parties is, in the long run, an infinitely better agency for the ascertainment of truth' than any species of inquisitorial inquiry.
[385] Frank *Courts on Trial* 80-81.
[386] *Ibid* 81.
[387] *Ibid* 81.
[388] *Ibid* 81.
[389] *Ibid* 81-83.

What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony. If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book *Hints On The Trial of a Law Suit* (a book endorsed by the great Wigmore), in writing of the "truthful, honest, over-cautious" witness, tells how "a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness." The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest "adverse" witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury. "You may," writes Harris, "sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again." Taft says that a clever cross-examiner, dealing with an honest but egotistic witness, will "deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him 'hang himself.' And thus," adds Taft, "it may happen that not only is the value of his testimony lost, but the side which produces him suffers for seeking aid from such a source" - although, I would add, that may be the only source of evidence of a fact on which the decision will turn.

"An intimidating manner in putting questions," writes Wigmore, "may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value." … [Truths of a witness for one side 'must be turned into falsehoods' by counsel for the other side, so that the witness may be falsely shamed] … [R]eferring to this manner of handling witnesses, Sir Frederic Eggleston recently said that it prevents lawyers from inducing persons who know important facts from disclosing them to lawyers for litigants. He notes, too, that "the terrors of cross-examination are such that a party can often force a settlement by letting it be known that a certain... counsel has been retained."

The lawyer not only seeks to descredit [sic] adverse witnesses but also to hide the defects of witnesses who testify favorably to his client. If, when interviewing such a witness before trial, the lawyer notes that the witness has mannerisms, demeanor-traits, which might discredit him, the lawyer teaches him how to cover up those traits when testifying: He educates the irritable witness to conceal his irritability, the cocksure witness to subdue his cocksureness. In that way, the trial court is denied the benefit of observing the witness's actual normal demeanor, and thus prevented from sizing up the witness accurately.

Frank also pointed out that cross-examination may be deliberately calculated to confuse an otherwise truthful witness so as to give rise to material errors and omissions; '[i]f an "adverse," honest witness, on cross-examination, makes seemingly inconsistent statements, the cross-examiner [may try] to keep the witness from explaining away the apparent inconsistencies'; a main preoccupation of counsel in cross-examination is to avoid introducing evidence that will harm his or her case – to avoid perhaps eliciting damaging truth from a witness which opposing counsel who called the witness could not bring out (for example, due to an exclusionary rule); a lawyer will not concede the existence of any facts if they are inimical to his or her client and he or she thinks they cannot be proved by his or her adversary; counsel may attempt to prevent exposure of any inaccuracy where a witness testifies inaccurately but favourably to his or her client.[390] The import of all this, according to Frank, is that the lawyer in the adversary system 'aims at victory, at winning in the fight, not at aiding the court to discover the facts.'[391] He or she does not want the trial court to reach a sound verdict, if it is likely to be contrary to his or her client's interests.[392] Frank thus concluded that the adversarial trial method is 'equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.'[393]

Frank remarked further on how trial witnesses may succumb to partisan interests in the adversary system:[394]

> But much inaccurate testimony, not to be classified as perjurious, results from a practice that is not dishonest: Every sensible lawyer, before a trial, interviews most of the witnesses. No matter how scrupulous the lawyer, a witness, when thus interviewed, often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed. So we have inadvertent but innocent witness-coaching. The line, however, between intentional and inadvertent grooming of witnesses cannot easily be drawn. Now, according to many lawyers of wide experience, the contentious method of trying cases augments the tendency of witnesses to mold [or tailor] their memories to assist one of the litigants, because the partisan nature of trials tends to

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[390] *Ibid* 81, 83-84. In JR Spencer 'Evidence' in M Delmas-Marty & JR Spencer (eds) *European Criminal Procedures* (2005) 594 629, it is similarly stated that the drawback with examination and cross-examination by the parties 'is that it can easily distort the evidence, because the people who ask the questions do so in the hope of obtaining answers that fit the case they are putting forward.'
[391] Frank *Courts on Trial* 85.
[392] *Ibid* 85.
[393] *Ibid* 85.
[394] *Ibid* 86.

> make partisans of the witnesses. They come to regard themselves, not as aids in an investigation bent on discovering the truth, not as aids to the court, but as the "plaintiff's witnesses" or the "defendant's witnesses." They become soldiers in a war, cease to be neutrals.[395]

The author noted, moreover, with regard to drawbacks of binary adversariness:[396]

> "I do not think I am exaggerating," wrote Eggleston…, after a resume of the ways of trial lawyers and trial courts, "when I say that the evidence contains only kaleidoscopic fragments of the facts. It is as if a checker of light and dark patches were held over reality. All that gets down in the record is that seen through the light patches. It is quite clear," he continues, "that reality does not survive in the process of analysis to which" the contending lawyers "submit it from opposite poles. Cases are won by the exercise of the last degree of ingenuity, and this marginal utility makes the contest highly artificial.

Frank claimed that the 'contentious trial method', or as he also put it, 'the excessive fighting method of trials', survives 'partially' because of what Wigmore termed the 'sporting theory of justice', which 'lower[s] the system of administering justice and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance', where 'lawyers use evidence "as one plays a trump card, or draws to three aces, or holds back a good horse till the home-stretch"'.[397] Frank suggested it can also be perpetuated, both in civil and criminal cases, by 'the belief in uncontrolled competition, of unbridled individualism', that is, to 'extreme laissez-faire'.[398] Frank commented that the 'fight' theory of adversarial justice 'is a sort of legal laissez-faire',[399] and that '[i]t assumes a "litigious man."'[400] The implication of this, according to Frank, is as follows:[401]

> It assumes that, in a law suit, each litigious man, in the court-room competitive strife, will, through his lawyer, intelligently and energetically try to use the evidential resources to bring

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[395] For similar instructive observations on how evidence is distorted or the discovery of truth is hampered in the handling of witnesses in the adversary system, see Damaška (1975) *University of Pennsylvania Law Review* 1093-1094 (as considered above).

In Damaška *Evidence Law Adrift* 78, it is observed with regard to the inquisitorial trial model, that considering that the greater involvement of the Continental court in adducing evidence or fact-finding reduces the bipolar tensions of adversarial factual inquiries (which is characterised by party polarisation of means of proof), 'the means of proof can more easily be conceived as repositories of neutral information than is the case in the far more competitive setting of the Anglo-American trial.' For this reason, it can be said, as Damaška puts it (*ibid* 80):

> 'Where greater judicial involvement in fact-finding activities reduces adversary tensions, the threat of one-sided distortions of information appears less immediate, and the need to subject means of proof to testing becomes less compelling.'

[396] Frank *Courts on Trial* 86.

[397] *Ibid* 91.

[398] *Ibid* 92.

[399] *Ibid* 92.

[400] *Ibid* 92.

[401] *Ibid* 92.

> out the evidence favorable to him and unfavorable to his court-room competitor; that thereby the trial court will obtain all the available relevant evidence; and that thus, in a socially beneficial way, the court will apply the social policies embodied in the legal rules to the actual facts, avoiding the application of those rules to a mistaken version of the facts. Legal laissez-faire theory therefore assumes that the government can safely rely on the "individual enterprise" of individual litigants to ensure that court-orders will be grounded on all the practically attainable relevant facts.[402]

However, Frank cautioned that 'observation of court-room realities shows that the postulates of legal laissez-faire are insufficient as exclusive postulates', and added in this regard:[403]

> We should retain what there is of value in the fighting theory of justice, eliminating what is socially harmful. We should retain, I repeat, so much of "individual initiative" in the trial of cases as serves to bring out evidence that might be overlooked and the niceties of legal rules a court might otherwise ignore. But the fight should not so dominate a law-suit that it leads to the non-discovery of important evidence and the distortion of testimony.

Frank also remarked that '[t]he fighting theory has, in part, broken down', through the process of the disclosure of evidence in the possession of a litigant to the adversary party before trial, and that in so doing, we have 'advanced towards effectuating the "truth" theory.'[404] The author pointed out that there have been other advances to this end, 'such as increased insistence on the power and right of the trial judge to take a hand in examining witnesses, and even to summon witnesses of whom he is aware and whom neither litigant has called', and possibly to 'interfere' in the examination of witnesses so as to 'correct patent errors, misconceptions or misrepresentations', although there would seem to have been disagreement amongst judges in the latter regard.[405] Frank argued, nonetheless, that:[406]

> [E]ven if the judge does "interfere," and even if "discovery" procedure is open, the trial court may fail to learn of crucial evidence. Partly this may be due to the incompetence of the lawyer for one side. For lack of means to retain an able lawyer, the impecunious litigant may here be singularly disadvantaged… Apart from failure to bring out the evidence, the mistakes of a man's lawyer may cause him to lose his case - a proper result under strict legal laissez-

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[402] See also in this regard Landsman *Readings on Adversarial Justice* 28, where it is remarked that party control in adversarial process yields the following benefit besides judicial neutrality: 'Psychological experiments have indicated that when parties in an adversary system find themselves at a factual disadvantage, they will expend significant effort to improve their position. This tends to bring the proof presented at trial into balance and to ensure a decision based upon more complete information than would otherwise be the case.' (Footnote omitted).

[403] Frank *Courts on Trial* 92-93 (footnote omitted).

[404] *Ibid* 93.

[405] *Ibid* 93.

[406] *Ibid* 93-94.

faire theory. But is it fair that a litigant should be punished because he retained an incompetent lawyer?

Similarly to Frank and Mirjan Damaška,[407] Roger C Park[408] draws attention *inter alia* to the following shortcomings in relation to adversarial influences on the interrogation of trial witnesses, particularly with regard to adversarial cross-examination and its impact on the discovery of truth:[409]

- Most contemporary lawyers and trial advocate teachers recognize and try to follow the precepts of not asking questions unless the answer is known, not asking witnesses to explain, maintaining control, and taking no risks… It seems obvious that the low-risk precepts of adversarial cross-examination have their costs. Tantalizing bits of information go unpursued, even if they might shed some light on the case. Clarifying questions are not asked for fear that they will backfire. Any time that the cross-examiner fails to ask a relevant question because he fears backfire, or the direct examiner does not ask the question for the same reason (or because she knows the answer but doesn't like it) the adversarial climate has obstructed the search for truth.[410]
- In comparing adversarial cross-examination with interrogation by a neutral in a non-adversarial setting, then it should be borne in mind that the adversarial setting contributes to the concealment of information. Lawyers prepare the witness for direct examination and rehearse them. This facilitates the slanting of testimony so that it reveals information helpful to the proponent while concealing information helpful to the cross-examiner. If adversarial cross-examination were replaced by a system of neutral investigation and interrogation, under which lawyers did not prepare witnesses for testimony, the concessions might come more freely. In fact, it might be wrong to even call them "concessions," since non-party witnesses would be less likely to become aligned with parties. The system in which witnesses are prepared and called by parties creates subtle incentives for otherwise neutral witnesses to be part of the team.[411]
- One of the principal costs of cross-examination is witness vexation. Lawyers ask witnesses embarrassing questions. Sometimes the questions contain assertions that are not true or that, though true, hurt the witness without much advancing the cause of truth-finding. Abuses are not entirely prevented by the requirement that the cross-examiner have a good faith basis for the question or by protections against inflammatory or prejudicial questions… Some lawyers ignore these rules and get away with it; in any

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[407] See, for instance, the comments in Damaška (1975) *University of Pennsylvania Law Review* 1093-1094.

[408] Professor of Law and James Edgar Hervey Chair in Litigation at the University of California, Hastings College of the Law.

[409] RC Park 'Adversarial Influences on the Interrogation of Trial Witnesses' in PJ van Koppen & SD Penrod (eds) *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2003) 131.

[410] *Ibid* 142-143.

[411] *Ibid* 152-153.

> event, a good faith basis is not a requirement that the fact be more probable than not… It seems likely… that the attack on cross-examination is more harmful to vulnerable witnesses than an attack by other means would be. Moreover, even gentle and appropriate questioning may be harmful to vulnerable witnesses, for example children who have been subjected to sex abuse. And otherwise appropriate techniques may sometimes lead to mistaken verdicts, as where a lawyer defeats a witness in cross-examination while knowing that the witness is truthful (though it appears that the same thing might happen without cross-examination, for example where the impeachment takes the form of evidence about prior convictions of the witness). Cross-examination, because it is feared, can also cause witnesses to stay away from the courtroom where they can, in one way or another, avoid testifying… Just as cross-examination deters falsehoods, it can also deter truthful testimony because of a fear of its ordeal.[412]

In some respects, pre-trial consultations between counsel and prospective witnesses may of course promote the discovery of truth.[413] 'It is essential for a lawyer, in his or her capacity as an investigator, to discover all the information, positive and negative,

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[412] *Ibid* 163-164 (footnote omitted). See also McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 59, where the opinion is expressed that: 'Cross-examination is an extraordinarily oppressive way to challenge witness testimony, even when it is ostensibly polite and low-key. Frequently the questions are designed to confuse or humiliate witnesses by enmeshing them in minutiae of marginal or no relevance.' See too Menkel-Meadow (1996) *William and Mary Law Review* 21-22 (the truth can be distorted 'by making the true look false' through the cross-examination of a truthful witness); ML Schwartz 'On Making the True Look False and the False Look True' (1988) 41 *Southwestern Law Journal* 1135 1140 (impugning or negating the truthful testimony of a witness in cross-examination interferes with the truth-ascertainment objective of a trial). In Eggleston (1975) *The Australian Law Journal* 431, it is demonstrated how the truth in the adversary system is undermined by an honest witness being disbelieved because the cross-examiner manages 'to implant the impression that the witness was not being frank' or traps the witness into telling a lie.

Of course, a party has a duty to cross-examine a witness on aspects of his or her evidence which are disputed. If it is intended to argue that the evidence of a witness should be rejected, the witness should be cross-examined so as to afford him or her an opportunity of answering the matters supposedly adverse to him or her. It is a precept of fairness, and indeed a cornerstone of the administration of justice, that counsel should put his or her case to witnesses for the other side so as to afford them the opportunity of responding or commenting thereon. – see Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-82-22-82A. The South African constitutional right to a fair trial guarantees the right to adduce and challenge evidence (section 35(3)(*i*) of the Constitution). This includes the right to cross-examine – see *S v Msimango and Another* 2010 1 SACR 544 (GSJ) paras 27-28. 'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.' - *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC) para 61.

It would also be proper to cross-examine an honest witness to test the reliability or level of certainty of the witness especially in relation to sensory perceptions (sight, hearing), ie the powers of observation of the witness – see AK Pye 'The Role of Counsel in the Suppression of Truth' (1978) *Duke Law Journal* 921 944; Schwartz (1988) *Southwestern Law Journal* 1143, 1145.

[413] BA Green '"The Whole Truth?": How Rules of Evidence make Lawyers Deceitful' (1992) 25 *Loyola of Los Angeles Law Review* 699 705.

that bears on his or her client's cause. Moreover, the lawyer's questions may bring to light significant information that was previously forgotten and cause the witness to clarify the basis of his or her knowledge.'[414] However, 'witness preparation may do more to *undermine* than to promote the discovery of truth.'[415] Counsel can 'carefully craft and rehearse the testimony of witnesses before calling them to the stand.'[416] In preparing witnesses for trial counsel can 'shape both the content and style of witnesses' testimony.'[417] 'For example, by apprising their witnesses of the law relevant to the case and of the statements made by others, as well as by asking questions in a suggestive manner, lawyers cause witnesses to recall things differently from how they originally perceived them; by rehearsing their witnesses' testimony, lawyers make witnesses inordinately certain of the quality of their recollections; by moulding the personality of their witnesses, lawyers make them more believable than they would ordinarily appear.'[418] 'Many commentators have observed that extensive rehearsal may cause witnesses to give less accurate accounts of what they originally perceived while, at the same time, making it more difficult for opposing counsel to expose inaccuracies through cross-examination.'[419] In sum, witness preparation by counsel can give rise to 'the subtle transmutation of testimony by means of psychological suggestion' and 'the subornation of perjury.'[420]

Besides witnesses being coached by the parties or being 'over-prepared' and a witness being 'inept', for example, where the witness may be truthful, but fearful, and therefore very vulnerable on cross-examination, further 'evidence distortions'

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[414] *Ibid* 705. In MR Gorsky 'The adversary system' in R Bronaugh (ed) *Philosophical Law: Authority, Equality, Adjudication, Privacy* (1978) 127 133-134, it is pointed out that it is advisable that counsel should interview a prospective witness and review with him or her the evidence that the witness intends to give at trial. The witness during such preparation should be acquainted with the kinds of questions he or she can expect to be asked in examination-in-chief and in cross-examination. When such a practice is omitted or too little time is devoted to it, the witness' evidence in court may fail to convey the version of the facts the party calling such witness had reason to anticipate would be forthcoming. A failure to prepare a witness may prevent the bringing of either the true facts or the party's honestly held version of the facts before court, and can give rise to inept counsel. The hazards of skimping on preparation cannot therefore be over-emphasised.

Gorsky, however, shows that financial strictures and the time-consuming and arduous nature of proper preparation by counsel of witnesses, as well as a heavy case load, can pose difficulties for counsel to adequately prepare his or her case, which in turn may impede or undermine the process of obtaining and adducing relevant evidence. (*Ibid* 134-137).

[415] Green (1992) *Loyola of Los Angeles Law Review* 705 (author's emphasis).

[416] *Ibid* 704.

[417] *Ibid* 704.

[418] *Ibid* 704-705.

[419] *Ibid* 705. See also Pollis (2016) *The George Washington Law Review* 66-67; Damaška (1975) *University of Pennsylvania Law Review* 1094.

[420] Landsman *Readings on Adversarial Justice* 28.

through the adversarial method have been identified: 1. a witness may be reluctant to testify or recalcitrant, and thus both parties may be hesitant to call such a witness for fear that the witness if called may not testify in accordance with what he or she previously stated; 2. there may be an unawareness of a potential witness because of a lack of 'independent', competent or thorough investigation; 3. there may be inequalities in expert witness production as a result of economics; and 4. counsel may be more inept than his or her opponent.[421]

It has also been said that '[e]very single accused lies.'[422] Although this may perhaps be an overstatement, it has been suggested that 'it is simply too much to expect of a human being, caught up in the criminal process and facing loss of liberty and the horrors of imprisonment, not to attempt to lie to avoid that penalty.'[423] Moreover, counsel appearing for an accused who pleads not guilty, would invariably be driven by partisan, individual self-interest in attempting to get the accused off, and would therefore try to frame and shape the evidence in the accused's favour whether or not such manipulation actually corresponds to what really happened or to the facts as counsel knows them.[424] It is difficult, however, to see how the truth (historical fact) can be uncovered where at least one party to the proceedings is actively seeking to hide the truth because it is damaging to his or her client.[425] Defence counsel must, within the established constraints upon professional behaviour, seek to maximise the likelihood that the accused will prevail.[426] It is self-evident that the adversary accused would be interested in winning, that is obtaining an acquittal, rather than in the discovery of truth.[427] Certainly, 'most' accused who go to trial in criminal cases 'are not desirous that the whole truth about the matters in controversy be exposed to scrutiny.'[428] It is a typical feature of the criminal process that at least one party has a vested interest in concealing the truth; this party (most often the accused) will thus not co-operate in the truth-finding process but try to obstruct it.[429]

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[421] Menkel-Meadow (1996) *William and Mary Law Review* 21 n 76, with reference to Gorsky 'The adversary system' in *Philosophical Law* 131-137.
[422] G Breytenbach *Rule of Law: A Memoir* (2017) 84.
[423] Freedman *Lawyers' Ethics in an Adversary System* 31.
[424] Goodpaster (1987) *The Journal of Criminal Law and Criminology* 124. The writer speaks generally of the adversary in the adversary system being interested in winning rather than discovery of the truth.
[425] *Ibid* 124.
[426] *Ibid* 124.
[427] *Ibid* 124.
[428] Frankel (1975) *University of Pennsylvania Law Review* 1037.
[429] Weigend (2003) *Harvard Journal of Law & Public Policy* 160.

'This is not to question the presumption of innocence or the prosecution's burden of proof beyond a reasonable doubt. In any particular case, because we are unwilling to incur more than a minimal risk of convicting the innocent, these bedrock principles must prevail.'[430] But '[t]he statistical fact remains that the preponderant majority of those brought to trial did substantially what they are charged with. While we undoubtedly convict some innocent people, a truth horrifying to confront, we also acquit a far larger number who are guilty, a fact we bear with much more equanimity.'[431] The advocate is plainly partisan; the advocate's prime loyalty is to his or her client, not to truth as such.[432] 'The advocate in the trial courtroom is not engaged much more than half the time - and then only coincidentally - in the search for truth.'[433] The long-standing sentiment still rings true that '"an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."'[434] Mirjan Damaška points out that courts seem to expect and tolerate behaviour on the part of defence counsel 'that has little, if any, relation to the search for the truth. To confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, is countenanced as an acceptable course for counsel to take.'[435] Damaška cites[436] as prevailing law on these points, the following remarks by Justice White in the United States Supreme Court case of *United States v Wade*, which leave one with a deep sense of unease:[437]

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent,

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[430] Frankel (1975) *University of Pennsylvania Law Review* 1037.

[431] *Ibid* 1037. See also CK Allen *Legal Duties and Other Essays in Jurisprudence* (1931) [Reprint Edition: 1977] 255: 'The magnanimous disposition of our law towards the accused is the more striking because it is perfectly well known to every intelligent person that the vast majority of accused persons are guilty of the crimes with which they are charged.'

See too Pye (1978) *Duke Law Journal* 927, where it is observed that anyone with experience in the criminal courts knows that many, if not most, accused brought to trial are guilty.

[432] Frankel (1975) *University of Pennsylvania Law Review* 1035.

[433] *Ibid* 1035.

[434] *Ibid* 1036, citing Lord Henry Brougham.

[435] Damaška *Evidence Law Adrift* 123.

[436] *Ibid* 123 n 97.

[437] 388 US 218 256-258 (1967) (footnotes omitted).

> our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

It follows from the adversary system that defence counsel may put a perjurious accused on the stand to testify and brutally cross-examine (or impeach) a witness known by counsel to be telling the truth.[438] It goes without saying, however, that the ascertainment of truth in this process is undermined.[439] Inasmuch as impeaching an honest witness distorts the truth,[440] exploiting evidence known to counsel to be incorrect or inaccurate does so too – it makes the false look true.[441] In both cases, counsel would be participating in misleading the finder of fact; counsel would be participating in an attempt to free a guilty accused.[442] Testing, then, the truth of the prosecution's case can simply be a 'euphemism' for defence counsel communicating 'the most vicious of lies.'[443] In many instances, defence counsel, if honest, would admit that an accused will win only if counsel is successful in preventing the truth from being disclosed.[444] '[I]t may well (and often will) be the case that the allegations made by the prosecution are consistent with the objective facts, at least in relevant

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[438] Freedman *Lawyers' Ethics in an Adversary System* 27-49. See also Luban 'The Adversary System Excuse' in *The Good Lawyer* 91.
[439] Schwartz (1988) *Southwestern Law Journal* 1140.
[440] *Ibid* 1140-1145.
[441] *Ibid* 1145-1146.
[442] Compare Freedman *Lawyers' Ethics in an Adversary System* 45.
[443] *Ibid* 45.
[444] Pye (1978) *Duke Law Journal* 928. The writer proceeds to use a hypothetical case to illustrate how defence counsel under the accusatorial system can suppress the truth in fulfilling his or her professional duty and by employing rules of evidence and procedure (*ibid* 928-934).

part, and that the defense is reduced to throwing smoke bombs in order to confuse [or obfuscate] matters. If that is the case, the innate tendency of the adversarial system to balance the competing versions will run the risk of diverting from the truth rather than establishing it.'[445] Professional ethics would require defence counsel to take instructions from an accused and act accordingly, irrespective of whether the truth would ultimately be advanced thereby or not. Nonetheless, 'there is a material difference between testing whether the version of an event testified to by a witness who is honestly attempting to describe what he perceived meets the normal standards of perception, narration and factors affecting veracity, on the one hand, and eliciting a direct falsehood from a witness by an attorney who knows the witness is lying, on the other. The former is justified by the interaction between the nature of the adversary system and the obligations of the state to prove guilt beyond a reasonable doubt by testimony that has met the test of cross-examination permitted by law. No similar justification exists for the latter.'[446] '[T]he adversary system itself does not demand active suppression of truth.'[447] The logical mind, starting from false premises, may unerringly arrive at a wrong conclusion.[448]

The determination of the truth in the adversarial trial may further be impeded by the discovery rule where disclosure of the prosecution's case without a reciprocal discovery from the defence, permits defence counsel to tailor and manipulate facts to its advantage.[449] Added to this, the privilege, and indeed constitutional rule,[450] against self-incrimination prevents the State from requiring the accused to testify and, thus, 'forecloses an important source of evidence for the prosecution.'[451] And as one commentator correctly notes, the prosecution's burden of proving guilt beyond a reasonable doubt is 'difficult to meet. In practical effect, the prosecution's failure to meet that burden may result in a guilty party's acquittal.'[452]

Contrast the position in the inquisitorial courtroom. As there is no requirement here that the prosecution must first establish a *prima facie* case against the accused

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[445] Weigend (2003) *Harvard Journal of Law & Public Policy* 159-160.
[446] Pye (1978) *Duke Law Journal* 958.
[447] Noonan Jr (1966) *Michigan Law Review* 1492.
[448] Pye (1978) *Duke Law Journal* 959. The ascertainment of truth should thus be an important fundamental value of the adversarial system of criminal justice.
[449] Goodpaster (1987) *The Journal of Criminal Law and Criminology* 123.
[450] Section 35(3)(*j*) of the Constitution: Every accused person has the right to a fair trial which includes the right 'not to be compelled to give self-incriminating evidence'.
[451] Goodpaster (1987) *The Journal of Criminal Law and Criminology* 123.
[452] *Ibid* 123.

before the defence introduces its evidence, there is no obstacle to beginning the proof-taking stage by the interrogation of the accused, which is in fact the rule in inquisitorial systems.[453] In inquisitorial systems, the accused 'is used as an evidentiary source before any other evidence has been examined at the trial.'[454] While the strategic value of this arrangement for the defence is a matter of some dispute, there is little doubt that it is advantageous to the prosecution.[455] At the beginning of the case the prosecutor can effectively sit back and expect that evidence damaging to the accused will come out of his or her interrogation. Also, the prosecutor may hope that the concocted story of a guilty accused will crumble in the light of testimony of subsequent witnesses.[456] The prosecutor in the common-law system, however, must, before he or she can hope to obtain incriminating evidence through the trial interrogation process of the accused, come forward with substantive proof of guilt by using items of evidence other than the accused's statements in court.[457]

It is clear from the afore-going considerations that litigants in the adversary system 'prefer victory to the truth and will systematically seek victory in derogation of the truth.'[458] The desire to win actuates or 'is the motivating consideration that prompts litigants to seek out, develop, and offer evidence and to bring relevant and persuasive legal doctrines and precedents to a decisionmaker's attention.'[459] While the role of the prosecutor in a criminal case is required to be different in that he or she 'is expected to seek justice',[460] even good prosecutors 'who strive to do the right

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[453] Damaška (1973) *University of Pennsylvania Law Review* 528-529.
[454] *Ibid* 529.
[455] *Ibid* 529.
[456] *Ibid* 529-530.
[457] *Ibid* 530.
[458] SA Saltzburg 'Lawyers, Clients, and the Adversary System' (1986) 37 *Mercer Law Review* 647 655-656.
[459] *Ibid* 656.
[460] *Ibid* 665. See also, for example, WP de Villiers 'Notes on the investigatory powers of the prosecution' (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*Journal of Contemporary Roman-Dutch Law*) 123 124, where, from a South African perspective, it is crisply noted that:

> 'The prosecution has a unique and special role. The accepted norms of seeking justice, doing justice, protecting the innocent and convicting the guilty are embedded in South African law… and in numerous other legal systems…
>
> The purpose of the prosecution is not to ensure a conviction but to ensure that justice is done. The prosecutor is the representative of the sovereignty, whose obligation is to govern impartially and whose interest is not that it shall win the case, but that justice shall be done. The prosecutor is therefore not in the position of an ordinary advocate'.

See too C Banks *Criminal Justice Ethics: Theory and Practice* 2 ed (2009) 115. Prosecutors are so-called 'ministers of justice' – see, for instance, *R v Stinchcombe* (1991) 68 CCC (3d) 1 (SCC) para 23

thing may discover that their quest to do justice suddenly conflicts with the rigorous demands of the adversary system. The temptation for a prosecutor to believe that his job is to win is always present for people trained in the adversarial ethic.'[461] For defence counsel, the desire to win may entail obfuscating the State's case, such as in the 'creation' of reasonable doubt.[462] One commentator observes that the ultimate purpose of the criminal trial in the common-law tradition is not to find facts or discover the truth, which is simply a means to an end, but to resolve a conflict between the State and the accused on the question of the accused's guilt, that is, to effectively restore the balance disturbed by the occurrence of a criminal offence.[463]

(Westlaw). 'The public prosecutor has a wider task than counsel or attorney for a client. He represents the State, the community at large and the interests of justice generally… The public prosecutor does not only represent the interests of the Crown, but he also has a duty towards the accused to see that an innocent person be not convicted. Thus it is his duty to disclose, in certain circumstances, facts harmful to his own case… The legal representative of a civil litigant is in a different position.' - *R v Riekert* 1954 4 SA 254 (SWA) 261D-F. As 'lawyer for the people' the prosecutor must ensure that justice is attained between the victim, the accused and the community, and the prosecutor must assist the trial court in arriving at a right verdict – see *S v Du Toit en Andere (2)* 2004 1 SACR 47 (T) 58*e-f*. In the High Court of Australia decision of *Mallard v The Queen* (2005) 224 CLR 125 para 82, Kirby J, in a concurring judgment, held:

> 'The obligation imposed by the law is to ensure a fair trial for the accused, remembering the special requirements that descend upon a prosecutor, who represents not an ordinary party but the organised community committed to the fair trial of criminal accusations and the avoidance of miscarriages of justice.'

The prosecutor is indeed not an ordinary litigant. The prosecutor appears for the State and as such represents 'the public' in the prosecution of crime - see, for instance, *S v Jaipal* 2005 1 SACR 215 (CC) para 29; *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) para 21; *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43. That this is so flows from the fact that, as is pointed out in Snyman *Criminal Law* 4 with respect to the distinction between a crime and a delict:

> '[A] crime is almost invariably injurious to the public interest, by which is meant, the interests of the state or the community, whereas a delict is ordinarily injurious only to private or individual interests. Whereas criminal law forms part of public law, the law of delict forms part of private law, and in particular of that part of private law which is known as the law of obligations. It is not for the person who has suffered harm or injury as a result of the commission of a crime to decide whether the offender should be criminally charged or not. The police may decide to proceed with a criminal charge even if the complainant begs them not to do so. In the case of a delict, on the other hand, it is up to the person who has suffered damage to decide whether to sue the wrongdoer for damages or not.' (Footnote omitted).

Moreover, as observed above, courts have found that a prosecutor stands in a special relation to the court as truth-seeker – see, for example, *S v Jija and Others* 1991 2 SA 52 (E) 68A; *S v Shaik and Others* supra para 67; *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 8; *Minister of Police and Another v Du Plessis* 2014 1 SACR 217 (SCA) para 28.

[461] Gershman (2001) *Georgetown Journal of Legal Ethics* 351.

[462] Menkel-Meadow (1996) *William and Mary Law Review* 13.

[463] Weigend (2003) *Harvard Journal of Law & Public Policy* 169. In Damaška *Evidence Law Adrift* 110, 122-123, it is said that criminal justice is also 'imagined as an engagement in dispute resolution', where there is 'inherent pressure' 'to neglect historic verity for the sake of achieving a result: "winning" the case.'

For a contrary view on the primary nature or aim of criminal procedure in an adversary system, see Zupančič (2003) *European Journal of Law Reform* 124, where it is noted that '[i]n criminal law… there is essentially no private conflict of interests, because the harm is considered done to society, morality, or some other non-palpable entity such as God, society's collective sentiments, ancestors, community as a whole, etc.' (Footnotes omitted). The issue of criminal guilt therefore

It may be that the adversary system is 'built on the theory that two halves (of the truth) make one whole, that the truth will appear like a bright streak of light born of the tension between opposite poles'; where it is assumed that the truth ideally is discovered by testing differing versions of the relevant facts through cross-examination of the respective proponents, each side striving to present the facts favourable to its case in the best light possible while disparaging the opponent's version, and where the neutral or impartial trier of fact 'needs only sit back and watch the spectacle unfold in order to be able to determine, when everything has been said and done, who is right and who is wrong.'[464] The adversary system is reliant 'on opposing parties coming forward with their competing versions of the truth, challenging each other's accuracy, and thereby ultimately bringing about a composite picture of (or approximating) the truth'.[465] The system assumes that, given the opportunity of parties to challenge each other's version, the truth will surface of its own accord.[466] But, as has been seen, the 'spectacular show' of searching for the whole truth and nothing but the truth 'cannot conceal the adversarial system's deficiencies with respect to truth-finding.'[467] Undoubtedly, 'the partisan approach to gathering and presenting evidence is attractive, but its attraction lies on the surface rather than in its effectiveness at finding the truth.'[468]

The truth is not necessarily served by self-interested adversaries rather than a 'disinterested investigation'. Take for example the murderer who out of self-interest

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'transcends the limits of the conflict between the parties'. (*Ibid* 125). In a criminal case, the prosecutor, for the State, prosecutes and the accused defends 'only because there is the question of criminal guilt that must be decided.' (*Ibid* 124-125). According to Zupančič:

> 'The issue does not arise from the conflict between the prosecutor and the defendant, neither does it arise from the more metaphysical conflict between the state and the defendant. The conflict, insofar as it exists at all is intended to serve as an artificial framework within which there will be proper finding of guilt or innocence.' (*Ibid* 125).

For Zupančič, then, '[p]rocedure and adjudication here do not serve either truth finding or conflict resolution: they serve constitutional protective purposes.' (*Ibid* 125). Adjudication is not a tool of truth finding. Truth finding in adjudication 'is merely an instrument toward conflict resolution.' (*Ibid* 125). If it is accepted that adjudication is 'a form of conflict resolution', criminal adjudication would 'not [be] the best example of this because the conflict there is somewhat contrived and artificial.' (*Ibid* 91).

[464] Weigend (2003) *Harvard Journal of Law & Public Policy* 159. In JH Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada* 3 ed (1940) Volume 5 § 1367, it is asserted that cross-examination 'is beyond any doubt the greatest legal engine ever invented for the discovery of truth.' However, as has been shown above, this assertion cannot be sustained, or at best, whether it is in fact correct 'cannot be answered with any assurance' – see Park 'Adversarial Influences on the Interrogation of Trial Witnesses' in *Adversarial versus Inquisitorial Justice* 166.

[465] Weigend (2003) *Harvard Journal of Law & Public Policy* 158.

[466] Roodt (2003) *Codicillus* 69.

[467] Weigend (2003) *Harvard Journal of Law & Public Policy* 159.

[468] *Ibid* 158.

lies about his whereabouts at the time the murder was committed in order to escape conviction; such would have to be the stance strenuously advanced by the accused's counsel.[469] The State's case would then be attacked on this basis, which would entail attempting to prevent the introduction of unfavourable evidence and undermine the credibility and reliability of State witnesses and setting unfavourable facts in a context in which their importance is minimised.

In the circumstances, the adversary system, in the words of one writer, 'does not lead to the discovery of "true" truth but of an artificially generated set of facts euphemistically called "procedural truth."'[470] A court judgment 'is not so much in the nature of a pronouncement on the true facts of the case; it is, rather, a decision *between* the parties.'[471] The adversary system is criticised for being 'a world of "make-believe" where relevant evidence may not be presented, counter evidence may not be made known and contradictions are left unresolved.'[472] This common-law phenomenon simply exacerbates the anomaly of the trier of fact having to accept responsibility for a judgment while at the mercy of the information supplied by the parties,[473] many of whom show a lack of commitment to truth.

Moreover, the polarity of 'two partisan searchlights' on the facts, characteristic of the adversarial trial, created by the two opposing evidentiary cases (or versions), prevents a more diffuse light being cast on the facts of the case as found in inquisitorial systems where witnesses are allowed more freedom to narrate what they know and to explain themselves (the so-called 'natural legato' of testimony) than under the Anglo-American technique of direct and cross-examination.[474] Where under the adversary system the flow of testimony by witnesses is punctured by

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469 Luban 'The Adversary System Excuse' in *The Good Lawyer* 97.

470 Weigend (2003) *Harvard Journal of Law & Public Policy* 160.

471 Damaška (1973) *University of Pennsylvania Law Review* 581-582 (author's emphasis).

472 JD Jackson 'Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry' in A Duff, L Farmer, S Marshall & V Tadros (eds) *The Trial on Trial: Volume 1: Truth and Due Process* (2004) 121 123.

473 In Damaška *Evidence Law Adrift* 91, it is observed that the notion that an adjudicator should accept responsibility for a judgment which is dependent on the evidence presented by the parties bruises deeply ingrained inquisitorial legal sensibilities, in terms whereof the active participation of the trial judge in proof-taking is perceived as flowing from his or her responsibility for a correct decision – 'the truth'.

474 *Ibid* 92-93. The writer points out that in inquisitorial systems, witnesses are invited first by the court to present a narrative account before they are questioned by the judge and the parties. (*Ibid* 93). The division of proof-taking into two evidentiary versions is unknown in such systems: 'proof-taking is always structured as a single integrated inquiry presided over by the bench.' (*Ibid* 93). The writer furthermore argues that the splitting or fission of proof-taking into two evidentiary cases 'is by itself a major cause of deviation from normal modes of transmitting information' found outside the courtroom. (*Ibid* 91-92).

questions by the parties that are aimed at eliciting only such information that is favourable to their cause of action (the so-called 'staccato' effect), such compounds the kaleidoscopic fragmentation of informational input.[475] Witnesses in adversarial trials 'are not allowed to express themselves freely, but have to give their evidence while contending with the rigid control, and, sometimes, downright cruelty, of the examining advocate.'[476]

Jenny McEwan observes that '[a] hallmark of the adversarial trial is that it is the parties who determine which issues will be tried and what evidence the court will hear',[477] and that truth may be 'subservient' to such procedural autonomy of the litigants.[478] According to McEwan, 'it may be that the more a community identifies itself with "liberty, egalitarianism, individualism, populism and laissez-faire" the more aggressively adversarial it will expect its procedures to be – irrespective of their suitability for the pursuit of the truth.'[479] 'In other words', says the writer, 'if a trial is perceived to be fair in the light of the prevailing culture of the society within which it takes place, less attention may be paid to the matter of whether questioning styles hinder witnesses from expressing themselves, or even whether the prospect of hostile treatment deters potential witnesses from testifying at all.'[480]

In addition to these factors, it has been noted that rules of evidence and procedure 'constitute another impediment to a full presentation of the facts.'[481] Whereas the concept of 'truth' in a criminal case could be understood to refer to maximum correspondence between a guilt judgment and the culpable conduct which the accused allegedly committed, judicial officers must find and tell such 'judicial' or 'legal' truth in their decisions.[482] But they must do so 'within the confines of the rules of procedure and evidence.'[483] As one writer puts it:[484]

> The trial is not a process of determining moral culpability according to abstract principles of justice. It is a procedure to determine legal guilt in accordance with existing provisions of law. Counsel takes the law as he finds it. The law requires the state to prove guilt beyond a

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475 *Ibid* 92.
476 McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 59.
477 *Ibid* 56.
478 *Ibid* 58.
479 *Ibid* 60 (footnote omitted).
480 *Ibid* 60.
481 Devlin *The Judge* 62. See also Roodt (2003) *Codicillus* 69; Erasmus (2015) *Stellenbosch Law Review* 664; Landsman *Readings on Adversarial Justice* 26, 29-30.
482 Roodt (2003) *Codicillus* 69.
483 *Ibid* 69.
484 Pye (1978) *Duke Law Journal* 941.

> reasonable doubt by competent evidence. Counsel has a right, and indeed a duty, to insist that guilt be determined according to that law.

Many of the rules of evidence owe their existence to the structural demands of the adversarial system and 'are incompatible with the uncovering of the truth.'[485] Mirjan Damaška explains in this regard that:[486]

> [T]he adversary system in its modern variant is inspired to a great extent by an attitude of distrust of public officials and its complementary demand for safeguards against abuse. Accordingly, the adversary system is quite tolerant of evidentiary barriers limiting the search for the truth for fear of abuse of governmental power. Moreover, it does not view as unnatural the use of the criminal process itself "as the appropriate forum for correcting its own abuses," thus making possible the reversal of "substantively" just decisions on "technical-procedural" grounds. It stands to reason that as a result of greater hospitality toward such ideas, the factfinding potential of the system must somehow be decreased. Concern to establish the "real truth" has serious competitors in "collateral" considerations under the adversary system; guilt and innocence are not paramount.
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> By contrast, the ideology supporting modern non-adversary procedure, be it in the "family" or some other variant, while not ignoring the potential danger of abuse, exhibits much less distrust of police, prosecutors, judges, and public officials in general. Accordingly, many procedural safeguards and technical rules, acceptable to the ideology of adversary procedure, are dismissed as unjustified loopholes, "unnecessary obstacles of pedant legal etiquette," or impermissible injections of collateral issues into the search for guilt or innocence.
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> Assume, furthermore, that a general mood of skepticism permeates the ideology of adversary procedure. This skepticism would then relate not only to the possibility of establishing the truth, but also to the "morality and utility of the criminal sanction." If there is a measure of truth in this and similar contentions, then there are other factors rendering the adversary ideology more tolerant of restraints on the search for the truth, or, in other words, *more committed to the pursuit of other values*.

A prime example of a rule of evidence that is moulded by adversarial proceedings, where the parties are in control of the investigation and presentation of evidence and the presiding officer assumes a relatively passive role, is the hearsay rule.[487] PJ Schwikkard amplifies the rationale for the hearsay rule in adversarial process thus:[488]

> The dominant and partisan role of the parties in adversarial proceedings increases the possibility of misleading evidence being introduced. Consequently, there needs to be an immediate mechanism for testing evidence and this mechanism is cross-examination. It is

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485 McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 65-66.
486 Damaška (1973) *University of Pennsylvania Law Review* 583-584 (footnotes omitted) (my emphasis). For similar observations, see Damaška (1998) *Hastings Law Journal* 305.
487 Schwikkard 'Hearsay' in *Principles of Evidence* 288 (para 13 2 1).
488 *Ibid* 288-289 (para 13 2 1) (footnotes omitted).

> the absence of the opportunity to cross-examine the declarant on whom the probative value of the evidence depends which makes hearsay potentially unreliable in common-law systems.
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> In adversarial systems adjudication takes place at a relatively concentrated trial where the principle of orality guides the presentation of evidence. The presentation of hearsay evidence is frequently something of a "surprise" for the person against whom it is sought to be admitted and there is no time to locate or prepare a basis of challenging the credibility of the hearsay declarant.
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> The principle of orality is directly related to a belief underlying the adversarial system that an adjudicator is best able to make accurate decisions of fact where the witness upon whom the probative value of the evidence depends, testifies in open court. A witness who testifies in open court does so in circumstances in which the solemnity of proceedings is reinforced by potential liability for perjury. The presence of the party against whom the testimony is given also encourages circumspection on the part of the witness. The court's ability to observe the witness's demeanour contributes to a more reliable assessment of credibility. However, the central objection is embedded in a belief in the effectiveness of the adversarial mechanism for truth finding – cross-examination. When hearsay evidence is admitted these advantages of testifying in open court are lost. Consequently the "four 'dangers' of faulty perception, erroneous memory, insincerity, and ambiguity in narration" are inherent in the admission of hearsay.

Mirjan Damaška similarly notes that the common law rule against hearsay evidence stems from the inability to cross-examine the original declarant of such evidence (ie the person upon whose credibility the probative value or reliability of such evidence depends), where cross-examination is vitally important in adversarial process to test or challenge biased, selective and potentially misleading or untrustworthy evidence presented by a party in his or her favour and which is consequently damaging to the opponent's case.[489] The fact that 'a skillfully executed cross-examination, by raising at least some credibility questions, can decrease the value of almost any testimony and may tip the balance of advantage in a close case', reinforces the common law's 'malaise' about hearsay.[490] Thus, 'the common law's hostility toward hearsay is not predicated on purely epistemic concerns: it also springs from *principles of fairness that are applicable to a competitive fact-finding scheme*.'[491]

Similar considerations, however, do not apply in inquisitorial process where hearsay witnesses are less readily associated with the litigants; indeed, where the threat of one-sided distortions of information appears less immediate because the

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[489] Damaška *Evidence Law Adrift* 79-80. The writer demonstrates how difficult it is to test effectively a witness who merely repeats an extra-judicial statement. (*Ibid* 80).
[490] *Ibid* 80.
[491] *Ibid* 80 (my emphasis).

judicial officer is involved in fact-finding activities which reduces adversary tensions, and where the need to subject means of proof to testing accordingly becomes less compelling.[492] The inability to subject the original declarant of hearsay to courtroom testing is less of a drawback in a system where the judge, instead of partisan adversaries, is in control of proof-taking: 'the original declarant is less likely to be regarded as an "out of court enemy" of the opponent of hearsay evidence.'[493]

Another truth-limiting rule of evidence or procedural or constitutional rule which arguably features more prominently or strongly in adversarial systems, is the privilege against self-incrimination.[494] 'In modern law the rationale for retaining the privilege against self-incrimination probably remains founded in public revulsion to the idea that a person should be compelled to give evidence that will expose her to the risk of criminal punishment.'[495] But it is the accusatory system of criminal justice which demands that the prosecution seeking to punish an accused must produce the evidence against him or her by its own independent labours, rather than by the 'simple expedient' of compelling it from the accused's own mouth.[496] The accused in the accusatory system 'has no obligation to assist the prosecution and is entitled to assume a purely adversarial role [or attitude] toward the prosecution.'[497] The values inherent in the accusatory system are reflected in the requirements that the State must bear both the burden of proving the accused's guilt and the burden of going forward as well as in the accused's privilege against self-incrimination.[498] It has been seen, however, that in inquisitorial systems the accused 'is used as an evidentiary source before any other evidence has been examined at the trial', which is to the advantage of the prosecution.[499]

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[492] *Ibid* 80-81.
[493] *Ibid* 81.
[494] Damaška (1973) *University of Pennsylvania Law Review* 526-530.
[495] PJ Schwikkard 'Private Privilege' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 133 135 (para 10 2 1).
[496] *Miranda v Arizona* 384 US 436 460 (1966).
[497] *R v Stinchcombe* (1991) 68 CCC (3d) 1 (SCC) para 12 (Westlaw). See also *Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others* 1994 2 SACR 734 (E) 758*e-f*; *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 1 SACR 530 (C) 544*g*-545*b*.
[498] MT Fisher 'Harmless Error, Prosecutorial Misconduct, and Due Process: There's more to due process than the bottom line' (1988) 88 *Columbia Law Review* 1298 1319. In Schwikkard 'Private Privilege' in *Principles of Evidence* 134 (para 10 2 1), it is indicated that '[t]he privilege against self-incrimination and the right to remain silent are a natural consequence of the presumption of innocence which places the burden on the prosecution to prove the accused's guilt beyond a reasonable doubt.'
[499] Damaška (1973) *University of Pennsylvania Law Review* 529-530.

Thomas Weigend asserts that '[e]xclusionary rules can be found in every legal system, but they are more prevalent in systems adhering to the adversarial approach.'[500] The writer proceeds to elucidate the point as follows:[501]

> This is not by coincidence. In adversarial systems, truth is ultimately a procedural concept - an idea that comports well with an entrenched Anglo-American skepticism about man's ability to discover the "substantive" truth. To the extent that substantive truth is regarded as elusive, *the fairness of proceedings becomes the main foundation of the verdict's legitimacy*, and any result that has been found in conformity with procedural rules becomes acceptable. Under this approach, it is not anomalous to employ exclusion of evidence as a tool of enforcing adherence to procedural rules. The Continental inquisitorial model, on the other hand, insists that substantive truth can be found if enough effort is made and that the criminal process is, in principle, a search for substantive truth. This premise is inimical to any "artificial" exclusion of relevant and inherently reliable evidence. Exclusionary rules hence run counter to the goals and the spirit of the inquisitorial model; they are therefore used only as a last resort to safeguard indispensable procedural values, such as the absence of physical coercion in interrogations or respect for marital privacy.

Moreover, as Jenny McEwan notes, the inquisitorial system 'places its faith in the integrity of the State and its capacity to pursue truth unprompted by partisan pressures of individual self-interest.'[502]

Mirjan Damaška writes that party control over evidence-gathering 'provides compelling reasons for rejection of probative information in some situations.'[503] For instance, in order to prevail in a case, a party may be tempted to select proof of inferior probative value for tactical reasons, even where superior sources of information are readily available.[504] 'In this situation, intrinsic exclusionary rules become a useful instrument by which to pressure the parties and their lawyers to make available the best or most reliable sources of information to the court.'[505] Judges in inquisitorial systems, however, have at their disposal a variety of alternative bureaucratic incentives to employ - other than the exclusion of evidence - to induce officials to seek the optimal available means of proof.[506] Furthermore, where the parties and their counsel are in charge of presenting evidence, 'additional circumstances arise in which the court's rejection of probative information can serve

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[500] Weigend (2003) *Harvard Journal of Law & Public Policy* 168.
[501] *Ibid* 168 (footnote omitted) (my emphasis).
[502] McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 63.
[503] Damaška *Evidence Law Adrift* 84.
[504] *Ibid* 84.
[505] *Ibid* 84-85.
[506] *Ibid* 85.

a disciplinary purpose', such as the exclusion of evidence which a party seeks to introduce by ambush to the prejudice of the opponent.[507] The reason for this is plain enough: depriving the adversary of information before trial may catch him or her unprepared and throw his or her trial plans into disarray.[508] 'The prohibition against use of undisclosed evidentiary material thus is an effective sanction to maintain the integrity of the competitive fact-finding enterprise.'[509] Damaška states that '[w]here battling counsel develop evidence, *rules and practices of fair engagement inevitably emerge*, and their disregard - a "foul blow," so to speak - may under some circumstances require the rejection of information conveyed by the misbehavior.'[510]

In its efforts to save time and limit the issues to be investigated and in particular to confine the trial court's attention to the vital points and prevent the court being led astray by prejudice or preconceived opinions, the law of evidence in the adversary system has come to be very technical and intricate; '[t]he exclusionary rules of evidence, it is sometimes said, result in valuable evidence being withheld, and are in marked contrast to the liberal attitude taken in most Continental countries.'[511] Writing from a South African perspective, SE van der Merwe affirms that '[t]he law of evidence does not allow untrammelled access to all relevant evidence.'[512] 'Evidence which is logically probative or disprobative can be excluded because of its prejudicial effect on the party concerned. "Prejudice" in this context does not mean that the evidence must be excluded simply because the party against whom the evidence stands to be adduced will be incriminated or implicated. It means that incrimination or implication will take place in circumstances where the party concerned may be procedurally disadvantaged or otherwise exposed to a lengthy trial involving issues which, though logically relevant, are legally too remote to assist the court in its ultimate decision on the merits.'[513] Rules of evidence are also designed to prevent a 'protracted investigation into many collateral or side-issues which - once determined - would be of little probative value as regards the

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[507] *Ibid* 85.
[508] *Ibid* 85.
[509] *Ibid* 85.
[510] *Ibid* 86 (my emphasis).
[511] Hahlo & Kahn *The South African Legal System and its Background* 128.
[512] SE van der Merwe 'Relevance and Admissibility' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 49 50 (para 5 1); or as it is put in Damaška (1973) *University of Pennsylvania Law Review* 578: 'The pursuit of truth in the criminal process is not an untrammelled exercise in cognition.'
[513] Van der Merwe 'Relevance and Admissibility' in *Principles of Evidence* 56 (para 5 3 5).

true issues'.[514] Moreover, in the context of discussing the theoretical basis and practical purpose of the core principle embodied in section 35(5) of the South African Constitution, namely the exclusionary rule pertaining to unconstitutionally obtained evidence despite the relevance of such evidence,[515] Van der Merwe notes that '[t]he exclusionary rule is founded in the concept of due process which rejects the idea that there must be ascertainment of the truth at any cost.'[516] The author explains:[517]

> Unconstitutionally obtained evidence should be excluded because its admission compromises other more important values. It is argued that the primary function or goal of a criminal justice system is not merely to secure the conviction of an accused but to ensure that a conviction takes place in terms of a procedure which duly and properly acknowledges the rights of an accused at every critical stage during pre-trial, trial and post-trial proceedings. This due process argument gathers momentum when presented in the light of a bill of rights which demands and guarantees due process, and which places important constitutional limitations upon official power. For if evidence is obtained in breach of these constitutional rights and allowed into evidence, the status of these constitutional guarantees will inevitably be undermined.
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> Where due process is constitutionally guaranteed the prosecution's attempt to introduce unconstitutionally obtained evidence may be viewed as a request that the court act contrary to the spirit and perhaps express provisions of the Constitution. Evidence, however relevant and persuasive it might be, should in principle be excluded where the admission of such evidence would undermine the value system created and guaranteed by a bill of rights. In terms of this argument the exclusionary rule is not merely an evidential barrier to fact-finding; it is a constitutional barrier. It can be argued that real meaning and effect are given to constitutional provisions through the medium of the law of evidence. The reason for excluding unconstitutionally obtained evidence is not to provide the aggrieved accused with some form of personal remedy or some distorted form of "compensation", but to ensure that a court of law can in accordance with its constitutional duty make a valuable contribution to the upholding of constitutional principles which govern the criminal justice system as a whole.
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> Although the exclusionary rule may sometimes result in the factually guilty being acquitted, this undesirable result is justified on the basis that the purpose of the exclusionary rule is not to provide a remedy to that particular accused - but to ensure that in the long run other citizens are not deprived of their constitutional rights. In this context the interests of social justice prevail over those of individual justice.

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[514] *Ibid* 53-54 (para 5 3 3).

[515] Section 35(5) of the Constitution provides that 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.

[516] SE van der Merwe 'Unconstitutionally Obtained Evidence' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 197 205 (para 12 4 2).

[517] *Ibid* 205-206 (para 12 4 2) (footnotes omitted).

Nico Steytler comments that '[t]he purpose of disallowing the use of unconstitutionally obtained evidence is the indirect vindication of the right that was violated.'[518] Steytler writes that section 35(5) of the Constitution 'prevents the violator of the right from benefiting from the violation if it would render an accused's trial unfair or be detrimental to the proper administration of justice'; '[t]he exclusion of evidence as a constitutional remedy pursues the same purposes as the general remedy clause – vindicating a constitutional right and deterring and preventing the recurrence of its infringement.'[519] In considering the objective of section 35(5), Steytler pertinently concludes that '[t]he reliability of evidence is no longer determinative for its admissibility because the Bill of Rights has made "the rights of the individual and the fairness and integrity of the judicial system *paramount*".'[520] In *S v Tandwa and Others*, on the question of the admissibility of illegally obtained evidence, the Supreme Court of Appeal, per Cameron JA (as he then was), Mlambo JA and Hancke AJA, appositely found:[521]

> We accept that the public flinches when courts exclude evidence indicating guilt… But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order. Section 35(5) [of the Constitution] is designed to protect individuals from police methods that offend basic principles of human rights.

Similarly, in *S v Mthembu* the Supreme Court of Appeal, again pertaining to the issue of the admissibility of unlawfully obtained evidence, held:[522]

> [P]ublic policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have,

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[518] Steytler *Constitutional Criminal Procedure* 34.
[519] *Ibid* 34.
[520] *Ibid* 34 (my emphasis). Steytler cites with approval *R v Burlingham* (1995) 97 CCC (3d) 385 para 39 (Westlaw), where Iacobucci J for the majority of the Supreme Court of Canada analogously held that the rationale for excluding evidence obtained in breach of the *Canadian Charter of Rights and Freedoms* 'stems from the fact that… such evidence, if tendered at trial, detracts from the integrity of the trial and thereby infringes both the fairness principle and reliability principle', and that 'even if the improperly obtained evidence were reliable, considerations of reliability are no longer determinative given that the *Charter* has made the rights of the individual and the fairness and integrity of the judicial system paramount'.
[521] 2008 1 SACR 613 (SCA) para 121.
[522] 2008 2 SACR 407 (SCA) para 26.

> not only on a particular case, but also on the integrity of the administration of justice in the long term. Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution.

SE van der Merwe observes that '[t]he role that the exclusionary rule plays in ensuring that the notion of legality is retained in the criminal justice system is supported by the due process doctrine of legal guilt',[523] in terms whereof:[524]

> … a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them.

Van der Merwe points out that this doctrine can also be detected in the South African criminal justice system even before the advent of constitutionalism.[525] For instance, in *S v Lwane*, it was held:[526]

> According to the high judicial traditions of this country it is not in the interests of society that an accused should be convicted unless he has had a fair trial in accordance with accepted tenets of adjudication.

Mirjan Damaška argues that a comparison of the history, the ideological preconceptions, and the procedural structure of the Anglo-American adversary system and the inquisitorial Continental or non-adversary system reveals that the latter system exhibits a greater commitment to the pursuit of truth.[527] Damaška observes that '[i]t is openly stated by some common law lawyers that the aim of criminal procedure is not so much the ascertainment of the real truth as the *just* settlement of a dispute.'[528] On the other hand, Continental lawyers, in talking about the ends of the criminal process, place a primary emphasis or higher premium on the discovery of the truth 'as a prerequisite to a just decision. Considerations impinging upon the search for the truth are characterized as merely limitative, restricting somewhat the primary objective of truth discovery. The latter, however, remains the dominant aim to be achieved in a "socially acceptable way."'[529] According to Damaška, the emphasis in adversarial process shifts from problems of fact (or has he states it, 'problems of cognition') 'to the concern that parties abide by the rules

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[523] Van der Merwe 'Unconstitutionally Obtained Evidence' in *Principles of Evidence* 206-207 (para 12 4 3).
[524] Packer *The Limits of the Criminal Sanction* 166.
[525] Van der Merwe 'Unconstitutionally Obtained Evidence' in *Principles of Evidence* 207 (para 12 4 3).
[526] 1966 2 SA 433 (A) 444D-E.
[527] Damaška (1973) *University of Pennsylvania Law Review* 580-587.
[528] *Ibid* 581 (my emphasis).
[529] *Ibid* 581.

regulating their "battle."'[530] Fact-finding responsibilities of the parties, 'mandated by the nature of equitable dispute-resolution, bring in their wake *the need to assure fairness in their procedural interactions*. In some measure, *the emphasis must shift* from problems of cognition to concerns that the parties, or their counsel, abide by the rules of fair forensic disputation. Epistemically optimal or desirable fact-finding methods are acceptable only insofar as they do not compromise *the ultimate dispute-resolving objective: equity, rather than "truth"*.'[531] Damaška maintains that the dispute-resolving mission of legal proceedings 'erects the considerations of *disputational fairness* - such as the balancing of advantages between the litigants - to the status of values capable of interfering with the search for the truth.'[532] For this reason, 'it seems perfectly acceptable' that in the realm of the party contest, a party should lose on a technicality if he or she 'violated the rules regulating the contest.'[533] 'If, however, proceedings are structured as an official inquiry, the concern for ascertaining the facts of the case is much more central.'[534] Damaška remarks that '[a] natural outgrowth of this disparity in the two systems' commitment to the pursuit of truth is a disparity in evidentiary barriers to conviction. The Anglo-American adversary system's *commitment to values other than the pursuit of truth* has caused it to erect higher evidentiary barriers than its continental non-adversary counterpart.'[535]

It is important for present purposes to note that truth-finding plays second fiddle, or 'becomes an inconsistent side-effect', in the accusatory system where such system '*is exclusively bent on fairness in the sense of granting completely equal advantages to the opposing sides*.'[536] Indeed, as Boštjan Zupančič observes, truth-finding in the accusatory system is '*secondary*' not only to procedural fairness (which is borne out for instance by a preference for the exclusionary rule),[537] but also to '*the*

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[530] *Ibid* 581.

[531] Damaška *Evidence Law Adrift* 121-122 (my emphasis). Damaška indicates that party control over procedural action in a dispute-resolving process weakens concern for the completeness of evidence and the accuracy of factual findings. (*Ibid* 120).

[532] *Ibid* 124 (my emphasis).

[533] Damaška (1973) *University of Pennsylvania Law Review* 581.

[534] *Ibid* 582.

[535] *Ibid* 587 (my emphasis).

[536] Roodt (2004) *Fundamina* 154 (my emphasis). See also Erasmus (2015) *Stellenbosch Law Review* 664. Roodt observes that truth-finding is a 'much-neglected goal' of the accusatory system also where 'institutional weakness prevails'. (*Ibid* 154).

[537] Zupančič correctly points out that for this reason, people truly found to be guilty will go unpunished so that the ideals of procedural fairness can be preserved.

ideals of impartiality' which underlie criminal adversarial adjudication.[538] Procedure is not a mere means to truth-finding, but 'becomes a goal in itself in the sense that it *protects* different, procedural rights as independent entities and not merely supplements to the substantive questions of guilt and innocence.'[539] Excluding evidence or granting an accused a stay of proceeding or overturning a conviction on account of a technical, procedural irregularity cannot be reconciled with truth-seeking; rather it demonstrates that adversarial criminal adjudication prefers limitations on State power to truth-finding and that procedure has an independent function or 'acquires substantive connotations', where procedural fairness and judicial impartiality become the main purposes of a trial.[540] Christa Roodt indicates that '[p]roponents of the accusatory system often claim that because individual interests receive high priority, rights are better protected.'[541] The adversary system is extolled *inter alia* because of the protection it accords the accused.[542] In the adversary system, the search for the truth suffers in the process of the system protecting the accused's rights.[543] 'This result is to some extent inevitable, given rules of procedure based on the social decision that it is better that a guilty person should be exonerated than an innocent man be convicted.'[544] It has been shown that adversarial trials express a conception of the appropriate role of government in the resolution of disputes; '[p]referring to reduce governmental involvement to the most non-interventionist minimum, Anglo-American systems require *only the*

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[538] Zupančič (2003) *European Journal of Law Reform* 99-100 (my emphasis).

[539] *Ibid* 100 (my emphasis). Zupančič asserts that '[t]his is a position one must agree with because criminal procedure is the Magna Carta to citizens suspected of crime.' (*Ibid* 100).

[540] *Ibid* 100. Truth-finding must nevertheless remain an important aim of a trial in order for the criminal justice system to have legitimacy, that is, so that it does not lose credibility with the public. 'A system cannot claim to seek justice while at the same time abdicating its claim for truth.' Truth and justice are thus intimately intertwined. Basing judgments in cases on fictions would be as unacceptable as determining an accused's fate by throwing dice. 'The public will accept whatever is presented as "justice" only if justice is perceived to be based on an honest effort to find the "truth."' See Weigend (2003) *Harvard Journal of Law & Public Policy* 172-173.

In Jörg, Field & Brants 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe* 43, it is noted that even though truth-finding and fairness are distinct aims of criminal justice, 'they are also interrelated in the sense that they may clash and yet at the same time depend on each other for legitimacy.'

[541] Roodt (2004) *Fundamina* 154.

[542] Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 26. The writer points out that the adversarial system is extolled 'also because its competitive style of presenting evidence and argument is thought to produce a more accurate result than an "inquisitorial" alternative, where the judge monopolizes proof-taking.' (*Ibid* 26).

[543] MP Golding 'On the Adversary System and Justice' in R Bronaugh (ed) *Philosophical Law: Authority, Equality, Adjudication, Privacy* (1978) 98 117.

[544] *Ibid* 117-118. See also in this respect, Damaška (1973) *University of Pennsylvania Law Review* 579-580.

provision of a forum for their impartial resolution.'[545] Mirjan Damaška suggests that truth values in a proceeding whose paramount objective is dispute resolution (characteristic of adversarial process), are subservient to judicial impartiality.[546] As noted above, Damaška explains that adjudicators in such a system 'must tame their impulse to establish historic verity: they cannot become independent and energetic seekers after the truth without endangering the impartiality essential to their conflict-solving role.'[547]

A justification of the adversary system is the '*protection theory*', ie that 'irrespective of whether a trial aims at truth discovery or something else, justice requires that the parties be given a fair trial of their cause', which means that 'the rights, especially the procedural rights, of the litigant or defendant should be protected throughout the proceedings.'[548] It is said that 'the adversary system *is a necessary ingredient in a fair trial; a fair trial is an adversarial trial*.'[549] The rights of litigants and accused '*are best protected under the adversary system*, a system in which each side is represented by a partisan advocate.'[550] The belief is that when advocates combat each other, not only truth but also fairness will result and the court will learn of and protect against violations of the accused's rights.[551] One commentator appositely comments that '[t]he system of adversarial representation indeed is probably better justified as an institution for safeguarding liberty and privacy than for eliciting truth.'[552] David Luban affirms that 'zealous adversary advocacy of those accused of crimes is the greatest safeguard of individual liberty against the encroachment of the state.'[553] The author adds:[554]

> The good criminal defense lawyer puts the state to its proof in the most stringent and uncompromising way possible.

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[545] McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 66 (my emphasis).
[546] Damaška *Evidence Law Adrift* 121.
[547] *Ibid* 121.
[548] Golding 'On the Adversary System and Justice' in *Philosophical Law* 116 (author's italics). See too Pye (1978) *Duke Law Journal* 935 n 38.
[549] Golding 'On the Adversary System and Justice' in *Philosophical Law* 116 (my emphasis).
[550] *Ibid* 116 (my emphasis).
[551] Zacharias (1991) *Vanderbilt Law Review* 52 n 28. In *Polk County v Dodson* 454 US 312 318 (1981), the United States Supreme Court similarly observed that the adversary system 'assumes that adversarial testing will ultimately advance the public interest in truth and fairness.' See also Silver (1990) *Wisconsin Law Review* 1035, noting 'the organic relationship of adversariness to fairness'.
[552] GC Hazard Jr 'Rules of Legal Ethics: The Drafting Task' (1981) 36 *The Record of the Association of the Bar of the City of New York* 77 93.
[553] Luban 'The Adversary System Excuse' in *The Good Lawyer* 91.
[554] *Ibid* 91.

As indicated above, Nico Steytler is of the opinion that '[f]air trial proceedings *should be adversarial*, guaranteeing the autonomy of each party to the dispute and their full participation in the proceedings.'[555] The author refers in this regard to the Supreme Court of Canada decision of *R v Swain*, where Lamer CJ stated that 'the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings'.[556]

A fair trial or due process 'requires not only that the truth be determined and a just result reached, but also that the truth be determined exclusively through the use of fundamentally fair procedures.'[557] Even apparently guilty criminals are afforded fair trial rights that cannot be dispensed with as soon as the question of guilt appears to be conclusively determined.[558] Prosecutors under such a system, in performing the function of achieving justice, 'must assist the court in arriving at "the truth" *fairly*.'[559] As observed above, because substantive truth is regarded as elusive in the adversary system a verdict derives its legitimacy from the fairness of proceedings; 'any result that has been found in conformity with procedural rules becomes acceptable.'[560] In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)*, the Constitutional Court, per Yacoob J, pertinently found that '[t]he right to a fair hearing before a court lies at the heart of the rule of law', and that '[a] fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.'[561] Moreover, principles of fairness, such as the double jeopardy principle, the presumption of innocence, the right not to be compelled to give self-incriminating evidence, the right to remain silent and the principles of natural justice, which serve as "qualifiers" to the detection, conviction and sentencing of the guilty – ie 'crime control' – promote respect for and protection of certain rights of the individual; they uphold values and rights which are believed to be worth upholding,[562] such as human dignity, equality, privacy, property and the freedom and

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555 Steytler *Constitutional Criminal Procedure* 215 (my emphasis).
556 (1991) 63 CCC (3d) 481 para 35 (Westlaw).
557 Fisher (1988) *Columbia Law Review* 1320-1321.
558 *Ibid* 1321.
559 Banks *Criminal Justice Ethics* 115 (my emphasis).
560 Weigend (2003) *Harvard Journal of Law & Public Policy* 168.
561 2002 1 SA 429 (CC) para 11.
562 Ashworth (1979) *The Criminal Law Review* 413-414.

security of the person. Restrictions are also placed on the authorities in the pursuit of crime control to prevent abuse; rules of a criminal justice system represent a political compromise among conflicting policies of crime control and respect for fundamental human rights – 'it would be a fraud on the democratic process and destructive of liberty if officials were then allowed to depart from those rules'.[563] An evidentiary exclusionary remedy, for example, in respect of unconstitutionally or illegally obtained evidence, 'has a deterrent and educative function which, in turn, has an ultimate preventive effect', and 'is an effective means of ensuring that police officials (will) respect the fundamental rights of the individual'; it discourages unconstitutional police conduct.[564] The exclusion of otherwise relevant evidence serves as a 'sanction' for unlawful investigative procedures.[565] Recognition of fundamental rights may in certain instances reduce the efficiency of crime control; '[b]ut the whole point of rights is that respect for them is thought worthwhile on principle: they promote values which are believed to be worth preserving in a civilised society.'[566] Controlling the abuse of State power is also a means of preserving the balance between the State and the freedom of the individual.[567]

According to Mirjan Damaška, in resolving 'the conflict between efficient pursuit of the truth and protection of values such as human dignity and privacy and the preservation of a general atmosphere of freedom', a procedural system that places 'a very high premium on these other values will often remain committed to them even at the expense of truth discovery; in this sense it will be less "truth oriented" than the system for which values unrelated to truth discovery are less weighty.'[568] Damaška proceeds to add: 'The more "truth oriented" system will be less willing to erect those evidentiary barriers that are independent of the concern for factfinding reliability.'[569]

Adversarial fact-finding processes, in which the factual case against the accused is heard publicly by an impartial court and is evaluated only after the accused has had a full opportunity to discredit the case against him or her, are

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563 *Ibid* 414.
564 SE van der Merwe 'The "good faith" of the police and the exclusion of unconstitutionally obtained evidence' (1998) 11 *South African Journal of Criminal Justice* 462 465. See also, for example, Packer *The Limits of the Criminal Sanction* 168.
565 See, for instance, Weigend (2003) *Harvard Journal of Law & Public Policy* 168.
566 Ashworth (1979) *The Criminal Law Review* 422.
567 *Ibid* 425.
568 Damaška (1973) *University of Pennsylvania Law Review* 579.
569 *Ibid* 579.

central in Herbert Packer's Due Process Model,[570] which 'consists of the belief that individual values are paramount and that official power must be limited',[571] where, that is, the dominant concern is individual rights rather than a concern for more precision in establishing facts.[572] Mirjan Damaška argues that the adversary model tends to resolve the conflict between crime control (or enforcement of the criminal law) and protecting the rights of the accused 'in a synthesis coming closer to the Due Process ideology than does the non-adversary model.'[573]

So pivotal is due process or the observance of procedural safeguards in Anglo-American jurisdictions that the history of freedom is regarded as 'the history of procedure.'[574] In this respect, the Constitutional Court in *Bothma v Els and Others*[575] endorsed Justice Frankfurter's remarks in *McNabb v United States*, that:[576]

> The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.

Moreover, it has been said that the methods that are employed in the enforcement of criminal law 'have aptly been called the measures by which the quality of our civilization may be judged.'[577]

While it has been held that an adversarial trial is 'a means to an end - the ascertainment of truth - and has virtue only to the extent that it serves that end'[578]

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[570] Packer *The Limits of the Criminal Sanction* 157, 163-164; Goldstein (1974) *Stanford Law Review* 1016.

[571] Damaška (1973) *University of Pennsylvania Law Review* 574.

[572] *Ibid* 576. Herbert Packer contrasted the Due Process Model with the Crime Control Model, the distinguishing characteristic of the latter being its emphasis on the repression of criminal conduct as the most important function to be performed by the criminal process. The Crime Control Model requires that 'primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.' - Packer *The Limits of the Criminal Sanction* 158. 'Thus, speed and finality are placed very high in the hierarchy of values underlying this model.' - Damaška (1973) *University of Pennsylvania Law Review* 574. Moreover, under the Crime Control Model '[e]arly and accurate administrative factfinding by police and prosecutors predominates over a judicial search for the truth, which, because of evidentiary barriers, is less accurate. A guilty plea is preferred to a trial.' - Herrmann (1978) *SACC* 16. Although in theory the Crime Control Model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations, and the like, what it cannot tolerate 'is the vindication of those rules in the criminal process itself through the exclusion of evidence illegally obtained or through the reversal of convictions in cases where the criminal process has breached the rules laid down for its observance.' - Packer *The Limits of the Criminal Sanction* 167-168.

[573] Damaška (1973) *University of Pennsylvania Law Review* 576-577.

[574] *Malinski v New York* 324 US 401 413-414 (1945).

[575] 2010 1 SACR 184 (CC) para 33.

[576] 318 US 332 347 (1943).

[577] *Coppedge v United States* 369 US 438 449 (1962), cited with approval in *S v Makwanyane and Another* 1995 2 SACR 1 (CC) para 222.

[578] *R v Toten* (1993) 83 CCC (3d) 5 para 22 (Westlaw).

(such being a popular conception of the trial's function), it is actually 'far more than a search for truth'.[579] Under the adversary system in a free society, where 'the interests of the state are not absolute, or even paramount', '[a] trial is, in part, a search for truth.'[580] The constitutional fair trial rights of an accused which are characterised as procedural safeguards meant to guarantee the accused a fair hearing and protect against error in the search for truth,[581] may well outweigh or trump the truth-seeking value of a trial – a fact which is manifest when it is considered that those rights and other constitutional guarantees may impede the search for truth rather than further it.[582] An effective way, for example, to expose an accused's guilt would be to require self-incrimination, at least to the extent of compelling the accused to take the stand and respond to questioning before court. The accused, however is presumed innocent which means that the burden is on the prosecution to prove guilt beyond a reasonable doubt, and even the guilty accused has the right to remain silent and to put the State to its proof.[583] The State has a duty to begin and must establish a *prima facie* case against the accused before one can get to the accused giving evidence. Even then, the accused has the constitutional right to remain silent and not to testify in the proceedings.[584] The adversary system is said to have its foundations in respect for human rights even at the expense of the search for truth.[585] This is not to say that the adversary system is

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[579] Freedman *Lawyers' Ethics in an Adversary System* 2.

[580] *Ibid* 2.

[581] See, for example, *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 11: 'An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.' In Steytler *Constitutional Criminal Procedure* 208, it is observed that:

> 'The right of every accused person to a fair trial lies at the heart of the criminal justice system. It seeks to provide procedural fairness before the state intrudes upon core rights of a person, namely, dignity (the public denouncement as guilty in a status degrading ceremony), liberty (detention or imprisonment) and property (the imposition of a fine or forfeiture).'

See also *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 186, where O'Regan J noted that the right to a fair trial 'recognises that before the state can impose a criminal sanction on a person, that person must have been afforded a fair trial. In so doing, the section focuses on the importance of procedural fairness - long a cherished value in democratic societies.'

In Steytler *Constitutional Criminal Procedure* 208, it is pointed out that '[a] fair trial is also important in that it allows for the pretrial conduct of the state to be brought into the open and rights to be vindicated.'

[582] Freedman *Lawyers' Ethics in an Adversary System* 2. After all, as one court put it, it is 'axiomatic that justice is achieved when the guilty are convicted and the innocent acquitted *after a fair and just procedure*.' - *S v Mseleku and Others* 2006 2 SACR 237 (N) para 58 (my emphasis).

[583] Freedman *Lawyers' Ethics in an Adversary System* 2.

[584] These aspects are discussed in greater detail in the next chapter.

[585] *Ibid* 3.

not concerned with the establishing of truth, which is borne out by the fact that the system proceeds from the assumption that the best way to ascertain the truth is to present to an impartial court a confrontation between the proponents of conflicting views, assigning to each the task of gathering and presenting the evidence in as thorough and persuasive a way as possible, using such truth-seeking techniques as cross-examination, thus giving the trial court the strongest view of each side and placing the court in the best possible position to make an accurate and fair judgment.[586] However, the value assigned to truth-seeking in the adversary system is not absolute 'but may on occasion be subordinated to higher values.'[587] Truth-seeking is a 'basic value' of adversarial process, and 'the adversary system is one of the most efficient and fair methods designed for determining it';[588] however, uncovering the truth and exposing the ungodly, although not relegated to unimportance, are nevertheless 'weights in the scales of justice' with other fundamental rights that must be respected.[589] As the Constitutional Court has made clear, a balance must be struck between the interests of the individual and that of the State in carrying out its constitutionally mandated task of prosecuting crime.[590]

While some commentators assert that it is fundamental in both the adversary and inquisitorial systems that truth, insofar as it can be established, should be established in what is 'a fair, and therefore socially legitimate, way',[591] other

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[586] *Ibid* 3-4.

[587] *Ibid* 4.

[588] *Ibid* 3.

[589] *Protea Technology Limited and another v Wainer and others* 1997 3 All SA 594 (W) 611*d*.

[590] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 2 SACR 349 (CC) para 54; *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2008 2 SACR 421 (CC) para 74, in relation to the issue of the legality or validity of search and seizure operations and the individual's right to privacy.

[591] See Jörg, Field & Brants 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe* 42, adding that the two systems differ in their fundamental assumptions as to the best way of doing so. See also Jescheck (1970) *Virginia Law Review* 240-242, noting also that even though the safeguarding or protection of the accused's human rights in the trial is not identically understood in American and German criminal process, 'the principle is the same in both legal systems.' It is the methods chosen to obtain the high ideals of finding the truth, ensuring procedural fairness and protecting the accused's constitutional rights, which differ. (*Ibid* 241). (At the time of writing, Jescheck was Director of the Max Planck Institute for Foreign and International Criminal Law, and Judge of the Karlsruhe Court of Appeal (Oberlandesgericht)). In Snyman (1975) *CILSA* 111, it is observed that both the accusatorial and inquisitorial systems (the one system as much as the other) endeavour 'to arrive at the truth in each individual case, although the manner in which this is effected differs from the one system to the other.' The writer observes further on this score:

> 'Whether the English or the continental system presents the best way of achieving this aim, will probably always be the subject of debate. In this regard it is perhaps fitting to bear in

commentators observe that under the Anglo-American system, 'the goal is a fair trial', where 'there is an emphasis on individual rights' and where the truth is sought 'indirectly through the goal of a fair trial', in contradistinction to inquisitorial systems where finding the truth is more important than rules that govern procedures for a fair trial.[592] The trial in inquisitorial systems is much more aimed at implementing state policy towards crime, than in adversarial systems which are more aimed at 'individual conflicts' (ie conflict resolution between the parties) and 'individual rights'.[593] The very premise of adversarial process where the parties engage in a

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> mind that no system of procedure, being the product of human beings, can claim to be so devised as to reveal the absolute truth, or truth at all costs. Every Country's particular mode of searching for truth, still remains a mirror of the historical, sociological and cultural origins of its society.' (*Ibid* 111).

In DJ Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) 62-63, on the aspect of the controversy over whether in relation to procedural fairness the adversarial nature of the trial at common law is to be preferred to the more inquisitorial procedures of Continental Europe, it is argued that:

> 'Each [system] may be as effective as the other in leading to fair treatment, that is, in reaching correct outcomes and in maintaining respect for other values; there is no evidence, moreover, to show that one is better than the other in adhering to those ends. The real debate in comparing the two approaches is not about which will lead to more correct outcomes, but rather what values are relevant, with one tradition regarding an equal contest and the autonomy of the parties as important, the other emphasizing the importance of centralized control and unrestricted investigation by the magistrate and judge. The real difference, in other words, between the two traditions is what standards of fair treatment should govern the trial process; and because different answers are given to that question within each tradition, the procedures within them will also naturally vary.'

These remarks were cited with approval by Ackermann J in *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 11 n 11.

In Weigend (2003) *Harvard Journal of Law & Public Policy* 168, it is pointed out that even inquisitorial systems 'acknowledge the existence of practical as well as normative limits to determining the "true" facts by the means available in the criminal process', and that this 'indicates that truth-finding is unlikely to be the ultimate goal of that process', too. The writer comments that if it were otherwise, 'the process would have to result in a statement of facts found to be true (and not in a judgment), and the process would have to be structured much more like a historian's research into events of the past, collecting and processing information from all possible sources.' (*Ibid* 168-169). Weigend also articulates the following deficiency in inquisitorial systems in ascertaining the truth:

> 'Although the inquisitorial system introduces the inquisitorial magistrate, a professional third party officially interested in determining the truth, and thus avoids the party-motivation problem that characterizes the adversarial system, this system also suffers from a psychological flaw - it overlooks the fact that truth cannot reliably be extracted from a person unwilling to reveal what he knows. Even torture, the most extreme form of overpowering the resistance of a recalcitrant witness or suspect, turns out to be less than effective in producing the truth. In the age of human rights, when concerns of individual autonomy and freedom preclude any recourse to measures of crude coercion, an inquisitorial judge is left with empty hands in his quest for the truth if those who possess relevant information refuse to cooperate. Today, the end result of the search for the truth in inquisitorial systems will often be strikingly similar to that of the adversarial process - a half-truth based on what the defendant and more or less interested third parties are willing to disclose.' (*Ibid* 160-161). (Footnote omitted).

[592] See PJ van Koppen 'Miscarriages of Justice in Inquisitorial and Accusatorial Legal Systems' (2007) 7 *The Journal of the Institute of Justice & International Studies* 50 51.

[593] *Ibid* 51. See also Damaška *The Faces of Justice and State Authority* 71-96; Damaška *Evidence Law Adrift* 112. It is this policy-implementing mission of the criminal process in Continental

contest which is largely within their own control and where the judge has a limited role, is the liberal tradition in common-law jurisdictions of distrusting concentrations of government power and preferring a fragmentation of authority at all levels, where that is, the powers of the State are limited.[594] It 'is thought that Anglo-American procedure is better able to safeguard other values that are considered important.'[595] It is axiomatic that the contest between the parties would require that procedural fairness should be paramount, more so than in a system where the judge has an active role in shaping the issues and in calling for evidence and settling the facts with the parties and their advisors being pushed to the background.

It is clear from the afore-going considerations that 'concern for individual rights will often set limits to the pursuit of truth and conflict with the desire to establish the facts of the case.'[596] Truth may be 'qualified by values of equal importance, such as fairness or the worth and dignity of the individual.'[597] Moreover, '[t]he principle of party control means that adversary procedure is not concerned with the truth of the material facts but only the truth of the facts put in issue by the accused.'[598] Needless to say, as one commentator observes, '[t]he weakness of human perception, memory, and expression will often render the discovery of material truth impossible. To become preoccupied with truth may be both naïve and futile.'[599] In the Supreme Court of Canada decision of *R v Carosella*, it was appositely pointed out that:[600]

> The criminal justice system, being very much a human enterprise, possesses both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused's guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon the case which does not appear before the trier of fact.

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inquisitorial systems which 'requires that control over fact-finding be squarely placed on officials responsible for the final decision' so that the 'optimal response to crime' is attained based on all relevant facts and not simply the facts presented by the parties. (*Ibid* 115).

[594] Galligan *Due Process and Fair Procedures* 23. See also Van Koppen (2007) *The Journal of the Institute of Justice & International Studies* 51, indicating that what these factors boil down to in the end is that there is an emphasis on individual rights in the adversary system.

[595] JD Jackson 'Two Methods of Proof in Criminal Procedure' (1988) 51 *The Modern Law Review* 549 549.

[596] Damaška (1973) *University of Pennsylvania Law Review* 589.

[597] Roodt (2003) *Codicillus* 69.

[598] Jackson (1988) *The Modern Law Review* 560.

[599] Landsman *Readings on Adversarial Justice* 27.

[600] (1997) 112 CCC (3d) 289 para 59 (Westlaw), quoted with approval in *Bothma v Els and Others* 2010 1 SACR 184 (CC) para 68 n 76.

It has been seen that three notable facets of the adversary system which inhibit the finding of truth are (i) party control of the information-gathering process, (ii) zealous and single-minded or partisan representation of each litigant by his or her counsel, and (iii) evidentiary rules that circumscribe the types of information available to the trier of fact.[601] Under the adversary system, '[t]he party-orientation of the evidence may lead to the suppression and distortion of evidence, for the "truth" that a party may present is "an account edited with vested interests in mind". In the end the court cannot establish the material truth, but merely decides which party has adduced the more credible evidence.'[602] The lawyer's approach in adversarial process is that so far as is possible, only that should be revealed at trial which supports his or her case.[603] 'Far from being "the truth, the whole truth and nothing but the truth" a case is a biased construct, manipulating and editing the raw material of the witnesses' perceptions of an incident into not so much an exhaustively accurate version of what happened as one which is advantageous to one side.'[604] Advocacy in the adversary system is not so much about the quest for truth as it is about enabling a client in a civil case or an accused to win the case; about presenting a greatly edited, incomplete or false version of the facts or incident in question; about putting matters in evidence or omitting such and advancing argument to the advantage of the client so that the client can succeed.[605] The good advocate, it is said, is 'not concerned with reproducing incidents but producing cases, not with truth but with persuasion.'[606] Truth in adversarial process is a procedural concept.[607] So-called 'legal' or 'judicial' truth is afflicted by limits; the law, the parties, legal counsel, the judiciary and procedural rules are potential 'filters' of

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601 Landsman *Readings on Adversarial Justice* 26.

602 Steytler *The Undefended Accused on Trial* 9 (footnotes omitted).

603 DJ McBarnet *Conviction: Law, the State and the Construction of Justice* (1981) 17.

604 *Ibid* 17.

605 *Ibid* 16-17, with reference to *Tombling v Universal Bulb Co Ltd* (1951) 2 TLR 289 297, where Lord Denning made it clear that the duty of counsel to his or her client 'is to make every honest endeavour to succeed', which, while not meaning knowingly misleading the court, would entail advancing the case of his or her client towards winning the case, given that counsel 'is not the judge of the credibility of the witnesses or of the validity of the arguments.'

606 McBarnet *Conviction: Law, the State and the Construction of Justice* 17. McBarnet asserts that adversary advocacy 'is not by definition about "truth" or "reality" or a quest for them, but about arguing a case.' The search for truth 'is replaced by a contest between caricatures.' (*Ibid* 16).

607 See GL Certoma 'The Accusatory System v. The Inquisitorial System: Procedural Truth v. Fact?' (1982) 56 *The Australian Law Journal* 288 289: '[T]he common law criminal process, embodying party evidence, elaborate exclusionary rules and other rules of evidence, is characterised as a system tending to *procedural truth*', whilst civil-law, inquisitorial systems 'strive to ensure a *complete and factual* judicial inquiry.' (Author's emphasis).

the evidence and probative material, 'able to create an illusion of truth.'[608] One writer remarks that in view of such 'practical formalisms' as truth being qualified by values of equal importance such as fairness or the fundamental rights of the individual, 'the law is "without truth" and beyond "true and false".'[609] Some would argue that trials in the adversary system are not quests for truth in a serious objective or empirical sense, and cannot be, partly because 'truth is unknowable in any objective sense'.[610] The adversary system in practice is known to be anything but the truth-revealing process it pretends to be.[611] 'It involves systematic distortion of the truth. Perjured evidence is commonplace in criminal cases and more than occasional in civil cases, and reconstruction of witness recollection is standard technique. Questioning is conducted not to enlighten but to entrap.'[612] In discussing the emergence of the adversary trial, John Langbein notes that '[w]hen the adversary system allowed the lawyers to gain control over gathering and adducing the evidence, responsibility for the conduct of the proofs passed to persons who became professionally skilled at techniques of defeating the truth.'[613] Jenny McEwan indicates that adversarial proceedings are seen 'as a licence to lawyers to trample over the truth and over moral principles.'[614] The drawback with examination and cross-examination by the parties 'is that it can easily distort the evidence, because the people who ask the questions do so in the hope of obtaining answers that fit the case they are putting forward.'[615] Many have also been critical of the ability of adversary procedure to achieve completeness of evidence.[616] The system of party collection and control 'ensures that relevant evidence which is considered harmful or potentially harmful to both sides is not presented.'[617]

With twenty-four years of prosecutorial experience, I have for the most part encountered in our very own adversarial criminal trial system what can simply be described as systematic distortions of the truth of the kind that this thesis has sought

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608 Roodt (2003) *Codicillus* 69. See also Erasmus (2015) *Stellenbosch Law Review* 664, where this stance is affirmed.
609 Roodt (2003) *Codicillus* 69.
610 See Hazard *Ethics in the Practice of Law* 122.
611 *Ibid* 123.
612 *Ibid* 123.
613 Langbein *The Origins of Adversary Criminal Trial* 334. See also Roodt (2004) *Fundamina* 154-155.
614 McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 60.
615 Spencer 'Evidence' in *European Criminal Procedures* 629.
616 Jackson (1988) *The Modern Law Review* 560.
617 *Ibid* 560.

to draw attention to above, as well as polarised, kaleidoscopic fragmentations of real events or the facts, often consisting of mere scraps of evidence. Perjured and highly improbable evidence is commonplace, and reconstruction of witness recollection is indeed standard technique. Oppressive cross-examination is frequently conducted not to enlighten but to badger, confuse and entrap an honest witness or make him or her appear at a disadvantage possibly with discrepancies elicited by misleading questioning or by enmeshing the witness in minute detail of little or no relevance. It is not uncommon to find cross-examination which is tantamount to a fishing expedition, and litigation techniques which are calculated to obfuscate, rather than clarify, issues (a deliberate exercise of splitting hairs and kicking up dust, as it were, in order to divert the trial court's attention away from the material picture that emerges from the case in its entirety).

Where the searchers of evidence are not disinterested or neutral, but instead are propelled by partisan self-interest in a process involving binary, oppositional presentation of facts, 'the system needs procedures for preventing concealment and distortion of evidence',[618] more so than in inquisitorial systems.[619] This stands to reason when it is considered that 'the threat of one-sided distortions of information appears less immediate' where there is greater judicial involvement in fact-finding activities, as in Continental European procedural systems.[620]

Despite the truth deficit in adversarial process, such a system 'survives because rival systems are not demonstrably better.'[621] Moreover, although the real

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[618] Posner (1999) *Stanford Law Review* 1490. This is all the more so where an accused is not legally represented. In Steytler *The Undefended Accused on Trial* 9, it is explained that '[i]f the truth may be distorted by two equal and combative parties, it seems highly improbable that the truth will emerge where one of the parties is undefended, poorly defended, or does not have the same resources to gather or present evidence. The parameters of the dispute will in such a case be drawn by the prosecution; only one comprehensive and coherent presentation of evidence will be advanced to the court, and this must inevitably prevail.'

[619] Damaška *Evidence Law Adrift* 76-81.

[620] *Ibid* 80.

[621] McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 60. In D Luban *Lawyers and Justice: An Ethical Study* (1988) 92, the author, after advancing what he describes as an argument that is 'negative, a persecution and assassination of the adversary system', contends nonetheless that retaining such a system, instead of replacing it with another, is justified for the following reasons:

> '[F]irst, the adversary system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights. None of its existing rivals, in particular the inquisitorial system and the socialist system, are demonstrably better, and some, such as trial by ordeal, are demonstrably worse… Second, some adjudicatory system is necessary. Third, it's the way we have always done things.'

In Hazard *Ethics in the Practice of Law* 128, it is said that '[i]f the truth suffers from our use of the adversary system [where a contest for discovery of the truth may lead to suppression and distortion],

value of the adversary system may not be its contribution to truth, its value does lie in 'its contribution to the ideal of individual autonomy. This is the rationale underlying many rules that obscure the truth, such as the privilege against self-incrimination and the rule that private premises may not be searched without a warrant.'[622]

3.3.2 Adversarial process and equality of arms

> It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.[623]

Another limitation in the adversarial model, is that while it is assumed that each party has the ability, skill and resources to search out the evidence favourable to his or her case and to present it to court, the reality is that not all citizens can afford the fees of competent counsel and not all counsel are equally skilled.[624]

Since an assumption undergirding adversarial or accusatorial criminal procedure is that the facts would not be found if the parties were unequal as regards strengths and skill, it is considered necessary to maintain the procedural balance between the opponents on both sides and foster an equality of arms procedurally and institutionally. The right of an accused to legal counsel lies central to this principle; but most accused lack the means to employ own counsel and thus have to represent themselves or apply for legal aid. The neutral role of the judge requires adjustment, especially if the accused is undefended. Basic notions of fairness could require the judge to enter the arena in order to assist the accused, to ensure and facilitate the accused's participation in the proceedings, to advise the accused of his or her rights and duties and to assist with the exercise of these rights.[625]

As in any contest, there have to be rules of fairness to ensure that each party has an equal opportunity to participate in the adversarial trial.[626] This means that in a criminal case the State must prove the charge against the accused beyond a

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we ought to consider how it might suffer if we used some other system. In our political culture, the interrogative system of trial could well turn out to resemble Congressional hearings.'

[622] Hazard *Ethics in the Practice of Law* 129.

[623] *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)* 2002 1 SA 429 (CC) para 11.

[624] Cosman 'Trial and Court Procedures in Canada' in *Trial and Court Procedures Worldwide* 217. See also, for example, Steytler *The Undefended Accused on Trial* 8-10.

[625] Roodt (2003) *Codicillus* 80-81.

[626] Jackson & Doran *Judge without Jury* 63.

reasonable doubt, and the accused must be permitted to show that that standard has not been met.[627] In theory, the adversary system places the accused on an equal footing with the prosecutor and protects the accused's autonomy by allowing him or her the same freedom of action in conducting his or her defence as the prosecutor enjoys in presenting the State's case.[628] The adversary system also presupposes that 'the contending parties are more or less on a par as regards access to sources of evidence.'[629] These basic tenets of adversarial process constitute, or fall under the mantle of, the so-called equality of arms. The principle of equality of arms '"is an expression of the rule *audi alteram partem*, and implies that each party to the proceedings before a tribunal must be given a full opportunity to present his case, both on facts and in law, and to comment on the case presented by his opponent. This opportunity must be equal between the parties and limited only by the duty of the tribunal to prevent in any form an undue prolongation or delay of the proceedings."'[630] The equality of arms principle 'in criminal trials represents those procedural mechanisms with which the vast inequality in power between the state and the accused is sought to be addressed.'[631] In *S v Mofokeng*, the Court pointed out that 'the adversarial nature of our criminal process' carries with it 'the leitmotiv of equality of arms', that is, '[a]n accused must have a fair opportunity to defend him- or

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[627] *Ibid* 63.

[628] Weigend (2003) *Harvard Journal of Law & Public Policy* 159.

[629] P Brett 'The Implications of Science for the Law' (1972) 18 *McGill Law Journal* 170 188. See also Jackson (1988) *The Modern Law Review* 560, for a similar observation in relation to the question of the completeness of evidence by party examination and cross-examination.

[630] Snyckers & Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in *CLOSA* 51-105, citing with approval JES Fawcett *The Application of the European Convention on Human Rights* 2 ed (1987) 154-155.

[631] Snyckers & Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in *CLOSA* 51-105. In Zupančič (2003) *European Journal of Law Reform* 82-83, it is said in this respect that:

> 'We cannot say that criminal procedure deals with a conflict to be resolved, unless we first posit the 'equality of arms,' which is, when it comes to the relationship between a criminal defendant and the state, almost surrealistically artificial. Obviously, the need to *postulate* equality in terms of a conflict between equals, derives precisely from the fact that in reality there is no equality because the plaintiff in criminal procedure is the formidable state, i.e. its executive branch (the police, the prosecution) whereas the defendant is a powerless subject of that state. Most of the big guns of the constitutional artillery, therefore, i.e. the so-called constitutional guarantees in criminal procedure, are aimed at the inherent *inequality* between the suspected or accused individual and the state's powerful criminal justice machinery.' (Author's emphasis).

In Pye (1978) *Duke Law Journal* 926-927, it is similarly remarked:

> 'In most cases the resources available to a defendant are much less than those available to the state, and in some cases they may border on the inadequate. The rules of procedure at a criminal trial reflect an allocation of power between the individual and the state.'

See also, for example, *S v Nassar* 1995 2 SA 82 (NmHC) 110B-C.

herself when pitted against the resources of the State.'[632] In *S v Lavhengwa*, Claassen J held that '[a] fair trial envisages an "equality of arms"', adding that the right to equality and the accused's right to a fair trial:[633]

> … are mutually reinforcing. The right to equality before the law must also extend to equality in criminal trials. A fair trial embraces equality before the law between litigants in a criminal trial. Although inequalities between accused persons are inherent in any criminal justice system… inequalities between opposing litigants in a criminal trial is contrary to the principle of a fair trial.[634]

JS Silver[635] explains what must be equal in this process:[636]

> First, it does *not* mean that counsel for each side must possess the same degree of skill or experience in trial advocacy. It does not mean that, beyond providing the constitutional minimum of effective assistance, each attorney must meet a particular standard of performance or perform with equal effectiveness. Instead, in the battle in court, there must be an *equality of arms* among contestants, that is, the procedural rights permitting each advocate to formulate and present her case must, in principle, be accorded equally and to the same extent. Just as it would not have been fair to give one contestant in a trial by battle a lance and a shield and the other only a knife, equality of arms i*s essential to the pursuit of fairness and truth*. Examples of procedural rights that must exist in symmetrical balance include the ability to subpoena witnesses and records… sequester witnesses, introduce evidence, cross-examine adverse witnesses, make objections, give opening and closing arguments…

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[632] 2004 1 SACR 349 (W) para 20. See too *Chambers v Mississippi* 410 US 284 294 (1973), where Justice Powell, for the majority of the United States Supreme Court, enunciated the principle thus (as endorsed in *S v Mofokeng* supra para 20):

> 'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process… "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."'

In Steytler *Constitutional Criminal Procedure* 216, it is similarly observed that '[i]n the context of an adversarial system of criminal justice there should be equality of arms; an accused should have a fair opportunity to defend him or herself when pitted against the resources of the state.' (Footnote omitted).

[633] 1996 2 SACR 453 (W) 477*j*-478*b*. See also Steytler *The Undefended Accused on Trial* 10, where it is indicated that equality of arms is 'a necessary precondition for a fair trial'.

[634] In Ashworth (1979) *The Criminal Law Review* 414, it is likewise pointed out that a disparity of resources between the prosecution and the accused derogates from the principle that every accused should have a fair trial. Ashworth observes that many of the rights, liberties, powers and immunities which the law declares, and the constraints on police and prosecution which their protection imposes, originated not in any concern for individual rights so much as in response to the relatively weak position of the accused vis-à-vis the State. Certain rules of criminal justice can be said to be weighted against the State and crime control, to compensate for the weaker position of the individual accused. It is proper for rules of evidence and procedure to afford greater protection to the individual accused in order to counterbalance the greater resources of the prosecution. (*Ibid* 414).

[635] At the time of writing, Silver was Assistant Professor of Law, St Thomas University School of Law.

[636] Silver (1990) *Wisconsin Law Review* 1037-1038 (footnotes omitted) (author's and my emphasis).

> Imposing nonreciprocal restrictions on either side's exercise of such trial rights would upset the delicate balance between prosecution and defense.

SE van der Merwe explains, in a South African context, that in the course of the trial, the principle of equality of arms requires, for example, that a party should not be denied the opportunity to cross-examine the opponent's witness, there should be equal opportunities in addressing the court on the merits and on the question of an appropriate sentence, and an accused should in principle have legal representation in order to be on a par with the State, which employs a prosecutor.[637] Hence, specifically in the domain of the right of the accused to prepare a defence and to cross-examine State witnesses or to challenge the State's case (in other words, 'to make full answer and defence'), the principle of equality of arms would ordinarily require a prosecutor to make pre-trial disclosure to the defence of the relevant sections of the police case docket,[638] in accordance with the dictates of the Constitutional Court decision of *Shabalala and Others v Attorney-General of Transvaal and Another*,[639] and especially evidence which on the face of it appears exculpatory or which the defence would deem favourable and relevant to the accused's case.

In dealing with the ideological foundations or underpinnings of the adversarial and inquisitorial trial systems, Joachim Herrmann considers *inter alia* the so-called due process model,[640] which as noted above was developed by Herbert Packer and distinguished by the latter from the crime control model.[641] Herrmann observes that the due process model 'favours reliability in the factfinding process' and 'expresses "the concept of limitation on official power"'[642] or 'improper invasions by the authorities,'[643] that is, 'protection of the defendant's rights'.[644] Within this context,

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637 Van der Merwe 'Trial Principles and the course of the criminal trial' in *Criminal Procedure Handbook* 336.

638 See McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 63; RJV Cole 'Recognising the centrality of disclosure to the realisation of equality of arms in criminal proceedings in Botswana' (2010) 23 *South African Journal of Criminal Justice* 327 328-330, 342-345, 348-350; *S v Nassar* 1995 2 SA 82 (NmHC) 110B-C. In *Smyth v Ushewokunze and Another* 1998 3 SA 1125 (ZS) 1131F, it was held that '[t]he duty of the prosecutor to place before the court all material essential for the investigation of the truth, is justified on the ground that the prosecution has all the resources of the State, including finances, the police and vital information, at its disposal.'

639 1995 2 SACR 761 (CC) paras 37, 72. See also, for example, *R v Stinchcombe* (1991) 68 CCC (3d) 1 (SCC); *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA).

640 Herrmann (1978) *SACC* 16-19.

641 Packer *The Limits of the Criminal Sanction* 149-173.

642 Herrmann (1978) *SACC* 16.

643 *Ibid* 18.

644 *Ibid* 17.

Herrmann argues as follows on the assistance that the State ought to render to an accused, as well as its duties vis-à-vis the accused, which comport or are in line with the principle of equality of arms by implication:[645]

> When developing his due process model Packer has only asked how the accused can be protected against improper invasions by the authorities. This approach was appropriate for the liberal era of the sixties in the United States. One should take into consideration, however, that it is not sufficient to protect the individual against the state. There is the other question what the state must do to help an individual who has to face a criminal charge. The liberal idea of protection has to be supplemented by the social idea of help. The accused who in most cases is underprivileged, unfamiliar with the criminal process and unable to defend himself properly needs help in many respects. Instances of such help are well known. Defence counsel has to be appointed for the indigent accused. The defence has to have a right to full pre-trial discovery and inspection of the evidence against the accused. During the investigative stage of the proceedings as well as at the trial the accused has to be informed of his rights and advised how to exercise them. In this respect not only the judge but also the prosecutor and the police are under a duty to act as counsel of the accused.
>
> Thus Packer's due process model has to be expanded by the idea of social justice. The idea of social justice is less developed than the idea of liberal justice but it is of the same importance as the latter.

Adversarial process 'functions effectively only when opposing counsel can fashion and present their strongest case from positions of relative equality.'[646] The accusatorial (adversarial) system 'is based on the premise that truth-finding is enhanced if the prosecution and defence are responsible for presenting their respective cases', but 'this approach is only valid if the prosecution and defence have equal opportunities.'[647] In this context, the principle of equality of arms developed.[648] The reliability of adversarial process 'is based on its fairness, especially on each party's equal access to evidence and on an equal distribution of competence and means to present evidence in court.'[649] However, '[e]quality of this kind, more often than not, exists on paper only. Poor defendants must rely on underpaid and overworked public defenders or legal aid lawyers, whereas the state has at its disposal legal powers as well as sufficient means and expertise to make sure that evidence is collected and presented effectively in court… In criminal

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[645] *Ibid* 18-19.
[646] Silver (1990) *Wisconsin Law Review* 1037.
[647] See Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 335, endorsing Silver above.
[648] *Ibid* 335.
[649] Weigend (2003) *Harvard Journal of Law & Public Policy* 160.

matters, the "sporting theory of justice," which assumes that justice will emerge from a fair fight between equal partners, is hence more myth than reality.'[650]

The lack of equality of arms is the most obvious when an accused is undefended.[651] Nico Steytler gives a crisp explanation for why this is so in the context of the purpose of the accused's fundamental fair trial right to legal representation:[652]

> The right to a lawyer is an essential feature of the right to a fair trial as lawyers play a critical role in ensuring that the accusatorial system, the foundation of a fair trial in the common law tradition, produces a just result. In an adversary system a court's decision rests primarily on the evidence and argument advanced by the parties and the system is predicated on the assumption that parties will protect their own interests through their vigorous participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision. Because effective participation requires legal knowledge and court room skills, accused need the assistance of lawyers who have such knowledge and skills. With the constitutionalisation of criminal procedure, the need for legal assistance is even greater; not only is a fair trial likely to emerge through skilled participation, but other constitutional rights, such as privacy, can also be vindicated through the criminal process. The right to legal representation can thus rightly be viewed as "the cornerstone of a civilized system of justice".

Steytler similarly explains elsewhere that the principal feature of the adversary model, in relation to a criminal case, 'is that the two litigants, the State and the accused, are responsible to ensure that justice is done. For the accused to receive a fair trial is thus largely dependent upon his desire and ability to protect and promote his own interests.'[653] Steytler observes that '[f]or the adversary system to achieve substantial or procedural justice, it is essential that the parties should be highly combative, effective, and evenly matched adversaries. In the event of inequality between the parties, the system would fail to achieve the goal of justice through combat. The court, due to its ascribed passive role, would not intervene substantially on behalf of the weaker combatant in pursuit of the principles of a fair trial.'[654] Steytler opines further that if the truth may be distorted by two equal and combative parties, it seems even more unlikely that the truth will emerge where one of the parties is unrepresented, poorly represented, or does not have the same

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[650] *Ibid* 160.
[651] See, for example, Steytler *Constitutional Criminal Procedure* 216.
[652] *Ibid* 302 (footnotes omitted).
[653] Steytler *The Undefended Accused on Trial* 8.
[654] *Ibid* 8 (footnote omitted).

resources to collect and present evidence.[655] The parameters of the dispute would in such a case be drawn by the prosecution, with the result that only one comprehensive and coherent presentation of the evidence would be advanced to the court, which may, then, likely prevail.[656] Thus, there would need to be equality of arms as between the prosecution and the accused for the accusatory system to function properly. Where the accused is undefended, the trial court would be required to discharge numerous duties which would secure the greater participation of the accused and the establishment of the truth, in order for the trial to be fair within the meaning of the Constitution.[657] The adversarial system can only operate fully if the undefended accused is assisted by the trial court through procedural and evidential hurdles;[658] that is, where the court advises the accused of his or her rights, and assists the accused (i) in questioning State witnesses during cross-examination, (ii) in properly putting his or her defence to the State witnesses, and (iii) in the presentation of his or her case.[659]

Steytler argues, moreover, that a system entailing a party-orientated proceeding and 'in which a passive role is ascribed to the judicial officer, is open to manipulation by either the accused, asserting his rights to a fair trial, or the prosecution, pursuing the goal of crime control. The non-assertion of the accused's rights will result in the unchallenged pursuit of crime control.'[660] Thus in the adversary system there may be little chance of procedural justice without competent legal representation for both parties to the dispute.[661]

The Supreme Court of Appeal has likewise noted that the adversarial system 'assumes a forensic contest that is more or less evenly matched.'[662] However, '[t]he sad reality is that all too frequently it is not', with an unrepresented accused being 'usually disadvantaged, first, by a lack of legal knowledge and skill, and, second, because he or she suffers the disability of not being able to dispassionately assess and present his or her case as well as trained counsel for the State can.'[663] 'It

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[655] *Ibid* 9.
[656] *Ibid* 9.
[657] See *S v Simxadi and Others* 1997 1 SACR 169 (C) 170*e*-171*d*.
[658] Cole (2010) *UBLJ* 85.
[659] See *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO and Another* 1989 3 SA 368 (E) 378A-379A.
[660] Steytler *The Undefended Accused on Trial* 9-10.
[661] *Ibid* 10.
[662] *Legal Aid Board v The State and Others* 2011 1 SACR 166 (SCA) para 1.
[663] *Ibid* para 1.

cannot therefore be doubted that a criminal trial is most fairly conducted when both prosecution and defence are represented by competent counsel. The entitlement of a person charged to be represented, if necessary, by a legal practitioner at public expense is an important safeguard of fairness in the administration of criminal justice.'[664] Legal representation 'reduces the possibility of an injustice and enhances the prospects of a fair trial.'[665] Constitutionally, therefore, there is a nexus between legal representation and a fair trial.[666] Hence, section 35(3) of the South African Constitution guarantees to every accused person his or her right to a fair trial, which includes the right in subsection (*f*) to legal representation and in subsection (*g*) to have a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result.[667]

It is clear from the afore-going considerations that the adversary system can in practice break down where there is no legal representation, save in the exceptional case of the skilled litigant.[668] Without equality of arms, the criminal justice process may remain 'skewed in favour of the State'.[669] This is particularly so when it is considered that 'the investigation of crime is principally the sacred domain of the State'; the State 'has a general monopoly over witnesses' – all possible witnesses are 'scooped up and interviewed by the police during the investigations'; the State has 'overwhelming control… over the investigation process' and has 'unbridled and almost exclusive access to the relevant evidence'.[670] The prosecution enjoys an enormous advantage in a criminal trial, as it has the police at its disposal in the gathering of evidence;[671] 'the prosecution has all the resources of the State, including finances, the police and vital information, at its disposal.'[672]

Moreover, whereas the accusatorial system takes the form of a contest between two theoretically equal parties (the prosecution and the defence) who do the questioning, in turn leading their own witnesses and cross-examining the opposition's witnesses, and whereas the 'adversarial trial presupposes that each

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[664] *Ibid* para 2. See also Steytler (2001) *Law, Democracy & Development* 3-6, 20.
[665] *Legal Aid Board v The State and Others* 2011 1 SACR 166 (SCA) para 2.
[666] *Ibid* para 2.
[667] *Ibid* para 2.
[668] See Devlin *The Judge* 67; *Legal Aid Board v The State and Others* 2011 1 SACR 166 (SCA) para 1. See also the comments in Resnick 'Due Process and Procedural Justice' in *Due Process* 222-223.
[669] Cole (2010) *SACJ* 350.
[670] *Ibid* 342-344.
[671] *S v Nassar* 1995 2 SA 82 (NmHC) 110B.
[672] *Smyth v Ushewokunze and Another* 1998 3 SA 1125 (ZS) 1131F.

party has a duty of presenting its own evidence',[673] such a system can only function optimally if the prosecution and defence perform their duties properly.[674] In *S v Sebofi*, Sutherland J appositely stated that:[675]

> The calibre of the case presentations, both prosecution and defence, was unacceptable for a case of this seriousness. A prosecutor cannot present a case by just pouring out a jumble of random facts as if one were pouring treacle from a jar. It is unfair to a court and it retards the aim of a fair trial which, apart from other factors, needs to be coherent and orderly. The defence fares little better: the cross-examination hardly plumbed the body of evidence and appeared to have no plan or objective and was either blind or inattentive to several material or potentially material details. The narrative of the testimony refers to relevant aspects which were ignored or overlooked. An adversarial process is founded on proper preparation and commitment to testing the testimony available. It is not served by treating the process as a clerical chore.

In an adversary system, 'the interests of the accused can be seriously jeopardised when he is inadequately represented, particularly as the court plays a rather passive role and does not itself undertake an independent examination of the case.'[676] Justice may also fail (adversarial process may collapse) if the prosecution is incompetent or inexperienced and the defence able.[677]

It is clear from the aforesaid that the adversary system can in principle only work properly, or optimally, if there is equality of arms. 'For effective and fair adjudication in the case of adversary combat an equality of arms is required.'[678] Equality of arms is 'the minimum threshold requirement for any judicial proceedings to be considered fair and consistent with human rights standards.'[679] The principle of equality of arms 'demands that each party to proceedings must be given a full opportunity to present its case and no party should be put at a significant disadvantage vis a vis the other.'[680] The principle 'ensures procedural equality between the parties.'[681] Equality of arms is essential to adversarial theory, but may be difficult to attain in a criminal trial, as the State and the accused do not stand on

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673 Cole (2010) *SACJ* 342.
674 Van der Merwe 'A basic introduction to criminal procedure' in *Criminal Procedure Handbook* 23.
675 2015 2 SACR 179 (GJ) para 65.
676 Brouwer (1981) *The Australian Law Journal* 208.
677 See Steytler (2001) *Law, Democracy & Development* 3-5.
678 L Meintjies-Van der Walt '*S v Huma (1)* 1995 (2) SACR 407 (W) Shooting at science: expert evidence and equality of arms' (1996) 9 *South African Journal of Criminal Justice* 361 361-362.
679 S Negri 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 *International Criminal Law Review* 513 514.
680 Cole (2010) *SACJ* 329.
681 *Ibid* 329-330.

an equal footing due to a disparity of resources between them;[682] the indigent accused may be denied an effective defence.[683] Procedural fairness is thus critical, since it is a means to the realisation of substantive equality between the parties.[684]

3.4 The advantages of adversarial / accusatorial process

> Adversarial justice presupposes that decision makers will reach their conclusions based solely on the evidence and arguments that the parties properly present.[685]
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> [P]arty control is necessary to preserve the neutrality of the fact finder. If the judge is assigned the task of making factual inquiry, both theoretical analysis and empirical data suggest that her biases are likely to be intensified and her decisions opened to prejudicial influence. This loss of neutrality is arguably as significant a problem as any skewing caused by party control.[686]
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> The typical accusatory system is associated with an impartial and distanced umpire who ensures that the parties or contestants observe the 'rules of the game'.[687]

As in other common-law jurisdictions, an essential feature of the South African justice system is the adversarial (or accusatorial) process. In South Africa, the parties, rather than the judge, are responsible for adducing and presenting evidence and arguing principles of law and issues of fact both in civil and criminal cases. The judge does not control the conduct of the case or the investigation of the matters under dispute in order to arrive at the truth. The judge's role is to evaluate the merits of the case based on the evidence and submissions presented by the parties. Ironically, the judge who is responsible for the judgment, that is, for a correct decision on the merits of the case, is principally at the mercy of the information supplied by the parties.[688] It is important then to consider pertinent benefits of party

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[682] See Packer *The Limits of the Criminal Sanction* 168; *S v Nassar* 1995 2 SA 82 (NmHC) 110B-C. In McEwan 'The Adversarial and Inquisitorial Models of Criminal Trial' in *The Trial on Trial* 63, it is observed that it has been recognised that there is no equality of arms in a criminal prosecution.
[683] See Packer *The Limits of the Criminal Sanction* 168.
[684] See Negri (2005) *International Criminal Law Review* 514.
[685] Zacharias (1991) *Vanderbilt Law Review* 88.
[686] Landsman *Readings on Adversarial Justice* 28.
[687] Roodt (2003) *Codicillus* 80.
[688] However, in Snyman (1975) *CILSA* 110, the writer opines that '[t]o describe the judge in the Anglo-American system as merely a passive referee, and deciding merely on issues and considerations presented to him by the parties, are to oversimplify the system's basic character to the extent perhaps of even distorting it.' The writer explains that:

control of litigation, and whether such a system can indeed constitute a procedural safeguard that may protect or enhance the prospects of the fairness of a trial and impartiality of adjudication in the face of adverse pre-trial publicity.

3.4.1 Greater emphasis on procedural fairness

The accusatorial system is seen as the foundation of a fair trial in the common-law tradition.[689] In general, 'the accusatorial system seems to be more sensitive to the liberty of the citizen whilst the inquisitorial system places more emphasis on ensuring the punishment of a guilty party. It is clear that a zealous pursuit of the inquisitorial approach would erode the freedom of the citizen.'[690] 'It is apparent that the more extreme the inquisitorial objective, the less sensitive the system becomes with regard to personal and civil rights.'[691] Under the Anglo-American system, 'the goal is a fair trial', more so than the pursuit of truth.[692] It is claimed that 'the judge in the inquisitorial system is more concerned with *discovering "the truth"* whereas in the adversarial system, lawyers dominate, and judges, acting as referees, are mainly concerned about *due process and procedures being followed* and not so much the search for "the truth".'[693] The adversarial system privileges procedural fairness over truth.[694] The adversary system of justice is not so much a search for truth, as a

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> 'It is also in these systems the task of the court or judge to ascertain the truth and to do justice according to law - a task which has been, on occasion, acknowledged by the courts. It is the prerogative of the judge to decide on the admissibility of all the evidence tendered by the parties. He may rule evidence to be inadmissible even when there has been no objection thereto by any of the parties. He may ask questions to all witnesses, and for this purpose may even interrupt the questioning of a witness by one of the parties, subject to the well-known qualification that he ought not to "descend into the arena and be liable to have his vision clouded by the dust of the conflict." He may disallow superfluous or unnecessary evidence, and see to it that aspects of the case or the evidence which have been left incomplete, are properly cleared up. He may call back witnesses who had already given evidence in order to ask them additional questions, and, what is most important, he may even in certain circumstances himself call a witness, who has not been called upon to give evidence by any of the parties.' (*Ibid* 110-111). (Footnotes omitted).

Snyman notes further that these considerations, amongst others, 'clearly indicate the extent to which the purely accusatorial character of the Anglo-American, and also the South African criminal procedure, is qualified by inquisitorial traits.' (*Ibid* 111). Nonetheless, the South African criminal procedure 'remains, in principle, accusatorial compared to the continental systems.' (*Ibid* 111).

689 Steytler *Constitutional Criminal Procedure* 302. See also Golding 'On the Adversary System and Justice' in *Philosophical Law* 116-117, noting that a fair trial is regarded as an adversarial trial, and that the rights of the accused are better protected through representation by a partisan advocate.

690 Certoma (1982) *The Australian Law Journal* 288.

691 *Ibid* 291.

692 Van Koppen (2007) *The Journal of the Institute of Justice & International Studies* 51.

693 Banks *Criminal Justice Ethics* 109 (author's emphasis).

694 *Ibid* 109.

system where the parties 'are concerned only that the game should be played according to the rules.'[695] The principles of fundamental justice 'contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings'.[696] 'It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial'.[697] An adversarial proceeding forms 'the bedrock of a fair trial', 'guaranteeing the autonomy of each party to the dispute and their full participation in the proceedings.'[698] The adversarial system 'helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.'[699] Thus, adversarial (accusatorial) process is intrinsic to and enhances the prospects of a fair trial.

It is indeed not insignificant to note that reforms in criminal procedure have been effected in some inquisitorial countries such as Italy, Chile and other Latin American countries, so as to bring about a shift from an inquisitorial system to the adoption of a more adversarial or accusatorial model. Such reforms have principally been underpinned by a need to create a trial system where judicial impartiality and neutrality are improved, fair trial or due process guarantees are increased, the fundamental rights of the accused are safeguarded and the proceedings are more open – orality and publicity, as well as the distribution of control over the conduct of the case amongst the parties (where the responsibility is transferred to the parties to gather and present the evidence at trial), has brought unprecedented transparency to these criminal justice systems. The reforms, in other words, were aimed at injecting greater procedural fairness into the legal system.[700] Of major concern

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[695] L Kennedy *The Trial of Stephen Ward* (1964) 251. See also B Wootton *Crime and Penal Policy: Reflections on Fifty Years' Experience* (1978) 19-20; Damaška *Evidence Law Adrift* 121-122:

> 'The enhanced fact-finding responsibilities of the parties, mandated by the nature of equitable dispute-resolution, bring in their wake the need to assure fairness in their procedural interactions. In some measure, the emphasis must shift from problems of cognition to concerns that the parties, or their counsel, abide by the rules of fair forensic disputation. Epistemically optimal or desirable fact-finding methods are acceptable only insofar as they do not compromise the ultimate dispute-resolving objective: equity, rather than "truth."'

[696] *R v Swain* (1991) 63 CCC (3d) 481 (SCC) para 35 (Westlaw).

[697] *Jasper v The United Kingdom* ECHR (16-02-2000) application no. 27052/95 para 51. See also *Edwards and Lewis v The United Kingdom* ECHR (22-07-2003) application nos. 39647/98 and 40461/98 para 52.

[698] Steytler *Constitutional Criminal Procedure* 215.

[699] *Borowski v Canada (Attorney General)* (1989) 47 CCC (3d) 1 (SCC) para 31 (Westlaw).

[700] For discussions on this aspect, see, for example, CR de la Barra Cousino 'Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile' (1998) 5 *Southwestern Journal of Law & Trade in the Americas* 323; R Blanco, R Hutt & H Rojas 'Reform to

leading to such reforms was the undue prejudicial influencing of the presiding judge's mind at the commencement of the trial, caused by the judge having to study the dossier, or case docket (containing the materials, typically police reports, witness statements, documents relating to the crime, physical evidence, expert reports, and other materials, gathered during the pre-trial investigation), so as to enable him or her to call and question the witnesses and in order to determine the issue of guilt and the appropriate punishment. Such judicial access to the dossier was seen as creating the danger of the presiding judge entering the trial with preconceived beliefs about the guilt or innocence of the accused, that would dominate the trial stage. The idea was that the presiding judge should enter the trial *tabula rasa*, or with a so-called virgin mind or clean slate, as to the facts or evidence of the case. The intention was that a new trial system ought to be established to shield the trial judge from the investigation file so that he or she would not be biased by the records contained therein, thereby guaranteeing that only the evidence introduced by the parties at trial would influence the judge; that the decision, in other words, would be based solely on the evidence and submissions presented by the parties at trial.[701] It was felt that severance of the case docket from the trial judge 'should guarantee that investigative evidence does not affect the judge's decision at trial.'[702] By insulating the trial judge completely from the activities conducted by public officials (the public prosecutor, the judge of the preliminary investigation, and judge of the preliminary hearing), during the pre-trial phase, would prevent the results of the pre-trial

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the Criminal Justice System in Chile: Evaluation and Challenges' (2005) 2 *Loyola University Chicago International Law Review* 253; C Riego 'Oral Procedures and Case Management: The Innovations of Chile's Reform' (2008) 14 *Southwestern Journal of Law & Trade in the Americas* 339; JL Bischoff 'Reforming the Criminal Procedure System in Latin America' (2003) 9 *Texas Hispanic Journal of Law & Policy* 27; Pizzi & Montagna (2004) *Michigan Journal of International Law* 429; WT Pizzi & L Marafioti 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' (1992) 17 *Yale Journal of International Law* 1; Panzavolta (2005) *North Carolina Journal of International Law and Commercial Regulation* 577; E Amodio 'The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy' (2004) 52 *The American Journal of Comparative Law* 489; Grande (2000) *The American Journal of Comparative Law* 227; Grande (2016) *The American Journal of Comparative Law* 583; L Marafioti 'Italian Criminal Procedure: A System Caught between Two Traditions' in J Jackson, M Langer & P Tillers (eds) *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (2008) 81. See also Roodt (2004) *Fundamina* 156.

[701] See in this respect, Bischoff (2003) *Texas Hispanic Journal of Law & Policy* 43; Pizzi & Montagna (2004) *Michigan Journal of International Law* 434-435; Panzavolta (2005) *North Carolina Journal of International Law and Commercial Regulation* 587, 589; Grande (2000) *The American Journal of Comparative Law* 243; Grande (2016) *The American Journal of Comparative Law* 594 n 44.

In Pizzi & Montagna (2004) *Michigan Journal of International Law* 434, it is said that the 'first reform' in Italy's attempt to introduce an adversary trial system was to limit the influence of the dossier on the trial.

[702] Panzavolta (2005) *North Carolina Journal of International Law and Commercial Regulation* 589.

investigation from prejudicing the trial court before the trial even starts.[703] By preventing the trial court's access to the case docket and creating a trial system that demanded the production anew of all the relevant evidence against the accused orally, would encourage the court 'to develop a fresh understanding of the facts, as untainted as possible by the views of any public official involved in the previous stage of the proceeding.'[704] To ensure compliance with the rule that the trial judge may not base his or her decision on the contents of the dossier, but only on the evidence produced in court, the judge would be required to '*explain*' his or her decision.[705]

The adversary model 'has been treated as offering a variety of advantages that are attractive alternatives to inquisitorial methods.'[706]

Adversarial process is perceived as the fairest of procedures for resolving disputes, compared to non-adversary alternatives.[707] Moreover, the inquisitorial approach 'is less sensitive to claims concerning individual rights', and more committed to material truth.[708] This emphasis on material truth in the inquisitorial system, 'relegates questions of individual rights to a subsidiary position in the litigation.'[709]

3.4.2 Adversarial (accusatorial) process presupposes and enhances the prospects of judicial impartiality

The term 'adversary system' is 'the generic description of the procedures and practices by which society has entrusted to counsel principal responsibility for the investigation and presentation of evidence under evidentiary rules designed in general to ensure a high degree to reliability. Society has placed responsibility upon counsel rather than choosing another alternative, such as entrusting the evidence gathering and presentation process to court officials. This system has been called the "*only effective means for combatting this natural human tendency to judge too*

[703] See Grande (2016) *The American Journal of Comparative Law* 594 n 44.
[704] *Ibid* 594.
[705] Panzavolta (2005) *North Carolina Journal of International Law and Commercial Regulation* 589 (my emphasis).
[706] S Landsman *The Adversary System: A Description and Defense* (1984) 50.
[707] *Ibid* 45, with reference to a pertinent survey conducted by Professors John Thibaut and Laurens Walker, as discussed in Thibaut & Walker *Procedural Justice* 77-80, 94-96.
[708] Landsman *The Adversary System* 50.
[709] *Ibid* 50.

swiftly in terms of the familiar that which is not yet fully known."'[710] Indeed, '[p]roponents of the adversary system contend that issues of fact and law are more thoroughly and impartially considered by the decisionmaker within a procedural context that delegates control of the development and presentation of evidence to the parties in the dispute.'[711]

The adversarial system creates a presumption of judicial impartiality and, consequently, independence.[712] This is so when it is considered that judicial impartiality is displayed in the very arrangement in adversarial process of a trial as a contest between two parties, 'with the court in an intermediate and relatively passive position except for its rendering of a decision.'[713] That the group of participants in such a trial system 'is a triad (two parties and one judge) is itself important because it makes clear that the judge is not a party to the suit.'[714] A contest, then, between two parties, implies impartial adjudication by an independent arbiter.[715] Juxtaposed partialities in a legal conflict (ie a confrontation between two procedural opponents before an independent and detached adjudicator) produces the possibility of 'concomitant impartiality.'[716] 'Without conflict there is no adjudication, and without the two partialities of the dispute there is no impartiality of the adjudicator. The notion of an impartial attitude willing to consider *all* the information submitted by both parties is relevant only in juxtaposition to the blind partiality of the two opponents. The statue of justice may be blind, but the essence of justice is precisely the opposite: to keep the eyes open until all relevant information has been presented.'[717] Impartiality presupposes the passivity of the arbiter.[718] By giving the trial judge a relatively passive role, impartiality is promoted.[719] Passivity of the arbiter is often celebrated 'as the best device for counteracting bias and promoting neutrality'; uninvolved in the development of evidence, the adjudicator can sit back, observe the tapping of informational sources with calm detachment, and suspend his or her

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[710] Pye (1978) *Duke Law Journal* 935 (footnote omitted) (my emphasis).
[711] M Lea & L Walker 'Efficient Procedure' (1979) 57 *North Carolina Law Review* 361 362.
[712] JMT Labuschagne 'Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrolemeganismes van die regsprekende gesag' (1993) 26 *De Jure* 347 356.
[713] Eckhoff (1965) *Scandinavian Studies in Law* 40.
[714] *Ibid* 40.
[715] Zupančič (1982) *Journal of Contemporary Law* 42-43, 50-51, 79, 82, 115; Zupančič (2003) *European Journal of Law Reform* 99.
[716] Zupančič (1982) *Journal of Contemporary Law* 82.
[717] *Ibid* 79 (author's emphasis).
[718] *Ibid* 42.
[719] Eckhoff (1965) *Scandinavian Studies in Law* 41.

judgment longer than under alternative, or inquisitorial, arrangements.[720] Thus, the conflict at trial 'must be so presented that the adjudicator can only choose between two clear possibilities.'[721] Adversariness, therefore, serves the purpose of impartiality.[722] The import of this is that the existence of the legal profession, that is, the appearance of legal representatives for the parties in court, is 'an important factor in the institutional safeguards of judicial impartiality.'[723] Party representation creates an important control mechanism of the judicial authority.[724]

Whereas an integral component or part of judicial impartiality is the ability to remain undecided at trial, or not to form an early hypothesis on the issues, until all the evidence has been presented by the parties,[725] adversariness 'is a *necessary* condition' for impartiality.[726] This is because an undecided attitude, or an attitude on the part of the court of 'non-committal, hypothesis-aloofness', during the trial 'can only be preserved in a procedural situation where two parties alternate before an inactive adjudicator, each one pressing its own hypothesis and by the same token trying to neutralize the opponent's one. The adjudicator's attention shifts from one side to another - the courtroom architecture manifests this arrangement - and the very committal to one hypothesis at one moment becomes its own negation at the next one.'[727] A point-counterpoint method of proceeding, characteristic of the adversarial trial, 'helps achieve unprejudiced adjudication. Empirical evidence suggests that once a judge or fact finder adopts a bias - tentatively decides an issue in favor of one party - it becomes difficult to change that opinion. By introducing dispute at each stage of the proceedings (for example, through cross-examination and counter-arguments), adversarial presentation tends to keep tribunals uncommitted until all the evidence is in.'[728] Impartiality is thus seen as 'a natural by-product' of adversarial process.[729]

Where the parties to the dispute have the main responsibility for bringing in evidence and arguments, ie in a process involving party control of litigation, this

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[720] Damaška *Evidence Law Adrift* 95. See also Landsman *The Adversary System* 45.
[721] Zupančič (1982) *Journal of Contemporary Law* 42.
[722] *Ibid* 41.
[723] Eckhoff (1965) *Scandinavian Studies in Law* 41.
[724] Labuschagne (1993) *De Jure* 356.
[725] Zupančič (2003) *European Journal of Law Reform* 95 n 162.
[726] *Ibid* 99 (author's emphasis).
[727] *Ibid* 99.
[728] Zacharias (1991) *Vanderbilt Law Review* 54 (footnote omitted).
[729] Zupančič (2003) *European Journal of Law Reform* 87.

enables the arbiter to adopt a relatively passive posture, which enhances his or her ability both to be and to be seen to be impartial.[730] The arbiter is able to become impartial because he or she 'need not form premature hypotheses with which to discover the necessary factual and "legal" bases for a proper decision, since the parties are doing this for him. Any biases which are necessitated by the formulation of tentative but premature positions are counteracted by opposing biases.'[731]

In the adversary environment, the prosecution's hypothesis of guilt, in a criminal case, is exposed to ardent critique by the defence. The defects in the prosecution's case are laid bare as are the weak points in the defence. Each side endeavours to decimate the case of the other, and to prove its case in an independent way. 'Thus, both parties constantly demonstrate to the judge that different answers can be given to the charge. The judge, so to speak, gets a stereoscopic view of the alleged offence.'[732] The arbiter is essentially free to choose whose version to accept or reject after all the evidence is in, subject of course to evidential rules and the burden of proof. The arbiter is not required to form his or her own hypothesis concerning the subject matter of the dispute before him or her, at least not before the final stages of adjudication. The prosecution is required to establish a *prima facie* case, whereupon the burden of rebuttal shifts to the accused. This process of dialectic dispute and challenge helps to keep the trial court undecided until all the evidence has been adduced and both sides have been granted equal opportunity to present their respective cases and to challenge the case of the other through cross-examination and counter-arguments. Such a procedure, then, enhances judicial impartiality.[733] The predominant role of counsel in examining witnesses - as opposed to that of the judge in the inquisitorial tradition - promotes neutrality among those who preside over and serve as fact-finder in adversarial criminal prosecutions.[734] The advocate, by his or her zealous preparation and presentation of the facts and law, enables the court to come to the hearing with an open and neutral mind and render impartial judgments.[735] Because

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730 P Weiler 'Two Models of Judicial Decision-Making' (1968) 46 *The Canadian Bar Review* 406 413.
731 *Ibid* 413.
732 Herrmann (1978) *SACC* 6.
733 Zupančič (2003) *European Journal of Law Reform* 87.
734 Silver (1990) *Wisconsin Law Review* 1036-1037.
735 *Ibid* 1037 n 159. In Landsman *The Adversary System* 4, it is similarly observed that party presentation of evidence in adversarial process through skilled professional advocates insulates the fact-finder from active involvement in the case, and thus promotes the neutral evaluation of the case.

the adversary process assigns the responsibility of gathering and presenting the evidence at trial to the parties, 'it serves to increase the likelihood that the trier will be able to devote his full attention to a neutral adjudication of the case.'[736]

In the inquisitorial system, the presiding judge 'inevitably' begins much earlier to form some tentative hypotheses about the reality he or she seeks to reconstruct, particularly, as is the case in criminal matters, from the dossier or police file which lays the foundation for the trial.[737] Like the prosecutor in adversary proceedings, the judge has to study the dossier in advance of trial, for he or she cannot effectively interrogate the accused and the witnesses without being thoroughly *au fait* with the facts of the case as they appear in the dossier.[738] But '[s]tudying a dossier that was prepared by the prosecutor and by the police might create the danger that the judge will be unduly influenced in their favour.'[739] It may, in other words, lead to early hypothesis formation by the trial court, which may, as noted earlier in this chapter, make the court more receptive to evidence which confirms such hypothesis, especially when it is considered that 'people assimilate information selectively'.[740] Consequently, the court will interpret the information or evidence in an unconsciously biased way or in a way most consistent with the court's prior beliefs;[741] the court may in these circumstances prejudge the case[742] and be predisposed to a certain result, and 'have difficulty in listening to the evidence with an open mind.'[743] The presiding judge may subconsciously tend to put questions that seek information supporting his or her early or premature hypothesis.[744] This constitutes 'confirmation bias'.[745] 'Adversary theorists worry that a judge who has taken an active role in the

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Thus, intimately connected with the requirements of the trial judge's passivity and neutrality is the procedural principle that the parties must produce all the evidence on which the decision will be based.

[736] Landsman *The Adversary System* 45.

[737] Damaška *Evidence Law Adrift* 95; Damaška (1975) *University of Pennsylvania Law Review* 1091-1092.

[738] Herrmann (1978) *SACC* 13; Damaška (1975) *University of Pennsylvania Law Review* 1089.

[739] Herrmann (1978) *SACC* 13.

[740] See, for example, Damaška *Evidence Law Adrift* 95-96; Damaška (1975) *University of Pennsylvania Law Review* 1092; Grande 'Dances of Criminal Justice' in *Crime, Procedure and Evidence in a Comparative and International Context* 147; Callen 'Cognitive Strategies and Models of Fact-Finding' in *Crime, Procedure and Evidence in a Comparative and International Context* 170-172; Gravett (2017) *SALJ* 69-70, 74.

[741] Grande 'Dances of Criminal Justice' in *Crime, Procedure and Evidence in a Comparative and International Context* 147; Posner (1999) *Stanford Law Review* 1495.

[742] Sward (1989) *Indiana Law Journal* 314.

[743] Herrmann (1978) *SACC* 13.

[744] *Ibid* 13. See also Damaška (1975) *University of Pennsylvania Law Review* 1092.

[745] See, for instance, the instructive analysis of this aspect in Gravett (2017) *SALJ* 69-74.

development of the case might come to a decision too early and, consciously or unconsciously, stop looking for evidence or argument contrary to his conclusion.'[746] As, for example, Lon Fuller observed in an oft-cited work:[747]

> *[I]n the absence of an adversary presentation, there is a strong tendency by any deciding official to reach a conclusion at an early stage and to adhere to that conclusion in the face of conflicting considerations later developed*… "What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without waiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, *for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention*."

There is a 'distinct risk' that an active or interventionist judge 'will favour a particular theory or hypothesis and pursue it relentlessly to the exclusion of others',[748] in the same way that a police officer and prosecutor would remain committed to their theory of the case.[749] 'Adversary theory suggests that if the decision maker strays from the passive role, he runs a serious risk of prematurely committing himself to one or another version of the facts and of failing to appreciate the value of all the evidence.'[750]

A judge 'who conducts an apparently nonpartisan inquiry cannot truly keep an open mind'.[751] 'This is so because the moment we require the judge to find out what happened [ie to actively go about and find out the truth about the case], to find this out on his own, he is of necessity required to form a hypothesis. Without a hypothesis, he cannot function as an investigator.'[752] The investigation of a crime necessarily entails the formation of a hypothesis as to the probability of the accused's guilt, and this forms the basis of the criteria which the investigator employs in distinguishing what is essential or relevant in a case from what is not; an investigator cannot assume that an accused is innocent otherwise he or she could

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[746] Sward (1989) *Indiana Law Journal* 313.
[747] Fuller 'The Adversary System' in *Talks on American Law* 39-40 (my emphasis).
[748] Jackson & Doran *Judge without Jury* 65.
[749] Gravett (2017) *SALJ* 73-74.
[750] Landsman *The Adversary System* 2-3.
[751] Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 26.
[752] Zupančič (2003) *European Journal of Law Reform* 97.

not be treated as an accused.[753] No investigation can be completely impartial; all investigators are affected by their personal points of view and backgrounds; 'the act of investigating a crime itself creates bias on the part of the investigator.'[754] Anyone 'who is involved in searching is naturally partial'.[755] A criminal investigator will only investigate if he or she is committed to a hypothesis of guilt.[756] If the judge, then, were to carry the responsibility of finding the truth, he or she would be contaminated by the hypothesis he or she would need to create in order to investigate at all.[757] If, however, the judge remains, so to speak, a passive receptor of two opposing hypotheses as to the accused's guilt or innocence, he or she does not need to be committed to any hypothesis during the trial.[758] This helps to delay the hypothesis formation on his or her part and essentially improves the chances that he or she will see the case from at least two different sides.[759] 'Proof through evidence requires hypothesis; hypothesis requires a preliminary mind-set; *if an active judge-interrogator develops the proof, his preliminary mind-set too easily can become his final decision*; therefore, it is better to have conflicting preliminary hypotheses and supporting proofs presented by the parties *so that the judge's mind can be kept open until all the evidence is at hand.*'[760] Indeed, '[p]sychological insight suggests that it is very difficult for active investigators to suspend judgment and weigh evidence dispassionately.'[761] Lon Fuller endorsed the view that:[762]

> *An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known*. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.

In this respect, Mirjan Damaška observes that the adversary manner of developing evidence 'is designed in such a way that the art of suspended judgment can be practiced for a much longer period of time by the adjudicators. They are not driven by the duty to lead an inquiry into forming early tentative theories about the facts of

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[753] *Ibid* 97-98.
[754] Panzavolta (2005) *North Carolina Journal of International Law and Commercial Regulation* 585.
[755] *Ibid* 607.
[756] Zupančič (2003) *European Journal of Law Reform* 96 n 162.
[757] *Ibid* 98.
[758] *Ibid* 98.
[759] *Ibid* 98.
[760] Hazard *Ethics in the Practice of Law* 121 (my emphasis).
[761] Jackson & Doran *Judge without Jury* 65.
[762] Fuller 'The Adversary System' in *Talks on American Law* 40 (my emphasis).

the case.'[763] For Damaška, this is clearly 'an *advantage* of the adversary mode.'[764] Where a passive adjudicator observes the alternation of mutually incompatible hypotheses of the prosecution and the defence, he or she may very well form one opinion during the presentation by the prosecution and the contrary opinion during the presentation by the defence.[765] This, however, is very different from bias. As the Appellate Division, per Schreiner JA, appositely held in *R v Silber*:[766]

> Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias.

It is evident from the afore-going considerations that judicial impartiality is created 'out of a series of mutually incompatible partialities', that is, out of a dialectical process of thesis and antithesis; out of presenting a version of the facts which is challenged by the opposing side, which in turn presents its own version of the facts; out of proofs and counter-proofs and then out of argument and counter-argument.[767]

Moreover, '[t]here is always a danger that initiative on the part of the court to the advantage or disadvantage of a party will be interpreted as prejudice. For this reason it serves to protect the judiciary's reputation for impartiality that a party, and not the court, institutes the proceedings, and that the parties have the main responsibility for bringing in evidence and arguments.'[768] A 'major problem with judicial intervention is the danger of the judge being seen to develop a commitment to one side or the other. This can lead to a judge appearing to be less impartial'.[769] Mirjan Damaška maintains that 'a judge who actively injects himself into the

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[763] Damaška (1975) *University of Pennsylvania Law Review* 1092.
[764] *Ibid* 1092 (my emphasis).
[765] Zupančič (2003) *European Journal of Law Reform* 96-97 n 162.
[766] 1952 2 SA 475 (A) 481F-H, as cited with approval by the Constitutional Court in *S v Basson* 2007 1 SACR 566 (CC) para 34.
[767] Zupančič (2003) *European Journal of Law Reform* 97 n 162.
[768] Eckhoff (1965) *Scandinavian Studies in Law* 40.
[769] Jackson & Doran *Judge without Jury* 65.

examination of evidence *places his neutrality at risk: he appears to be putting on the case for one of the parties.*'[770] Because the judge in the adversary system seldom takes the lead in conducting the proceedings, he or she 'is unlikely to appear to be partisan or to become embroiled in the contest.'[771] When the judge 'becomes an active questioner or otherwise participates in a case', he or she 'is likely to be perceived as partisan rather than neutral. Judicial passivity [therefore] helps to ensure the appearance of fairness.'[772] The judge's 'detachment preserves the appearance of fairness as well as fairness itself.'[773] CR Snyman explains as follows on how the function of the presiding judge in inquisitorial process in a criminal matter can create the perception of bias, as noted above:[774]

> The main point of criticism against the continental inquisitorial system, is the double role which the judge must necessarily fulfil. He has to be both the detective, himself searching for the material truth and especially all facts and circumstances necessary to build up a case against the accused, and, at the same time, the arbiter who must objectively evaluate all these facts and considerations. *These two functions of the judge contradict each other. It is difficult for the judge to be completely unprejudiced against the accused, if he virtually has to be both prosecutor and judge at the same time.* Even if one defends the German system with the argument that the judge also actively has to look for circumstances in the accused's favour, *one still has the position that in the eyes of the accused, the judge is not wholly impartial, but is rather associated with the state prosecuting authorities, of which he is seen to be merely a representative. The judge is regarded by the accused as his opponent.*

Similarly, Glanville Williams writes, in comparing the Continental and English systems of the criminal trial:[775]

> The suspicion of bias attaching to the judge in Continental countries is recognised, even by domestic observers, to be one of the weakest elements in their procedure… [T]he chief reason for the unhappy position in which the Continental judge finds himself lies in the inquisitorial process, *which turns the presiding judge, whatever his intentions, into a second and more august prosecutor*. It has, indeed, been observed that *the roles of the judge and the prosecutor, as they are conceived in England, are almost precisely reversed in France*. There, the prosecutor does not examine the witnesses for the State, nor cross-examine the accused and the witnesses for the defence, or at any rate he does not bear the main burden of these tasks, and he never objects to the admission or exclusion of testimony. French

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[770] Damaška *Evidence Law Adrift* 89 (my emphasis).
[771] Landsman *The Adversary System* 44-45.
[772] *Ibid* 3.
[773] *Ibid* 45.
[774] Snyman (1975) *CILSA* 107-108 (footnote omitted) (my emphasis).
[775] G Williams *The Proof of Guilt: A Study of the English Criminal Trial* 3 ed (1963) 30-32 (my emphasis).

> commentators say that he refrains from taking too active a part from the fear of provoking the hostility of the jury and arousing their sympathy for the defendant. *But the result of his relative inactivity at the trial is to throw much of his work upon the judge, who thus comes to seem, in the mind of the public and the jury, to be more prejudiced than counsel for the prosecution…*
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> *A by-product of the Continental practice is that* [the trial judge] *cannot come into court with a perfectly open mind*. *Since the task of interrogation devolves upon him, he must spend as much time studying the bulky dossier as an English prosecuting counsel in getting up his instructions and proofs of evidence*. *Interrogation cannot be effectively conducted unless the case has been thoroughly mastered beforehand.* It is even required in France that the president of [the court] shall have interviewed and interrogated the accused before the trial, notwithstanding that there has already been extensive interrogation by the examining magistrate (*juge d'instruction*). The procedure is intended partly to be for the protection of the accused, it being thought that the judge can satisfy himself that there has been no suppression of evidence telling in the accused's favour. However this may be, *our reaction to the French system is that it creates a danger that the point of view of the prosecution will communicate itself to the judge before the case has been heard*.
>
> An English judge, on the other hand, *comes fresh to the case*. His aloof and unbiased position is responsible in part for the esteem in which he is held.

In *Wong Yang Sung v McGrath*, the majority of the United States Supreme Court affirmed that the evil resulting from the practice of commingling or embodying in one person or agency the duties of prosecutor and judge, is that '"[t]his not only undermines judicial fairness; it weakens public confidence in that fairness."'[776] The combination of the prosecuting and adjudicative functions in the presiding officer threatens the impartial performance of the judicial work.[777] The Court also affirmed that '"[a] genuinely impartial hearing, conducted with critical detachment, *is psychologically improbable if not impossible*, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible."'[778]

In noting the drawback of inquisitorial process, JR Spencer[779] makes the observation that:[780]

> Where the court questions the witnesses this creates the risk of compromising the neutrality of the judge, and is sometimes harmful to the accused, who sees himself deprived of the

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[776] 339 US 33 42 (1950).
[777] *Ibid* 42.
[778] *Ibid* 44 (my emphasis).
[779] Professor, Faculty of Law, University of Cambridge.
[780] Spencer 'Evidence' in *European Criminal Procedures* 629.

> possibility of attacking the prosecution witnesses effectively. If the accused considers that the questions the presiding judge is putting to the witnesses are unfair, to whom can he complain? To the judge: that is to say, to a figure who is at once responsible for seeing that the trial is fairly conducted and the person about whose behaviour the defendant wishes to complain.

In a similar vein, Joachim Herrmann, in drawing attention to the disadvantages of inquisitorial process, notes that 'it must be taken into consideration that in the inquisitorial system the judge has to do three jobs at the same time: he has to conduct the examination-in-chief, he has to conduct the cross-examination, and he has to assess the evidence.'[781] Herrmann points out that '[i]n assessing the evidence [the trial judge] may have to decide on the efficiency of his own questioning.'[782] 'There is danger', says Herrmann, 'that the judge might be psychologically overburdened by these disparate tasks.'[783]

In the circumstances, the structure of the inquisitorial trial endangers judicial impartiality.[784] Inquisitorial trial procedure may give rise to the problem of the trial judge gaining a preliminary or provisional impression of the merits of the case before the trial even commences, which factor may result in judicial bias denoting 'a leaning, inclination, bent or predisposition towards one side or another' or 'a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues', ie a state of mind which is not 'open to persuasion by the evidence and submissions' of counsel in court.[785] The position of the judicial officer in inquisitorial process would be similar to that of a prosecutor, whom having studied the police case docket before trial, would 'inevitably entertain a "natural" bias [or 'a mental "inclination" or "predisposition"'] towards the guilt of an accused', for the very institution of criminal proceedings, which is to be founded on *prima facie* evidence contained in the case docket that implicates the accused, would not otherwise

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[781] Herrmann (1978) *SACC* 13.

[782] *Ibid* 13.

[783] *Ibid* 13. See also Jescheck (1970) *Virginia Law Review* 249-250.

[784] See also Jackson 'The Function of the Criminal Trial in Legal Inquiry' in *The Trial on Trial* 122, noting that:

> 'Critics have pointed to miscarriages of justice in France and the Netherlands where supposedly more neutral professionals are put in charge of investigating and adjudicating cases but where there has often been a similar dependence on the police file as in adversarial systems. This raises questions about the incentives on official investigators to unearth enough evidence, and *about the degree of trust we can have in officials to act with independence and impartiality*.'

(Footnote omitted). (My emphasis).

[785] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21, endorsing *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) paras 104-106 (Westlaw).

occur.[786] The prosecutor is effectively called upon to form a preliminary, or initial, opinion on the matter, particularly as to the guilt of the accused.[787]

It is a long-established principle in the common-law that a judge who descends into the arena and usurps the function of counsel by taking it upon him- or herself to examine witnesses and the accused, is liable to have his or her 'vision clouded by the dust of the conflict.'[788] Unconsciously he or she deprives him- or herself 'of the advantage of calm and dispassionate observation.'[789] 'A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination.'[790] A judge who associates him- or herself too closely with the conduct of the case, denies him- or herself the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his or her position of relative detachment, the way the balance tilts.[791] It would convey or be likely to convey an impression opposite to that of open-mindedness, impartiality and fairness, which qualities ought to be manifest to all those who are concerned in the trial and its outcome, especially the accused.[792] A judge is required to ensure not only that justice is done, but that it is also seen to be done.[793] A judge should refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him or her from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him or her by the litigants.[794] Justice is best done by a judge who holds the balance between the contending parties without him- or herself taking part in the disputations.[795] It is so that the trial judge may intervene in the proceedings to ask questions of witnesses to clear up any point that has been overlooked or left obscure, and to ensure that the rules of procedure and evidence are adhered to by

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[786] *R v Sole* 2001 12 BCLR 1305 (Les) 1330H-1331D.
[787] *Ibid* 1330I-J. See also *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.
[788] *Yuill v Yuill* (1945) 1 All ER 183 (CA) 189A-B.
[789] *Ibid* 189B.
[790] *Ibid* 189A. These findings in *Yuill v Yuill* supra were cited with approval by the Appellate Division in *S v Rall* 1982 1 SA 828 (A) 832C-D; *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 28.
[791] *Hamman v Moolman* 1968 4 SA 340 (A) 344E-F. See also *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 28.
[792] *S v Rall* 1982 1 SA 828 (A) 832A-B.
[793] *Ibid* 831H.
[794] *Ibid* 832C.
[795] *Jones v National Coal Board* (1957) 2 All ER 155 (CA) 159C.

the parties and that the accused receives a fair trial and in order to assist an undefended accused.[796] But if the judge goes beyond this, he or she 'drops the mantle of a judge and assumes the robe of an advocate'.[797] There is a fundamental difference between, on the one hand, judicial intervention which is intended to ensure that justice is properly administered, as part of the trial court's role of being the arbiter and ultimate repository of fairness whereby courts are enjoined to control the behaviour of litigants,[798] and, on the other, undue intervention which has the effect of the court 'virtually taking over from counsel both the examination and cross-examination of witnesses.'[799]

It 'can *scarcely be disputed* that a degree of decision maker passivity during the examination of evidence has its virtues.'[800] A fundamental requirement of impartiality is passivity of adjudication.[801] Judicial neutrality and passivity are essential 'to ensure an evenhanded consideration of each case', and to ensure the appearance of fairness; the court is not seen as partisan and biased.[802]

'Passivity of adjudication means that the judge must not be required to actively go about and find out the truth about the case.'[803] He or she must primarily, so to speak, 'sit still and be passively open to allegations and counter-allegations' made by the parties to the dispute.[804] It is therefore not difficult to see how the structural demands and dynamics of adversarial process, where the parties are

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[796] *Ibid* 159G.

[797] *Ibid* 159H.

[798] See, for example, *R v Hepworth* 1928 AD 265 277; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)* 2002 1 SA 429 (CC) para 11; *S v May* 2005 2 SACR 331 (SCA) para 28; *R v Sole* 2001 12 BCLR 1305 (Les) 1342B-C. See too *Glasser v United States* 315 US 60 71 (1942), where the principle was enunciated thus by the majority of the United States Supreme Court:

> 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.'

Similarly, in *Geders v United States* 425 US 80 87 (1976), the same Court held:

> 'If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.'

See also *Quercia v United States* 289 US 466 469 (1933), where the principle was appositely articulated as follows:

> 'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.'

See further the germane remarks in ME O'Neill 'Private Vengeance and the Public Good' (2010) 12 *University of Pennsylvania Journal of Constitutional Law* 659 731-732, that the judge presides over the trial and has an obligation to ensure that the accused's rights are preserved.

[799] *Hamman v Moolman* 1968 4 SA 340 (A) 344E.

[800] Damaška *Evidence Law Adrift* 95 (my emphasis).

[801] Zupančič (2003) *European Journal of Law Reform* 97.

[802] Landsman *The Adversary System* 3.

[803] Zupančič (2003) *European Journal of Law Reform* 97.

[804] *Ibid* 97.

responsible for collecting and producing the evidence at trial in developing their respective cases, promotes judicial passivity and consequently judicial independence and impartiality. The passive attitude of the trial judge has an affinity with adversarial, laissez-faire ideology.[805] Only under the adversary system can passivity of the adjudicator be achieved. The legitimacy of the system rests on the neutrality of the arbiter.[806] Mirjan Damaška shows that it is the adversary mode of trial, as opposed to the inquisitorial method, which favours passivity of the decision-maker.[807] Damaška indicates that an essentially passive trier of fact is 'a desirable stance only within the adversary mode.'[808] Indeed, according to Damaška, the adversary system does not hesitate to place passivity and impartiality of the decision-maker above a substantively right or accurate disposition of the case.[809] Damaška notes that the image of an impartial decision-maker is central to adversarial process, and this image requires that the decision-maker 'be disinterested and essentially passive.'[810] The reason for this is obvious: in essence under the adversary system the information about the facts of the case reaches the adjudicator in the form of two alternating one-sided accounts presented by the two respective opposing parties to the case.[811] Damaška points out that in terms of this arrangement, 'each party calls his own witnesses and tries to obtain from them information favorable to his case. In order to do this effectively, the party must often prepare the witness for the court appearance; what is later to be testimony is often told in the lawyer's office first. After one party has elicited information from his witness, his adversary takes over the interrogation process. Now the reliability of the other party's witness will be questioned, or an attempt will be made to obtain from him reliable information in favor of the cross-examiner's thesis. And it is through such rival use of evidentiary sources that the factfinding stage of the trial unfolds.'[812] Damaška explains, as noted earlier in this chapter, that because in adversarial process 'proof-taking divides into two contrary cases managed by counsel for the

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[805] Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 25.
[806] Damaška *The Faces of Justice and State Authority* 135.
[807] *Ibid* 135-140.
[808] Damaška (1975) *University of Pennsylvania Law Review* 1099.
[809] Damaška *The Faces of Justice and State Authority* 136.
[810] *Ibid* 168.
[811] Damaška (1975) *University of Pennsylvania Law Review* 1091.
[812] *Ibid* 1090. See also Damaška *Evidence Law Adrift* 74; Damaška 'Adversary System' in *Encyclopedia of Crime & Justice* 25; Damaška (1973) *University of Pennsylvania Law Review* 563-564, specifically tracing the contours of criminal adversarial procedure.

parties, the court's sharing of evidentiary burdens with either party is difficult to organize or even to conceive. *For if the judge were to take a substantial role in evidence-gathering, his activity instantly would translate as help offered to one side in a conflict - that is, as prejudice, bias, and an abdication of judicial neutrality. Nor can it be otherwise in a fact-finding scheme in which two litigants compete to make their respective evidentiary "cases," and the court then decides who was more successful in meeting the standard set in this endeavor ("who has made a better case")*.'[813] It is, then, no coincidence that judges in common-law systems 'only sparingly employ their powers of intervention in the partisan presentation of evidence, and that they will disrupt a strongly competitive exercise of proof taking only in exceptional cases',[814] such as to rule on admissibility of evidence, or in order to obtain clarity on aspects raised in evidence.[815] The reluctance by judicial officers to interfere in the competitive presentation of evidence is due to the difficulty of mixing impartiality with partisan attitudes.[816] Where the judge unduly intervenes in the presentation of evidence that is primarily entrusted to the parties, such may be perceived as descending into the arena and taking sides in the dispute, whereas the parties in adversarial process must be treated equally by the adjudicator: 'impartiality presupposes "two partialities."'[817] Moreover, if the adversary system is to function properly, 'the parties must invest in the strategy and preparation of their evidentiary cases; if they are to derive the greatest tactical advantage from their evidence, they must plan what persons to call as witnesses, in what order to examine them, and even what sequence of questions to propound.'[818] But if the judge begins freely to intervene in the competitive proof-taking process or in this partisan mode of using evidence, this may, even in the instance of one limited *bona fide* interference on the part of the judge, 'render all the pain and travail of the parties useless.'[819] Damaška adds on this score that '[i]f judicial interference can be expected in the normal run of events, the wind begins to go out of the sails of the competitive evidentiary process, and the incentives that sustain it begin to dry up.'[820]

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[813] Damaška *Evidence Law Adrift* 82 (my emphasis).
[814] Damaška *The Faces of Justice and State Authority* 125.
[815] Damaška (1975) *University of Pennsylvania Law Review* 1090.
[816] Damaška *The Faces of Justice and State Authority* 124.
[817] *Ibid* 124.
[818] *Ibid* 124-125.
[819] *Ibid* 125.
[820] *Ibid* 125.

Damaška observes that if an official, or judicial, fact-finder conducts a 'focused investigation' at trial, he or she '*must adopt an initial hypothesis or assumption which - in a dichotomous dispute - necessarily favors one disputant over the other*.'[821] It is therefore possible that the party disfavoured by this assumption will view the official's factual inquiry as subtle bias.[822] Damaška notes that it makes no difference whether the official fact-finder seeks confirmation of his or her initial hypothesis or (a less likely alternative) engages in a 'Popperian' quest[823] for its refutation.[824] 'In either case,' says Damaška, '*one party may begin to lose faith in the fact finder's neutrality. This possible erosion of faith accelerates when the official seeks to test the accuracy of information by vigorously challenging its supplier: when he grills a witness testifying in favor of one disputant, the other may think that the official is assisting his adversary*.'[825]

A 'building block', then, of the adversary system is that because the adversaries themselves are the means for shaping and focusing the issues and evidence, the trial judge or fact-finder should be an essentially passive and a neutral participant in the trial.[826]

Damaška points out that in the non-adversary or inquisitorial mode of trial the issue of the adjudicator's 'neutrality as between two sides need not even arise, in that there need not always be two parties to the legal process.'[827] In such a system there are in a criminal case no separate witnesses for the prosecution and the

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[821] *Ibid* 120 (my emphasis).

[822] *Ibid* 120.

[823] This relates to the theory that a hypothesis can be falsified by observed exceptions but never absolutely proven to be true. It proposes that knowledge cannot be absolutely confirmed, but rather that science progresses by the experimental refutation of the current theory and its consequent replacement by a new theory, equally provisional but covering more of the known data.

[824] *Ibid* 120.

[825] *Ibid* 120 (my emphasis).

[826] Zacharias (1991) *Vanderbilt Law Review* 61. Nevertheless, a judge's position in such a system 'is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.' - *R v Hepworth* 1928 AD 265 277.

In Fuller 'The Adversary System' in *Talks on American Law* 41, it is similarly observed that for participation by the parties in an adversarial trial to be meaningful, 'it must take place within an orderly frame, and it is the duty of the judge to see to it that the trial does not degenerate into a disorderly contest in which the essential issues are lost from view. Furthermore, when the party is given through his attorney an opportunity to present arguments, this opportunity loses its value if argument has to be directed into a vacuum. To argue his case effectively, the lawyer must have some idea of what is going on inside the judge's mind. A more active participation by the judge - *assuming it stops short of a prejudgment of the case itself* - can therefore enhance the meaning and effectiveness of an adversary presentation.' (My emphasis).

[827] Damaška *The Faces of Justice and State Authority* 168.

defence[828] that would necessitate a passive and neutral trier of fact. Instead, '[a]ll witnesses are evidentiary sources of the bench, and it is the judge, not the parties, who has the primary duty to obtain information from them.'[829] The parties may not affect or prepare the witnesses for trial and the bulk of their narrative accounts is led by the trial judge, with the parties being permitted to ask some questions only after the judge has questioned the witnesses. To this end, the judge, as has been seen, is given the dossier before trial to enable him or her to have a conception of the case and knowledge about the role of the witnesses in it, in order that he or she can effectively question the witnesses and the accused at trial.[830] It is thus easy to see what lies at the core of this described manner of presenting evidence. The decision-maker is 'active'; he or she uses the informational or evidential sources him- or herself.[831] The information or evidence does not reach the decision-maker 'in the form of two one-sided accounts; he strives to reconstruct the "whole story" directly', and is not dependent on the parties to do so.[832] In this procedural environment, it becomes clear why Damaška is of the view that the image of an impartial decision-maker does not express 'the adjudicative ideal' in a non-adversary or inquisitorial trial.[833] Instead, in such a system the paramount issue is to identify those postures and attributes of the trial judge 'most likely to promote a substantively right disposition of the case.'[834] Damaška notes that even if the proceedings are not free from what he calls 'bipolar tensions', say between the prosecution and the defence, the active decision-maker 'is not bound to treat both sides equally; under some circumstances he may be expected to side with the party who urges what seems to be the correct view and to assist him if he fails to make the right "case" effectively.'[835]

It has been shown in the above discussion that '[t]he essential characteristic of the adversary system is that the presiding judicial officer appears as an impartial arbiter between the parties.'[836] 'What makes a system accusatorial is the fact that evidence is collected in oral form with adversary dynamics in front of an impartial

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[828] Damaška (1975) *University of Pennsylvania Law Review* 1088.
[829] *Ibid* 1088.
[830] *Ibid* 1088-1089.
[831] *Ibid* 1090.
[832] *Ibid* 1090.
[833] Damaška *The Faces of Justice and State Authority* 168.
[834] *Ibid* 168.
[835] *Ibid* 168.
[836] *S v Rudman and Another; S v Mthwana* 1992 1 SA 343 (A) 348F; submitted in argument to show that if an accused is undefended, the judge is placed in an invidious position to assist the accused.

judge.'[837] The adversary system assigns each participant a distinct, single function: the judge is to serve as a neutral and relatively passive arbiter, whose primary function is to decide the case, whilst counsel is to act as a zealous advocate in presenting the case of the party whom he or she represents.[838] 'According to adversary theory, when each actor performs only a single function the dispute before the court will be resolved in the fairest and most efficient way.'[839] Where, however, the judge assumes a conflicting role in actively searching for the truth, a responsibility of counsel, there is a fundamental danger that the judge will abandon neutrality.[840] Characteristic passivity of Anglo-American fact-finders as trials unfold means that '[a]lthough responsible for the ultimate decision, they are dependent on evidence and witnesses selected by the parties. They have little - if anything - to say about the choice and arrangement of the information on which their decision will turn. *Rather than forging their own path to understanding, they must rely on others for what they hear and see*.'[841]

The structural arrangement of adversarial process can thus be said to create or advance and preserve the impartiality of the decision-maker. The adversary or accusatory environment is conducive to, or facilitates, judicial impartiality. Lon Fuller concludes that 'the justification for the adversary system lies in the fact that it is a means by which *the capacities of the* [decision-maker] *may be lifted to the point where he gains the power to view reality through eyes other than his own, where he is able to become as impartial, and as free from prejudice, as "the lot of humanity will admit."*'[842] Empirical evidence too suggests that 'adversarial emphasis on party presentation tends to counteract the bias of the decision maker more effectively than does an approach requiring the active participation of the trier in marshalling the

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[837] Panzavolta (2005) *North Carolina Journal of International Law and Commercial Regulation* 610.

[838] Landsman *The Adversary System* 45.

[839] *Ibid* 45.

[840] *Ibid* 46. It is likewise observed in Fuller 'The Adversary System' in *Talks on American Law* 30-31:

> 'The philosophy of adjudication that is expressed in "the adversary system" is, speaking generally, a philosophy that insists on keeping distinct the function of the advocate, on the one hand, from that of the judge, or of the judge from that of jury, on the other. The decision of the case is for the judge, or for the judge and jury. That decision must be as objective and as free from bias as it possibly can… "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit." If the judge is to perform that high function - a function which… may put human nature to a severe test – then the rules of procedure that govern a trial must be such that they do not compel or invite him to depart from the difficult role in which he is cast. It is not his place to take sides. He must withhold judgment until all the evidence has been examined and all the arguments have been heard.'

[841] Damaška *Evidence Law Adrift* 89 (my emphasis).

[842] Fuller 'The Adversary System' in *Talks on American Law* 43 (my emphasis).

proof.'[843] Mirjan Damaška points out that there is empirical support for the postulate that an adversarial or 'bilateral summation of established facts *is better suited than a unilateral one to counteract the decisionmaker's inclination to render a judgment in accordance with his expectation that the defendant is probably guilty*.'[844]

3.4.3 The ideal position of the '*tabula rasa*' judge in adversarial process

Related to judicial impartiality in the adversary system is the requirement that the judge should preferably know nothing of the merits or evidence of a case until the parties present evidence.[845] Mirjan Damaška points out that '[i]n the Anglo-American system, prior knowledge of the case on the part of the judge is more readily associated with bias.'[846] *Ideally*, the judge in an adversarial trial should come to court *tabula rasa*, 'that is, without any prior knowledge of the *facts* of the case.'[847] The *facts* of the case are to be found and asserted by the parties at trial.[848] 'The judge is not to have investigated or explored the *evidence* before trial.'[849] Entering the trial *tabula rasa* or with a fresh or virgin mind means that the judge must be totally unprepared and ignorant about 'the *evidence*' he or she will be asked to evaluate.[850] The arbiter in such a system is required to be impartial and to operate 'as a judicial *tabula rasa* upon which the parties to the dispute inscribe facts.'[851]

But why is this so? Mirjan Damaška notes that the reasons for this 'are quite straightforward', and explains that '[i]f the judge obtains knowledge about the case independently of the dialectical process of courtroom inquiry, he can hardly decide which side emerged victorious from the disputation about the truth; *he will be siding*

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[843] Landsman *The Adversary System* 45, citing Thibaut & Walker *Procedural Justice* 49-51.
[844] Damaška (1975) *University of Pennsylvania Law Review* 1100, with reference to J Thibaut, L Walker & EA Lind 'Adversary Presentation and Bias in Legal Decisionmaking' (1972) 86 *Harvard Law Review* 386 (my emphasis).
[845] Sward (1989) *Indiana Law Journal* 313.
[846] Damaška (1975) *University of Pennsylvania Law Review* 1105. See also Damaška *The Faces of Justice and State Authority* 170, where it is remarked, under the rubric: 'The Problem of Extraneous Knowledge', that if the arbiter in the adversary system acquires information outside the courtroom regarding a case, that is, privately or if such information stems from 'familiarity with official documentation' gathered during the investigation, this will lead to suspicion of prejudice and bias.
[847] Damaška *Evidence Law Adrift* 89 (my emphasis).
[848] Frankel (1975) *University of Pennsylvania Law Review* 1042.
[849] *Ibid* 1042 (my emphasis).
[850] De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 410 (my emphasis).
[851] DE Stigall 'Comparative Law and State-Building: The "Organic Minimalist" Approach to Legal Reconstruction' (2007) 29 *Loyola of Los Angeles International and Comparative Law Review* 1 19.

all the time with the party whose version of the facts accords with his independent knowledge. Nor is this all. Quite ominously, the two parties will no longer be stimulated to invest their energies in a full adversary clash, for that method of inquiry will no longer be decisive, having formed a *mésalliance* with an alien epistemological approach.'[852] Damaška moreover explains, as observed above, that the familiarity of the judge with a case before the trial commences, as occurs in a non-adversary or inquisitorial matter where the judge gains prior knowledge of the case from studying the dossier or case docket, means that '*the judge inevitably forms certain tentative hypotheses about the reality he is called upon to reconstruct. More or less imperceptibly, these preconceptions influence the kinds of questions he addresses to witnesses. More importantly, there is an ever-present danger that the judge will be more receptive to information conforming to his hypotheses than to that which clashes with them.* Although the resulting dangers to accurate decisionmaking are somewhat decreased by the fact that judges are usually aware of this distorting psychological mechanism, *the shortcomings of this arrangement cannot be entirely eliminated*.'[853] Joachim Herrmann warns, in the context of the danger that may arise if a judge studies a dossier before trial, that '[p]sychologists tell us that perception to a large extent depends on unconscious assumptions that we bring to a particular occasion. They have defined perception as a "compromise" between what we expect to see and what we actually see.'[854] The risk of confirmation bias, or the unwitting selectivity in the acquisition and use of evidence, on the part of the trial judge cannot be discounted: judges being human too, one cannot ignore the fact that '"[m]ost people use their beliefs and attitudes to process information - to accept, distort, or reject it based on whether the information is consistent with their beliefs and attitudes"'.[855] There 'is considerable evidence that people tend to interpret subsequent evidence so as to maintain their initial beliefs. The biased assimilation

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[852] Damaška (1975) *University of Pennsylvania Law Review* 1105 (footnote omitted) (my emphasis).
[853] *Ibid* 1092 (footnote omitted) (my emphasis). See also Damaška *Evidence Law Adrift* 89: Damaška asserts that '[h]ow the dependence on information supplied by the parties is related to the adversary system is not difficult to see, for if the triers of fact obtained their information independently of the competitive and rule-bound courtroom inquiry, it would be difficult for them to decide which side established a better evidentiary case and thus deserved to win. *They would be inclined, instead, to side with the party whose version of events better accounts for the information they acquired by their own efforts in tapping the sources of information or by some other fact-finding efforts of their own*.' (My emphasis). Damaška observes that for this reason, the adversary system favours the adjudicator's passivity and prefers that the arbiter comes to court with a virgin mind. (*Ibid* 89 n 30).
[854] Herrmann (1978) *SACC* 13.
[855] See Gravett (2017) *SALJ* 69-74.

processes underlying this effect may include a propensity to remember the strengths of confirming evidence but the weaknesses of disconfirming evidence, to judge confirming evidence as relevant and reliable but disconfirming evidence as irrelevant and unreliable, and to accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically.'[856]

Exposure of a judge before trial to *evidence* contained in a police case docket may result in the judge being unduly influenced in the State's favour, that is, the judge may view or evaluate the case from the prosecutor's point of view and consequently have difficulty in listening to the evidence presented at trial with an open mind.[857] A prosecutor inevitably entertains a natural bias or mental inclination or predisposition towards the guilt of the accused, based on the contents of the case docket, when the decision is made to institute a prosecution, whereas the judicial officer, on the other hand, is required to keep an open mind throughout, until judgment.[858] Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong or firm view, that accused persons are guilty,[859] such being based on the statements and evidence contained in the case docket. The distinct danger is that a trial judge may be so inclined who has access to the docket. Effectively the judge would form an opinion as to the guilt of the accused before the trial begins; the judge would prejudge the guilt of the accused, which constitutes clear bias. Entering a trial, then, *tabula rasa* or ignorant of the facts or evidence of the case, ie the sources of information gathered by the prosecution and the police during the pre-trial investigative stage,[860] would ensure that the judge has no preconceived ideas about the case before he or she hears the first evidence.[861]

The judge, in his or her capacity as trier of fact, would, by having sight of the docket before the trial's commencement, effectively be able to evaluate the evidence in advance, and thereby be in a position to be prejudiced by it.[862]

According to Damaška, if the arbiter acquires '*factual* knowledge' extra-procedurally, he or she '*cannot be expected objectively to weigh evidence that*

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[856] Lord, Ross & Lepper (1979) *Journal of Personality and Social Psychology* 2099.
[857] Herrmann (1978) *SACC* 13.
[858] *R v Sole* 2001 12 BCLR 1305 (Les) 1330H-1331D.
[859] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.
[860] See Grande (2000) *The American Journal of Comparative Law* 243.
[861] De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 410 n 27.
[862] Compare Grande (2000) *The American Journal of Comparative Law* 229.

clashes with what he thinks he already knows.'[863] Instead, if the trial judge chooses to seek information he or she needs to reach a decision in the case from sources other than those channelled to him or her by the parties, it would become difficult for him or her to decide the case on the criterion dictated by the adversarial conflict-resolving process, namely which side has made a better case. Swayed one way or another by extra-party information, the judge may be inclined to rule against the litigant who otherwise would be the clear victor of the courtroom contest.[864]

In the circumstances, any suggestion that the South African criminal procedure should become more inquisitorial by allowing the judicial officer access to the case docket to enhance judicial participation in the management of the trial and to enable the judge to make sure that all possible material discrepancies between a witness' *viva voce* evidence in court and the witness' police statement contained in the docket are dealt with and in order to enable the judge to adequately assist the undefended accused,[865] cannot be supported despite such aims. While judges generally, by virtue of their training and experience, would be able to decide a case purely on the admitted evidence and submissions of counsel presented in court, there may be instances where even a professional arbiter may find it difficult to disabuse his or her mind of prejudicial inadmissible evidence.[866] And while the misuse of information can generally be guarded against through the requirement that judges give reasons for their factual conclusions,[867] it may happen that even with considerable judicial experience a judicial officer, who has outside knowledge of many of the *facts* which will be in dispute before him or her, may find it difficult to avoid allowing him- or herself, 'quite unconsciously', to be affected in deciding what evidence on the various disputed facts at trial he or she should accept.[868] The possible influence of the inarticulate premises cannot be discounted.

It has long been a trite principle in our common law that a judicial officer must decide a case according to the facts that have been proved or not at trial, and not according to independent knowledge of the case which the judge may have

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[863] Damaška *The Faces of Justice and State Authority* 138 (author's and my emphasis). See also R Zamir 'The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic' (2011) 11 *Pepperdine Dispute Resolution Law Journal* 467 475.
[864] Damaška *The Faces of Justice and State Authority* 136.
[865] See, for example, the discussion of this aspect in Schwikkard *Possibilities of convergence* 24-28.
[866] *Ibid* 27.
[867] *Ibid* 27.
[868] See, analogously, *S v Bailey and Others* 1962 4 SA 514 (E) 517H, dealing with the question of bias arising from the judicial officer having personal knowledge of the issues to be tried.

acquired.[869] Where a judge has information of a case other than what has been proved in evidence, he or she may be influenced by such knowledge in the disposition of the matter; the judge may frame his or her judgment on such information contrary to the evidence presented in the case.[870] If a judge were allowed to decide a case according to other information without regard to the evidence, 'that would be the way to make all legal proceedings capricious'.[871] Indeed, if the grounds for a judicial decision fall completely outside the framework of the evidence and argument presented at trial, thereby making all that was discussed or proved at the hearing irrelevant, 'then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.'[872] It is thus fundamental to the administration of justice in adversarial process that a presiding officer should be an impartial, open-minded and uninformed adjudicator in the sense that the only facts about the case which he or she can gather are those which are proved before him or her in court in the usual way.[873] In *S v Bailey and Others* it was appositely held that 'the administration of justice requires that a judicial officer presiding in any trial should be in a position to exercise an independent and detached judgment unhampered by a close personal knowledge of facts which may be highly material to the issues in the case.'[874] A judge who has personal knowledge of evidentiary facts that are in dispute may not be able to meet the criterion of deciding the case in an objective and impartial manner.[875] In the United States Court of Appeals decision of *Onishea v Hopper*, it was expressly affirmed that:[876]

> *Extrajudicial fact-finding by a judge is improper because it cannot be "tested by the tools of the adversary process."*… That is, "'a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of *evidentiary facts* that are in dispute.'"… Consequently, [there is a] duty to recuse if a judge, outside of his or her judicial capacity, gains knowledge of *facts material to the case*.

However, '[f]or a judge to be disqualified on the ground that he possesses personal knowledge of *disputed evidentiary facts*, the subject of the judge's knowledge

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[869] See, for example, U Huber *The Jurisprudence of my Time* (*Heedensdaegse Rechtsgeleertheyt*) (Translated from the Fifth Edition by Percival Gane – Volume II) (1939) 318.
[870] *Ibid* 318. See also *S v Bailey and Others* 1962 4 SA 514 (E) 517G-518A; *S v Essa* 1964 3 SA 13 (N) 16F-17D; *S v Sibeko en 'n Ander* 1990 1 SACR 206 (T) 207*h-i*.
[871] Huber *The Jurisprudence of my Time* 318.
[872] Fuller (1978) *Harvard Law Review* 388.
[873] See *S v Sibeko en 'n Ander* 1990 1 SACR 206 (T) 207*i*-208*a*.
[874] 1962 4 SA 514 (E) 518A.
[875] RE Flamm *Judicial Disqualification: Recusal and Disqualification of Judges* 2 ed (2007) 301.
[876] 126 F.3d 1323 1341 para 18 (1997) (my emphasis).

ordinarily must be both germane to the pending proceeding, and *of a kind that is not generally available to the public at large*.'[877] Thus, as Richard E Flamm[878] correctly points out, 'knowledge a judge acquires *from engaging in routine activities*, *such as watching television or reading media reports*, *will rarely warrant disqualifying* her from presiding over a case involving issues she learned about in this manner.'[879] The author[880] cites in this regard *Clay v Doherty*, where the Court observed as follows pertaining to the judge's capacity to remain impartial despite wide-ranging extra-judicial knowledge and impressions:[881]

> Plainly the longer a judge lives in a community the larger the body of knowledge, acquaintance and experience he or she carries onto the bench each day. There can be no denying every judge forms impressions based on such things as having read articles in a newspaper, having acted as counsel opposing a lawyer who now has a case before him or her, or having met and talked with an acquaintance at a reception, wedding or conference, or on a train or bus. Yet no reasonable person can doubt the judge's ability to decide the questions he or she confronts in a given case independently of such casual impressions. Only when the extrajudicial associations are in the broadest sense intimate - family relationships and friendships - or when they are substantially linked with financial or professional interest, or *when they afford prior knowledge of facts that weigh heavily in the case*, do reasonable people begin to doubt the judge's capacity to maintain the separation between judicial and extrajudicial knowledge.

On the question, then, of prejudice or disqualifying judicial bias, there is a fundamental distinction between exposure which a judge has to pre-trial publicity, ie to second-hand, and often highly speculative and inaccurate, media reports on a pending criminal case, and exposure to a police case docket where the judge would have direct access to statements of witnesses and other evidence to be adduced at trial. In the adversary system, the ideal of the judge entering a trial with a clean slate means 'a stance of ignorance in relation to the *facts*.'[882]

It may be fair in the circumstances to disqualify a judge under the adversary system who is in possession of extraneous *factual* knowledge or information concerning a case.[883] After all, the criminal trial in the accusatorial mode is a contest in which the accused 'has the right "to put the state to its proof" even with respect to

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[877] Flamm *Judicial Disqualification* 303 (footnote omitted) (my emphasis).
[878] At the time of writing, Flamm was a member of the California Bar.
[879] *Ibid* 303 (footnote omitted) (my emphasis).
[880] *Ibid* 303 n 14.
[881] 608 F.Supp. 295 299 (1985) (my emphasis).
[882] Zamir (2011) *Pepperdine Dispute Resolution Law Journal* 475 (my emphasis).
[883] Damaška *The Faces of Justice and State Authority* 170.

notorious events.'[884] Adversarial process, according to which the integrity of the contest between the opposing parties ranks above the efficient attainment of accurate outcomes, demands that all facts in dispute between the parties be subject to 'rival proof taking'.[885] This means that in the accusatorial ethos, the adjudicator's task is essentially 'to establish the facts on the basis of what the parties have presented, challenged, examined and cross-examined during the trial hearings.'[886]

It is clear that adversarial process requires an impartial and essentially passive posture by the trial judge, where he or she in ultimately reaching a verdict is primarily dependent on the parties for the evidence adduced at trial. If the decision on the facts in an adversarial trial is to emerge solely from the 'dialectic of party debate', the decision-maker should ideally enter the case *tabula rasa*, that is, 'unprepared, unaware of all matters specifically related to the issues.'[887] 'An important precondition for having a *tabula rasa* judge is that the adjudicator is shielded from the *evidence* until the start of the hearings on the merits.'[888] In the accusatorial system, 'the adjudicator should hear about the existence of every piece of evidence for the first time at trial. Whatever judicial involvement there is during the pre-trial phase must be limited to procedural issues and may never expose the adjudicator to the content of any evidence.'[889] 'Reliance on information that has not been filtered [by the parties in a competitive process of proof] might harm the reliability of the fact-determination process and make it difficult for the judge to weigh the evidence objectively. Thus stems the requirement to base the judicial decision only on the facts of the specific case as proved by the parties and not on facts not introduced in evidence.'[890]

Moreover, the adversary system enhances judicial *tabula rasa*. Such a quality is indeed the archetypical, common-law position of the arbiter. In the adversarial

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[884] *Ibid* 171.
[885] *Ibid* 138.
[886] De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 409.
[887] Damaška *The Faces of Justice and State Authority* 137, adding that the arbiter should be 'tutored only through the bilateral process of evidentiary presentation and argument.' Damaška points out, nonetheless, that '[t]he desirability of ignorance [as to the facts of the case], of course, does not entail the desirability of ineptitude: the decision maker should be mentally agile, able deftly to manipulate and make sense of the data presented to him. In sum, the judicial *tabula rasa* must be skillful, intelligent, and wise.' (*Ibid* 138).
[888] De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 410 n 28 (my emphasis).
[889] *Ibid* 410 n 28.
[890] Zamir (2011) *Pepperdine Dispute Resolution Law Journal* 475.

model, 'two meanings of judicial impartiality facilitate a mental and emotional condition of *tabula rasa*.'[891] The first is that of the trial judge maintaining equal distance from the parties in a, so to speak, triangular or triad structure, demonstrating an equal distance between the judge, who sits at the vertex, and both of the parties.[892] The judge, in other words, does not enter the fray and leaves the contest in the hands of the parties.[893] During the trial, the judge's involvement or participation is low[894] and he or she does not take a position in the dispute or side with one of the parties.[895] The evidence is collected and presented at trial by the parties. The trial judge is not involved in the pre-trial gathering of evidence, which is the responsibility of the police and the prosecuting authority. Where the judge abandons this triad structure and sides with one of the parties against the other, his or her decision will be perceived as illegitimate.[896] The second meaning of judicial impartiality that facilitates a *tabula rasa* position in the adversary system, is that 'the judge must not have any interest in any of the parties or in the outcome of the dispute.'[897] 'Such interest can prevent the judge from displaying an equal measure of openness toward the arguments of each party, which might then undermine the triad and create a real concern of partiality in conducting the trial.'[898]

Mirjan Damaška observes that because, in contrast to the adversarial position, judicial impartiality 'is not the central attribute' of the inquisitorial judge, his or her external knowledge or familiarity with extraneous facts or evidence 'is not so readily assumed to be a disqualifying defect; such knowledge becomes

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[891] *Ibid* 475.
[892] *Ibid* 474.
[893] *Ibid* 474.
[894] In De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 409-410, the limited participation of the judge in an accusatory trial is described thus:

> '[T]he the adjudicator in the accusatorial system is in the first place an observer and an umpire. The common law judge must view the case "from a peak of Olympian ignorance" with no preconceptions or prior knowledge about either the parties or the facts. He or she is there to listen to what the parties have to say, to evaluate their evidence and to uphold the balance and fairness of the proceedings. As the hearings are primarily intended to give the parties an opportunity to present their case, the adjudicator's main role at trial is to observe and draw conclusions. However, the presiding judge also has the important task of assuring the proper course of the hearings and especially the interrogation of witnesses. As the parties have the initiative, the judge's job is to make sure that they stay within the rules of fair conduct and, more generally, do not needlessly waste time or otherwise pervert the course of justice, through dilatory tactics, intimidation of witnesses… etc.' (Footnotes omitted).

[895] Zamir (2011) *Pepperdine Dispute Resolution Law Journal* 474.
[896] *Ibid* 474.
[897] *Ibid* 474.
[898] *Ibid* 474-475.

objectionable only if it can cloud substantive vision and endanger the correct disposition of the case.'[899] Acquiring extraneous factual knowledge may be desirable under the inquisitorial system, because it can empower the decision-maker to 'bypass ordinary proof-taking processes' and thus declare 'notorious' facts encompassed by such outside knowledge.[900] The situation is, however, different where the extra-procedurally obtained information is thought 'unreliable'.[901] For then it may be 'feared that the decision maker in possession of such knowledge may uncritically accept his own sensory perceptions - or his own secondary cognitive elaboration of these perceptions - even when his own clash with those of witnesses or with some other means of proof. Decisional rectitude could be adversely affected were he permitted to sit in judgment.'[902]

If a judicial officer under the adversary system were to actively embark on his or her own fact-finding process, such would necessarily dilute or undermine the force of a party contest;[903] the parties would be less zealous in presenting their best cases to convince the trial court that their version of the facts must be accepted and that of the opponent rejected. After all, as Damaška explains, '[t]he uncertainties of facing a decision maker who is *tabula rasa* are among the most potent catalysts of vigorous party action, assuming the case goes to trial and is not settled. If these uncertainties are reduced and incentives to party action thereby diminished, a procedure which relies on litigants as propellant forces is endangered. Partisan argument can lose its vitality and turn into ceremonial posturing.'[904] Furthermore, Damaška opines that a party disfavoured by information obtained by the decision-maker through the latter's own endeavours, may become saddled with the burden of rebuttal or of removing such information from the decision-maker's mind. Even if successful in this added endeavour, 'the party thus burdened may well feel that he was not treated equally with his opponent, and that the other side benefited from his burden.'[905]

Accordingly, the adversary system 'has no room for procedural arrangements that expose the decision maker to material that has not previously been structured by party interaction and then refined by party contest. The only substantive

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899 Damaška *The Faces of Justice and State Authority* 170.
900 *Ibid* 138.
901 *Ibid* 171.
902 *Ibid* 171.
903 *Ibid* 138.
904 *Ibid* 138-139.
905 *Ibid* 136.

information he may receive is channeled to him by the litigants and filtered by their debate.'[906] In South Africa's legal system, it would be a fundamental procedural irregularity that vitiates the proceedings if a judge with outside knowledge of a case ('buitekennis van 'n saak'), or who is acquainted with the merits of the case before trial, nevertheless proceeded to preside in the matter.[907] In *Levy and Levy v Additional Magistrate of Rustenburg and Attorney-General*, it was held that a judge ought not to stand in relation to a matter in dispute itself 'as would have a detrimental effect on his judgment',[908] and that 'where a magistrate or a judge allows matters which are inadmissible as evidence to be admitted or brought to his notice, and it is likely that this might prejudice him in the impartial view he should take of the case, the Court [of Appeal or Review], in such circumstances, will not uphold the proceedings.'[909]

The aforesaid understanding of the ideal position of the judicial officer in the accusatorial model was recognised by the South African Constitutional Court in *S v Mamabolo (E TV and Others intervening)*, where the Court effectively espoused the notion that adversarial process presupposes 'an impartial judicial officer [who] presides over and keeps the scales even in a contest between prosecution and defence.'[910] The Court observed that an inquisitorial process inherent in a summary procedure instituted and conducted by the presiding judge for enquiring into the possible commission of the crime of contempt of court *ex facie curiae* in the form of scandalising the court, which procedure rolled into one the complainant, prosecutor, witness and judge, was irreconcilable with the standards of fairness called for by the accused's right to a fair trial enshrined in section 35(3) of the Constitution.[911] In terms of such summary procedure, the presiding judge would take the initiative to commence proceedings by means of a summons which he or she formulated and issued, and at the hearing there would be no need for a prosecutor, with the issue being between the judge and the accused.[912] The Court pointed out further that in such a process, there was no formal plea procedure, no right to remain silent and no opportunity to challenge evidence, and the very purpose of the procedure was for the

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[906] *Ibid* 136.
[907] See *S v Sibeko en 'n Ander* 1990 1 SACR 206 (T) 208*a*.
[908] 1925 TPD 316 320.
[909] *Ibid* 323.
[910] 2001 1 SACR 686 (CC) para 55.
[911] *Ibid* para 55.
[912] *Ibid* para 54.

accused to be questioned as to the alleged contempt of court.[913] There was 'no adversary process with a formal charge-sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the prosecution; there [was] no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case.'[914] The Court found that there could be no doubt that a procedure by which an individual could be hauled before a judge for the sole purpose of enquiring into the possible commission of a crime, there to be questioned and, depending on the judge's view of the responses to the questioning, possibly to be punished by a fine or imprisonment, constituted a major inroad into his or her fair trial rights; nor could it be denied that such an individual enjoyed little protection or benefit of the law and its processes.[915] Such a procedure could not in the circumstances pass constitutional muster, with the Court adding that: '[I]t is inherently inappropriate for a court of law, the constitutionally designated primary protector of personal rights and freedoms, to pursue such a course of conduct.'[916] The Court found that there was no reason why the ordinary mechanisms of the criminal justice system could not be employed in a case of this nature.[917]

Some commentators observe, in the words of one writer: 'Pure impartiality is an ideal that can never be completely attained. Judges, after all, are human beings who come to the bench with feelings, knowledge, and beliefs that cannot be magically extirpated. They may have prior knowledge about evidentiary matters in a case, or strong beliefs about legal issues they must decide.'[918] Steven Lubet[919] states that '[l]itigants are not guaranteed the right to lay their cases on a *tabula rasa,* nor does impartiality require that we appoint judges who, in Mark Twain's words, "don't know anything and can't read."'[920] According to Lubet, the core rather 'of any concept of judicial impartiality *is the ability to be persuaded*. *A judge must be intellectually receptive to the facts and arguments that are presented in any*

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913 *Ibid* para 54.
914 *Ibid* para 54.
915 *Ibid* para 56.
916 *Ibid* para 58.
917 *Ibid* para 57.
918 JM Shaman 'The Impartial Judge: Detachment or Passion?' (1996) 45 *DePaul Law Review* 605 605.
919 At the time of writing, Lubet was Professor of Law, Northwestern University School of Law.
920 S Lubet 'Advice and Consent: Questions and Answers' (1990) 84 *Northwestern University Law Review* 879 881.

particular case, and must be willing to delay judgment until the conclusion of the matter. A judge may have pre-existing views, but must not be bound by them.'[921] Richard A Posner[922] similarly opines that the 'ideal factfinder is not a *tabula rasa*; he simply reserves judgment on whether the plaintiff or defendant in this particular case should win.'[923] 'In evaluating bias', says the writer, 'one must distinguish between prior beliefs about the proper outcome of the case and prior beliefs about the factfinding process itself - prior beliefs that constitute "common sense," such as the belief that witnesses are likely to shade evidence to make themselves look good.'[924] Impartiality means '*lacking a belief prior to hearing evidence in the case about the outcome of the case*'.[925] Posner writes: 'Ideally we want the trier of fact to work from prior odds of 1 to 1 that the plaintiff or prosecutor has a meritorious case.'[926] The author adds that '[a] substantial departure from this position, in either direction, marks the trier of fact as biased', and may later have an influence on his or her decision.[927] If the trial judge prejudges the guilt of the accused or reckons at the outset of the trial that the odds that the accused is guilty are high, he or she may have little incentive to pay close attention to the evidence presented at trial, because evidence of the accused's guilt will not alter his or her original judgment, while evidence of the accused's innocence, unless extremely powerful, will not push the odds in the range in which the judge would acquit the accused.[928] This would also disincentivise the parties into endeavouring to present their best cases, which naturally would seriously undermine the accuracy of the litigation process.[929] Posner notes that 'bias is clearest when the judge or jury not only has a prior belief about the proper outcome of the case but also holds the belief unshakably - that is, refuses to update it on the basis of evidence'.[930]

While it may be so that no judge comes to a case as a complete *tabula rasa*, devoid that is of any background knowledge, and receptive to all that is on its face

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[921] *Ibid* 881-882 (my emphasis).
[922] At the time of writing, Posner was Chief Judge, United States Court of Appeals, and Senior Lecturer, University of Chicago Law School.
[923] Posner (1999) *Stanford Law Review* 1515.
[924] *Ibid* 1515.
[925] *Ibid* 1515 (my emphasis).
[926] *Ibid* 1514.
[927] *Ibid* 1514.
[928] *Ibid* 1494.
[929] *Ibid* 1495.
[930] *Ibid* 1514.

logical or plausible, a judge may be disqualified in certain instances if he or she has prior knowledge of the *adjudicative* facts or *evidence* of a case.[931]

3.4.4 There is little opportunity for the judge to pursue his or her own agenda

It has been considered that adversarial process 'advances the idea of judicial impartiality and is perceived as a guarantor of its fulfillment', and that adversarial process and judicial impartiality are indeed interdependent or 'two sides of the same coin.'[932] It has been noted that impartiality is safeguarded and promoted by (i) the arbiter's dependence on the parties for the information or evidence needed to reach a decision and (ii) the ideal of judicial *tabula rasa* at the commencement of the trial as to the adjudicative facts and evidence of the case.[933] A further benefit of adversarial process is that such a system 'presupposes' that the arbiter will reach his or her conclusions 'based solely on the evidence and arguments that the parties properly present.'[934] Unlike in the inquisitorial system, where the judge is relatively free to conduct the inquiry as he or she sees fit, is free to find out what he or she wants to know and indeed is more likely to act upon his or her biases,[935] the arbiter in the adversary system is confined and in his or her quest for the truth is primarily restricted to the material or evidence presented by the parties.[936] The relatively passive role which the judge must assume in the adversary system, means that he or she must accept (ie is bound by) the evidence presented by the parties and must decide the case according to its weight.[937] 'When litigants direct the proceedings, there is little opportunity for the judge to pursue his own agenda or to act on his biases.'[938]

Even though fact-finders in the Anglo-American system are responsible for the ultimate decision in a case, 'they are dependent on evidence and witnesses selected by the parties. They have little - if anything - to say about the choice and arrangement of the information on which their decision will turn. Rather than forging

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931 JS Halpern 'Some Preliminary Thoughts on a Judge's Look beyond the Record for Evidence of Legislative Facts' (2004) 57 *Tax Lawyer* 861 867.
932 Zamir (2011) *Pepperdine Dispute Resolution Law Journal* 473-474.
933 Damaška *The Faces of Justice and State Authority* 136-140.
934 Zacharias (1991) *Vanderbilt Law Review* 88.
935 See Landsman *The Adversary System* 49. See also Devlin *The Judge* 61.
936 See, for example, Devlin *The Judge* 61.
937 See Jackson (1988) *The Modern Law Review* 560.
938 Landsman *The Adversary System* 44.

their own path to understanding, they must rely on others for what they hear and see.'[939] In an adversary trial, the judge has to wait and see what will be presented to him or her by the parties.[940] The parties draw the parameters of the dispute and within these the court must determine the issues raised by the parties. In this context, judicial impartiality means that the trial judge must decide the case on the basis of the information or evidence presented by the parties - information that is legally relevant - and not on extrinsic considerations such as, for instance, race, religion, political orientation, national origin,[941] or pre-trial publicity. By contrast, the inquisitorial system 'places the pursuit of truth in the control of a judge who has the initiative in collecting all the material he needs to decide the matter, and thus is not bound by the evidence tendered to him by the parties.'[942] In the latter system, the judge acts on his or her own in the development of the evidence needed to reach a decision.[943] It is submitted that this may make the judge more susceptible, consciously or unconsciously, to the possible prejudicial effects of adverse pre-trial publicity which paints the accused as guilty before any evidence is led at trial. This is all the more so where the operative principle in the inquisitorial system with regard to the admission and evaluation of evidence in criminal trials, as observed earlier in this chapter, 'is the *free evaluation of evidence* or "*free proof*"' (the judge has complete freedom over the admissibility of evidence and its evaluation), which means that the evidence may be weighed by the judge freely in accordance with his or her own prudent judgment or '*intimate conviction*'.[944] In the system of 'legal proof', however, evident in common-law jurisdictions, the law rigidly determines what evidence may be admitted and the weight it must be given.[945]

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[939] Damaška *Evidence Law Adrift* 89. In the inquisitorial system it is felt that because the court is responsible for a correct decision, that is, to find out the material truth and not merely to decide which party has adduced better evidence or whether the required standard of proof has been met by the party bearing the onus, the presiding judge bears the duty of calling and examining the witnesses, whilst counsel merely put supplementary questions. See, for example, Damaška *Evidence Law Adrift* 91; Zeidler (1981) *The Australian Law Journal* 395. In Herrmann (1978) *SACC* 12, it is said: 'It can be argued in favour of the inquisitorial system that the judge who has to decide the case knows best what information he needs and what questions should be put to the accused and to the witnesses.'

[940] Herrmann (1978) *SACC* 12-13.

[941] Zupančič (2003) *European Journal of Law Reform* 95 n 162.

[942] Certoma (1982) *The Australian Law Journal* 289.

[943] Devlin *The Judge* 60-61.

[944] Certoma (1982) *The Australian Law Journal* 290 (author's emphasis).

[945] *Ibid* 290. The writer adds in this regard, appertaining the non-accusatorial system, that '[t]he comparatively small number of norms prohibiting the admission of particular types of evidence are generally ignored in practice and the judges use their prudent judgment in deciding upon the weight to be attributed to the otherwise inadmissible evidence.' (*Ibid* 291).

In the adversary system '[p]artisan advocacy enables judges and juries to see controversies *from the litigants' perspectives*'.[946] The adversary system 'affords the decision maker the advantage of seeing what each litigant believes to be his most consequential proof. It also focuses the litigation upon the questions of greatest importance to the parties, making more likely a decision tailored to their needs.'[947] If the prosecution and the defence shape the factual basis of the case at bar, '*the court's vision could be limited to only what the parties want the judge to see* – possibly a mere torso of larger configurations.'[948]

Lon Fuller notes that '[t]he essence of the adversary system is that each side is accorded a participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments.'[949] Not only is the integrity of the adjudicative process dependent upon the participation of the advocate,[950] but such participation also enables the parties to 'influence' the decision.[951] The bond of participation by the litigant is most secure when the arbiter rests his or her decision wholly on the evidence and argument actually presented to him or her by the parties.[952] The decision of the court should not fall outside the frame of reference set by such proofs and arguments.[953]

Nico Steytler remarks that '[a]lthough the right to participate in decision-making is also an essential ingredient of inquisitorial systems, the central difference in the adversary system is that the court's decision rests primarily on the evidence and argument advanced by the participating parties. The court is not required to participate actively in the process since the adversary system is predicated on the assumption that each party to the dispute will protect its own interests. It is expected that all persons, motivated by enlightened self-interest, would participate vigorously in the dispute resolution and that as a result of the accused and prosecutor strongly promoting and protecting their own interests, a just decision will eventually

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[946] Zacharias (1991) *Vanderbilt Law Review* 54 (my emphasis). See also GW Adams 'The Small Claims Court and the Adversary Process more problems of Function and Form' (1973) 51 *The Canadian Bar Review* 583 593, noting that a more comprehensive understanding of the case by the trial court stems from the adversarial input of the parties who see the case from different points of view and who strive to develop their most convincing and complete theories of the case.
[947] Landsman *The Adversary System* 4.
[948] Damaška *Evidence Law Adrift* 115 (my emphasis).
[949] Fuller 'The Adversary System' in *Talks on American Law* 41.
[950] Fuller (1978) *Harvard Law Review* 382-383.
[951] Steytler *The Undefended Accused on Trial* 6.
[952] Fuller (1978) *Harvard Law Review* 388.
[953] *Ibid* 389.

emerge.'[954] As another commentator similarly observes: 'The adversarial system gives lawyers a great deal of control over the court process, and an underlying assumption of the system is that if lawyers do their job well, the court will reach a wise decision.'[955] Since in adversarial process it is left to the parties to present proof and arguments, the arbiter is able to assume a neutral and relatively passive position, which means that he or she is able to withstand the temptation of making early assumptions and thus is less likely to filter out later data or evidence inconsistent with those assumptions. As such, his or her decision is more likely to be the right and proper one in the circumstances.[956]

The adversary system, by its very nature, 'gives the parties a meaningful sense of participation in the working out of their own destinies in the solving of their disputes.'[957] 'In this sense, the affected parties participate in the solution to their dispute and this form of participation heightens the rationality and acceptability of the result'.[958] An adversarial trial promotes decisions that are well grounded on both the law and the facts because each side will, with partisan zeal, bring to the court's attention all the material favourable to that side, and, therefore, no relevant consideration will escape its notice.[959]

Given that the parties in adversarial process have a greater participation and influence in the court's decision, and given that the parties would naturally focus the court's mind on the evidence and submissions presented at trial, which the court is bound by, rather than on any prejudicial extraneous material, the trial court is less likely to act on any biases or be unduly influenced by adverse pre-trial publicity in reaching its decision. A judge in such a system would not be free to act on his or her own, or act independently of the party contest in developing the evidence, where he or she examines the witnesses and finds out what he or she wants to know, possibly with a mind contaminated by prejudicial pre-trial publicity or predilections, predispositions or preconceptions. Advocacy, then, 'has the potential to keep judicial idiosyncrasies in check.'[960]

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[954] Steytler *The Undefended Accused on Trial* 6. See also Saltzburg (1986) *Mercer Law Review* 656, observing that the desire to win actuates litigants in the adversary system to present their best cases.
[955] Banks *Criminal Justice Ethics* 103.
[956] Weiler (1968) *The Canadian Bar Review* 413.
[957] *Ibid* 413.
[958] Adams (1973) *The Canadian Bar Review* 593.
[959] Golding 'On the Adversary System and Justice' in *Philosophical Law* 106.
[960] Roodt (2004) *Fundamina* 139, in the context of discussing basic tenets of the accusatory system.

CHAPTER 4

THE SOUTH AFRICAN ACCUSATORY TRIAL: SALIENT ELEMENTS

The one who states his case first seems right, until the other comes and examines him. – Proverbs 18:17.[1]

Our legal system espouses the adversarial, as opposed to the inquisitorial criminal procedure system.[2]

[O]ur criminal justice model is essentially an adversarial one - where the court is left to the comfort and safety of its armchair while the State and the accused contest the arena…[3]

4. Introduction

Flowing from the previous chapter, attention is now focused on the basic contours of adversarial procedure in South African criminal trials. It is important to understand how the typical South African accusatory trial functions and what its structural demands are, in examining whether pre-trial publicity is likely to have an influence thereon. The main aspects considered in this chapter and the next are the non-jury trial system, the function and role of the judicial officer and that of the prosecutor, the appointment and function of assessors, the public nature of the criminal trial, the meaning of the presumption of innocence, and the requirement of a reasoned verdict. It must be emphasised that it is beyond the scope of the present enquiry to fully analyse such aspects. There is considerable authority and literature thereon. The discussion is thus limited to an outline of salient features within the context of pre-trial publicity; for instance, it is shown what the functions and roles of the judicial officer and the prosecutor are when confronted with adverse pre-trial publicity.

4.1 The triad trial system and party control of litigation and fact-finding

In essence, the South African criminal trial is an adversary proceeding which is characterised by a contest between the prosecution, for the State, and the accused

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[1] *The Holy Bible*, English Standard Version (2001).
[2] *S v Nkabinde* 1998 8 BCLR 996 (N) 1001B.
[3] *S v Bruinders* 2012 1 SACR 25 (WCC) para 60.

(or defence), over which an impartial judicial officer is to preside and keep the scales even.[4] The parties to a criminal trial are the prosecutor and the accused.[5] Unlike in European or Continental systems where 'the presiding officer is actually in charge of the investigation and trial',[6] South Africa has inherited the British adversarial system and thus the criminal trial in our legal system, as demonstrated in the Oscar Pistorius case, 'is party-centred, [where] lawyers for both the state and defence play a dominant role in the pursuit of procedural justice.'[7] The prosecutor in this system is '*dominus litis*, i.e. in control of the prosecution.'[8]

The fundamental nature of South Africa's adversarial system of criminal justice has received the Constitutional Court's imprimatur.[9] Moreover, '[t]he common law or adversarial legal tradition on which South Africa's criminal procedure is based is founded on the notion that the best way of determining guilt or innocence is by contest between two parties, the accuser and the accused, with the prosecutor filling the role of the accuser rather than the victim, while the judge plays the role of a detached umpire between warring parties.'[10]

South Africa does not have a jury system.[11] A criminal trial is presided over and adjudicated on by a professional judge or magistrate, depending on whether the trial is conducted respectively in either the High Court or magistrate's court (a district or regional court).[12] It is the prosecutor who decides in which forum the trial should

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[4] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 55. See also *S v Rudman and Another; S v Mthwana* 1992 1 SA 343 (A) 348F: 'The essential characteristic of the adversary system is that the presiding judicial officer appears as an impartial arbiter between the parties.'

[5] A Kruger *Hiemstra's Criminal Procedure* (RS 11 2018) 22-1.

[6] *S v Majavu* 1994 2 SACR 265 (Ck) 278*g*. See also *S v Van den Berg* 1996 1 SACR 19 (Nm) 65*c*.

[7] PM Bekker 'The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa' (2004) 37 *Comparative and International Law Journal of Southern Africa* 173 174.

[8] J Redpath 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' (2012) 186 *Institute for Security Studies Monographs* 47.

[9] See *Osman and Another v Attorney-General, Transvaal* 1998 2 SACR 493 (CC) para 22; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) para 94; *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) paras 54-55; *S v Thebus and Another* 2003 2 SACR 319 (CC) paras 78, 83, 87; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 2 SACR 130 (CC) para 222.

[10] Redpath (2012) *Institute for Security Studies Monographs* 47.

[11] Schwikkard *Possibilities of convergence* 21, where it is pointed out that the jury system that previously existed in South Africa was abolished in civil trials in 1927 and in criminal trials in 1969. See also M Basdeo, MG Karels & JP Swanepoel 'The trial courts' in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 257 265.

[12] Schwikkard *Possibilities of convergence* 21. See also Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 259-260; *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) paras 104-105.

be heard, having regard to the seriousness of the case and the jurisdiction of the particular court.[13] The accusatory trial structure may therefore be described as a triad comprised of the presiding judge or magistrate at the vertex, and then the prosecutor and the accused who is either defended or undefended, with the judicial officer required to be independent of the parties and relatively passive and to conduct the trial and adjudicate on the case impartially.[14] Judges and magistrates are trained and experienced in the law.[15] Judicial officers are also required to 'take an oath when they are appointed to uphold the law and to administer justice in an appropriate manner.'[16] In this respect, judicial officers swear or affirm that they will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.[17]

As with other common-law jurisdictions, the chief difference between the South African accusatorial trial and the inquisitorial trial lies in the conception and

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[13] S van der Merwe 'Prosecuting Authority' in E du Toit, F de Jager, A Paizes, A St Q Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) 1-47. See also *S v Khalema and Five Similar Cases* 2008 1 SACR 165 (C) paras 21-22, 35, where it was affirmed that the prosecutor is *dominus litis* and because he or she is in control of the case docket, he or she is in the best position to make an informed decision regarding the court (ie the forum) for the trial. The court held that the prosecutor 'is the party who dictates the route a case will take towards being finalised.' (*Ibid* para 22). See, similarly, *S v Sehoole* 2015 2 SACR 196 (SCA) para 10.

[14] See also sections 34 and 165(2) of the Constitution, which provisions guarantee access to courts which are independent and impartial and which apply the law without fear, favour or prejudice.

[15] See M Mhango 'Transformation and the judiciary' in C Hoexter & M Olivier (contributing eds) *The Judiciary in South Africa* (2014) 68 71-73; M Olivier 'The selection and appointment of judges' in C Hoexter & M Olivier (contributing eds) *The Judiciary in South Africa* (2014) 116 134-135; M Olivier 'The magistracy' in C Hoexter & M Olivier (contributing eds) *The Judiciary in South Africa* (2014) 319 327, 329, 351-353. See also, for example, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) paras 40, 48; *Bernert v ABSA Bank Ltd* 2011 3 SA 92 (CC) para 32; *S v Basson* 2007 1 SACR 566 (CC) para 30; *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) paras 11, 56; *Goqwana v Minister of Safety and Security NO and Others* 2016 1 SACR 384 (SCA) para 29; *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 105; *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9; *S v Bresler and Another* 2002 2 SACR 18 (C) 34*c*-*e*; *S v Maputle* 2002 1 SACR 550 (W) 554*d*; *Sager v Smith* 2001 3 SA 1004 (SCA) para 15; *S v Hlati* 2000 2 SACR 325 (N) 332*a*-*c*; *S v Somciza* 1990 1 SA 361 (A) 366C-D; *S v Mthembu and Others* 1988 1 SA 145 (A) 155E-F; *S v Mampie* 1980 3 SA 777 (NC) 779D-G; *Danisa v British and Overseas Insurance Co Ltd* 1960 1 SA 800 (D) 801F-G; *R v T* 1953 2 SA 479 (A) 483A; *Minister of the Interior and Another v Harris and Others* 1952 4 SA 769 (A) 789A-B; *R v Essa* 1922 AD 241 246-247. In *Khan v Koch NO* 1970 2 SA 403 (R) 404E-F, it was appositely held that:

> '[A] judicial officer is in a different position from that of an ordinary juryman because a judicial officer is trained "to discriminate between various facts all within his knowledge, to apply some and to reject others as having no bearing upon the matter to be decided".'

[16] *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 105. See also section 174(8) of the Constitution.

[17] See Item 6 of Schedule 2 of the Constitution, and section 9(2)(*a*) of the Magistrates' Courts Act 32 of 1944.

use of the judicial authority.[18] The terms 'accusatorial' and 'inquisitorial' refer to the mode in which evidence is elicited:[19] in the accusatorial trial it is primarily the responsibility of the prosecutor and the accused to adduce the evidence on which the verdict of guilt or innocence is to be based, whereas in the inquisitorial trial it is the responsibility of the presiding judge to adduce the evidence of the accused and the witnesses, with counsel for the prosecution and the accused playing an ancillary or a supplemental role in the development of the evidence or in questioning the witnesses. The judge in the inquisitorial system must study the case docket or dossier before trial so as to enable him or her to question the accused and the witnesses. The judge in the latter system therefore does not enter the trial *tabula rasa* as to the facts and evidence of the case. The judge in the latter system is free to conduct the inquiry as he or she sees fit, can ask for virtually any sort of information and is free to find out what he or she wants to know. This is in sharp contrast with the South African accusatory trial: the police case docket is presented to the prosecutor since it is his or her duty to decide whether to institute a prosecution and on what charge(s) the accused is to be tried, based on the witness statements and other evidence contained in the docket, and in that regard to draw up the indictment or charge-sheet, and it is the duty of the prosecution to prove its case by calling and examining the State witnesses and cross-examining the accused and other defence witnesses. The prosecutor and the defence independently gather and present their own evidence, examine their own witnesses and cross-examine the opponent's witnesses. In arriving at a decision, the trial court is basically dependent on the evidence and submissions of counsel for the prosecution and the defence which they present to court at trial; the court is essentially bound by the evidence and submissions of the parties in reaching a verdict. The judicial officer is not free to pursue his or her own agenda, and is thus less likely to act on any possible biases.

The 'core responsibility' of the judiciary in South Africa 'is to resolve live disputes *on the basis of evidence presented by opposing parties*.'[20] Writing from a South African perspective, Nico Steytler observes that '[i]n an adversary system a court's decision rests primarily on the evidence and argument advanced by the parties and the system is predicated on the assumption that parties will protect their

[18] Snyman (1975) *CILSA* 103.
[19] Williams *The Proof of Guilt* 29. See also Snyman (1975) *CILSA* 103.
[20] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 2 SACR 130 (CC) para 222 (my emphasis).

own interests through their vigorous participation in the proceedings.'[21] In *National Director of Public Prosecutions and Others v Freedom Under Law*, the Supreme Court of Appeal crisply held that '[w]hat is considered at the criminal trial is a determination, on all of the evidence presented in the case, of the guilt or lack thereof of the accused person'.[22] In our law, courts have expressed the notion that a judge or magistrate is a trained judicial officer who knows that he or she must decide every case which comes before him or her on the evidence adduced in the case.[23] The judiciary is also 'held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system.'[24] The Constitutional Court has noted that '[i]n our adversarial system, courts are required to be impartial and ordinarily only decide issues that the parties have properly raised and are properly before the court in terms of its factual underpinnings.'[25] In South Africa's adversarial/accusatorial system, those accused of crime enjoy rights to a fair trial and the presiding officer must be neutral and may not take any side in the contest.[26]

The responsibility for gathering evidence and presenting it before the court basically lies with the prosecutor and the accused.[27] What this means in effect is

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[21] Steytler *Constitutional Criminal Procedure* 302.

[22] 2014 4 SA 298 (SCA) para 24.

[23] See *R v T* 1953 2 SA 479 (A) 483A; *Danisa v British and Overseas Insurance Co Ltd* 1960 1 SA 800 (D) 801F; *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 9; *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 115. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) paras 40, 48; *S v Basson* 2007 1 SACR 566 (CC) paras 25, 30; *S v Tjiho* 1992 1 SACR 639 (Nm) 647*i-j*; *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 31D, 38C; *R v Essa* 1922 AD 241 246-247 (a judge's 'intellect is trained to discriminate between various facts all within his knowledge, to apply some and to reject others as having no bearing upon the matter to be decided').

[24] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 11.

[25] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 2 SACR 130 (CC) para 39.

[26] *Ibid* para 4.

[27] See Steytler *The Undefended Accused on Trial* 4, where it is said:

> 'In the adversary system the two parties, the State and the accused, are responsible for the collection and presentation of evidence.'

See also *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 1 SACR 530 (C) 545*a*, appositely affirming that: '"Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours"'. (Endorsing *Miranda v Arizona* 384 US 436 460 (1966)).

See too *Osman and Another v Attorney-General, Transvaal* 1998 2 SACR 493 (CC) paras 22-23; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) para 94; *S v Thebus and Another* 2003 2 SACR 319 (CC) para 83; *S v Maasdorp* 2008 2 SACR 296 (NC) para 15; Van der Merwe 'A basic introduction to criminal procedure' in *Criminal Procedure Handbook* 22-23; DT Zeffertt & AP Paizes *The South African Law of Evidence (formerly Hoffmann and Zeffertt)* 2 ed (2009) 923-924; Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in

that the trial court is mainly reliant on the evidence and submissions presented by the prosecutor and the accused in reaching its decision on the case.[28] One commentator notes that in the accusatorial system of criminal procedure in South Africa, it is left to the prosecutor and the accused 'to unearth the truth' ('[d]ie voorsittende beampte laat… die partye toe om die waarheid na vore te bring'), in contrast with the inquisitorial system where the presiding officer is in charge of the case and takes part and controls the process to find the truth.[29] Both sides in the adversarial trial have equal opportunity to present their version of the events in question,[30] whereupon it is for the trial court, as it were, to decide 'where the truth may lie in a welter of contradictory evidence',[31] or as Mirjan Damaška would say,

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Principles of Evidence 11 (para 1 5 2); WL de Vos & SE van der Merwe 'The Calling of Witnesses' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 460 461-464 (paras 23 4 1 – 23 4 3); Erasmus (2015) *Stellenbosch Law Review* 662-663; D Erasmus 'Ontslag van 'n beskuldigde na die sluiting van die vervolgingsaak: openbare mening en die reg op 'n billike verhoor ingevolge die akkusatoriese strafprosesregstelsel' (2015) 12 *LitNet Akademies* 857 859, 870; Bekker (2004) *CILSA* 177, who in discussing the importance of the accused's right to legal representation under the right to a fair trial, pertinently notes that: '[I]mplicit in a fair hearing under the adversarial process is the ability of the accused to present his/her case in a legally effective manner. Where the accused lacks that ability, legal representation is essential, otherwise the trial will not be fair.'

See, moreover, *S v Van den Berg* 1996 1 SACR 19 (Nm) 65*a*-*b*, *f*-*g*, recognising that according to the accusatorial nature of the South African criminal trial, 'the presentation of evidence is left almost entirely to the parties'; *S v Mpetha and Others (1)* 1983 1 SA 492 (C) 494A-C, 495F-496D; *S v Moshoeu* 2007 1 SACR 38 (T) 41*e*; *S v Mashinini and Another* 2012 1 SACR 604 (SCA) para 15; *S v Sehoole* 2015 2 SACR 196 (SCA) para 10; *S v Zuma* 2006 2 SACR 257 (W) 265*a* (the State is to put forward a case for the defence to meet); *S v Khalema and Five Similar Cases* 2008 1 SACR 165 (C) para 22 (the prosecutor 'is the party who dictates the route a case will take towards being finalised'); *S v Masoka and Another* 2015 2 SACR 268 (ECP) para 12; Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-48 ('the adversarial (accusatorial) nature of the criminal trial demands that parties should as far as possible be given equal opportunities in the presentation of their cases'); J Dugard *South African Criminal Law and Procedure: Volume IV: Introduction to Criminal Procedure* (1977) 122 ('[t]he trial is accusatorial by nature and the judge acts as an impartial arbiter of the evidence adduced by prosecution and defence').

In *Smyth v Ushewokunze and Another* 1998 3 SA 1125 (ZS) 1131B-F, it was pertinently held that the prosecutor 'must produce all relevant evidence to the court and ensure, as best he can, the veracity of such evidence… The duty of the prosecutor to place before the court all material essential for the investigation of the truth is justified on the ground that the prosecution has all the resources of the State, including finances, the police and vital information, at its disposal.'

[28] See *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 2 SACR 130 (CC) para 222; Snyman (1975) *CILSA* 108; Erasmus (2015) *LitNet Akademies* 870; Erasmus (2015) *Stellenbosch Law Review* 664; HC den Hollander 'Impressions of a Dutch Lawyer of the Administration of Justice in South Africa' (1975) *Acta Juridica* 332 337-338; M Cowling 'Criminal Procedure' (2006) *Annual Survey of South African Law* 684 718; Steytler *The Undefended Accused on Trial* 5: 'In the main… the judicial officer bases his decisions on the evidence produced by the parties. The evidence which he accepts has been called the "formal" truth, in the sense that it is based solely upon the evidence which the parties have decided to put before the court.' And *ibid* 6: '[T]he central difference in the adversary system is that the court's decision rests primarily on the evidence and argument advanced by the participating parties.'

[29] Erasmus (2015) *LitNet Akademies* 859, 870.

[30] *Ibid* 870.

[31] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 40.

between two conflicting evidentiary 'beams' which 'continue to illuminate the world presented to the adjudicator from the beginning until the end of trial.'[32] According to the South African accusatorial system, a 'high degree of autonomy' is afforded to the prosecution and the defence.[33] Indeed, '"the adversary system requires deference to counsel's informed decisions"' and thus '"strategic choices must be respected in these circumstances if they are based on professional judgment"'.[34]

The principle of orality must be observed in the criminal trial.[35] The prosecutor and the defence must adduce evidence by means of evidence- or examination-in-chief of witnesses (that is to say, through questions and answers, where leading questions are not allowed), and both parties may cross-examine every opponent's witness and may re-examine their own witnesses.[36] The prosecution presents its evidence first (in line with the presumption of innocence and the concomitant burden of proof resting on the State),[37] generally in open court[38] and in the presence of the accused, whereupon, and provided that the State has established a *prima facie* case against the accused (or a so-called case to meet or case calling for an answer, that is evidence tendered upon which a reasonable

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[32] Damaška *Evidence Law Adrift* 92.

[33] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) para 94.

[34] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 24, quoting with approval *Strickland v Washington* 466 US 668 681 (1984).

[35] See Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 338. See also section 161(1) of the Criminal Procedure Act; *S v Adendorff* 2004 2 SACR 185 (SCA) para 20; Steytler (2001) *Law, Democracy & Development* 3.

[36] See Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 331-348, for an overview of the course of the criminal trial in South Africa and the fundamental principles which govern it.

[37] In terms of section 150(2) of the Criminal Procedure Act. See also *S v Lavhengwa* 1996 2 SACR 453 (W) 485*c-e* (noting that the presumption of innocence entails *inter alia* that the prosecution has the duty to begin in adducing its evidence against the accused – it must make out a case against the accused before he or she needs to respond, whether by testifying, adducing evidence or otherwise); Zeffertt & Paizes *The South African Law of Evidence* 890; PJ Schwikkard & SE van der Merwe 'The Standard and Burden of Proof and Evidential Duties in Criminal Trials' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 601 602 (para 31 2).

[38] See, for example, *S v Muller and Others* 2005 2 SACR 451 (C) para 15, where it was said, in relation to the accused's constitutional right to a public trial before an ordinary court, that:

> 'The right to a public trial is not limited to access to criminal proceedings by the ordinary members of the public, as also the media. The accused is given the right to a public trial to ensure that justice is seen to be done. The right to a public trial would include a right to participate fully in the proceedings, be it by way of adducing and challenging evidence, or by way of addressing court on the merits of the case after the conclusion of evidence. It would include a right to participate meaningfully in the conduct of the trial, from the pleading stage of the proceedings up to the pronouncement of the verdict.'

See also *S v Nkabinde* 1998 8 BCLR 996 (N) 1001B-C, where it was held that South Africa's '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.' The importance of the open justice principle is amplified below.

person might convict),[39] the accused is entitled to present his or her evidence in the same manner.[40] PJ Schwikkard and SE van der Merwe explain in this regard that:[41]

> It is a fundamental principle of our law that in a criminal trial the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. This burden will rest on the prosecution throughout the trial. At the outset of the trial, in tandem with the burden of proof, the state must also discharge an evidential burden. It will do this by establishing a *prima facie* case against the accused. Once a *prima facie* case is established the evidential burden will *shift* to the accused to adduce evidence in order to escape conviction.

Similarly to the position in other common-law jurisdictions, cross-examination in our law is an essential component of the adversarial system of procedure, its purpose being 'to elicit evidence favourable to the party cross-examining and to challenge the truth or accuracy of the evidence given for the opposing party.'[42] In *Carroll v Carroll* it was held that the 'objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.'[43]

As shown in the Oscar Pistorius trial, the State and the defence will each try to prove its case in an independent way and will seek to destroy or decimate the case of the other party, and in the words of Joachim Herrmann, 'both parties constantly demonstrate to the judge that different answers can be given to the charge. The judge, so to speak, gets a stereoscopic view of the alleged offence. The essence of the adversary trial may be called dialectic dispute and challenge.'[44]

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[39] *S v Lubaxa* 2001 2 SACR 703 (SCA) paras 10-11, 18-19. See too section 151 of the Criminal Procedure Act.

[40] See Kruger *Hiemstra's Criminal Procedure* 22-50; De Vos & Van der Merwe 'The calling of witnesses' in *Principles of Evidence* 461-464 (paras 23 4 1 - 23 4 2).

[41] Schwikkard & Van der Merwe 'The Standard and Burden of Proof and Evidential Duties in Criminal Trials' in *Principles of Evidence* 602 (para 31 2) (authors' emphasis).

[42] *S v Mgudu* 2008 1 SACR 71 (N) para 24. See also *S v Nkabinde* 1998 8 BCLR 996 (N) 1001C; *S v Msimango and Another* 2010 1 SACR 544 (GSJ) paras 4-5; *S v Cele* 1965 1 SA 82 (A) 91B-D; Kruger *Hiemstra's Criminal Procedure* 22-51; Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-79, 22-82A; Steytler *The Undefended Accused on Trial* 141; Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 11-12 (para 1 5 2); McEwan *Evidence and the Adversarial Process* 14, noting that 'cross-examination is a necessary counterbalance to the way evidence in chief is elicited. Given the way witnesses are guided through their evidence in chief (albeit without leading questions as such) the right to cross-examine is essential to the other party. For the questions put in chief may omit, consciously or unconsciously, significant areas of fact which could be to the advantage of the other side. There may have been qualifications or explanations which the witness did not have the opportunity to add to his or her in chief testimony, and which subsequently can be uncovered only by cross-examination.'

[43] 1947 4 SA 37 (D) 40. See too *Mohan v Director of Public Prosecutions, Kwazulu-Natal and Others* 2017 2 SACR 76 (KZD) para 48, reaffirming *Carroll* supra on the purpose of cross-examination.

[44] Herrmann (1978) *SACC* 6.

It is clear from the afore-going that a hallmark of the South African accusatory trial is that it is the prosecutor and the accused who control the litigation; it is they who determine what issues will be tried and what evidence the court will hear. The parties instead of the judicial officer are responsible for eliciting or ferreting out the facts at trial. The judicial officer has to wait for the truth to emerge from the contentions of the opposing parties, and must decide the case not on evidence he or she has gathered but on the evidence introduced or submitted to him or her by the parties. The prosecutor and the accused have the duty of laying the facts before an impartial court, who does not effectively act as both judge and prosecutor as in an inquisitorial system[45] (where the judge is regarded by the accused as his or her opponent).[46] It is the prosecutor who initiates a prosecution, based on the *prima facie* evidence contained in the police case docket which is presented to him or her for decision.[47] It is then the plea tendered by the accused in response to the charge

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[45] Certoma (1982) *The Australian Law Journal* 288; Snyman (1975) *CILSA* 107-108.

[46] Snyman (1975) *CILSA* 108.

[47] A judicial officer is not involved in the pre-trial investigation conducted by the police and in the decision to prosecute and to initiate criminal proceedings, which decision must be exercised by the prosecuting authority. Contrast this with the position in certain inquisitorial systems where, for instance, in criminal cases of a serious or complicated nature, 'the investigation of the case before it comes to trial is led by an investigating judge (*juge d'instruction* in France…)', whose function it is 'to ascertain whether there are sufficient grounds of suspicion to warrant an actual trial by a competent court' - Snyman (1975) *CILSA* 104. See also Dugard *South African Criminal Law and Procedure: Volume IV* 138; M Jimeno-Bulnes 'American Criminal Procedure in a European Context' (2013) 21 *Cardozo Journal of International and Comparative Law* 409 438-439. In fact, in Germany any charges which the public prosecutor may have filed must first be reviewed by the same judge having jurisdiction to try the case, in order to establish whether or not an adjudication hearing shall be held – in this pre-trial screening of the case the judge may 'either order to open the trial *(Eröffnungsbeschluss)* or to dismiss the case *(Einstellung*)' – E Amodio & E Selvaggi 'An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure' (1989) 62 *Temple Law Review* 1211 1215-1216. See also Weigend 'Germany' in *Criminal Procedure* 262. A similar pre-trial screening is followed in France – see Amodio & Selvaggi (1989) *Temple Law Review* 1215; Brouwer (1981) *The Australian Law Journal* 210-211.

In De Smet 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *The Emerging Practice of the International Criminal Court* 410-411, it is observed that in the inquisitorial system, fact-finding is concentrated in the pre-trial phase, where evidence is collected by an investigating or examining magistrate or judge with a specific and broad investigative mandate to find all information that could lead to the truth. Once the charges are confirmed in this process, 'the dossier of the investigation is passed on to the judge who will hear the case on the merits. This cannot be the same judge who was in charge of the investigation. The judge on the merits (the trial judge) will then use the dossier as the basis for organising the trial and especially the calling of evidence.' (*Ibid* 411). (Footnote omitted). See too Roodt (2004) *Fundamina* 139-140; M Ploscowe 'The Development of Present-Day Criminal Procedures in Europe and America' (1935) 48 *Harvard Law Review* 433 434, noting that the *juge d'instruction* conducts an energetic investigation into criminal cases, and the written documents contained in the dossier embodying the results of his or her investigations 'form the basis for the decision as to whether the trial shall be held, and both before and during the trial are in the hands of the judges to guide them in bringing out the evidence.' For a more detailed discussion of the preliminary judicial investigation in the French inquisitorial system, see Brouwer (1981) *The Australian Law Journal* 212-215. Certain European

compiled by the prosecutor that determines the ambit of the dispute or '*lis*' between the prosecution and the accused.[48] The accused crosses swords formally with the State in the plea.[49] The points in issue are crystallised in the plea and submitted to the court for adjudication.[50] The parameters of the dispute are therefore set or defined by the parties and it is within these that the court must render a decision on the issues. It is then party-orientated evidence adduced in the trial on which the court makes its decision,[51] unlike the inquisitorial judge who 'is in no way bound merely to consider the facts and evidence adduced by the parties, but must (in accordance with the original meaning of the term *inquisitio* - a searching after) himself see to it that the information and considerations necessary to decide the issue are investigated and borne out at the trial.'[52] The parties in the accusatorial trial are thus in a position to focus the mind of the trial court on the evidence which they put before the court rather than on prior publicity detrimental to the accused.[53] Party control of litigation in such a system therefore serves as an important controlling mechanism of the judicial authority.[54]

4.2 The role and function of the judicial officer

The presiding judicial officer in the South African accusatory system is constitutionally required to be independent and impartial in the adjudication of any

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criminal procedures, such as in France and Spain, have, however, been reviewing the system of a judicial investigation; in Germany control of the pre-trial investigation is attributed to the public prosecutor following the abolition of the *Untersuchungsrichter* – see Jimeno-Bulnes (2013) *Cardozo Journal of International and Comparative Law* 438-439. See also Grande (2000) *The American Journal of Comparative Law* 232-234, as to the position in Italy, where the investigative function is assigned to the prosecutor, while a judge oversees the investigating authorities, making sure that the rights of those under investigation are respected. If the prosecutor decides to prosecute, he or she will make a formal request that the person under investigation be committed for trial. The decision of whether or not to refer the case for trial will then be made by the judge of the preliminary hearing.

The non-existence of the investigative judge or magistrate is considered a general characteristic of accusatorial systems – see Jimeno-Bulnes (2013) *Cardozo Journal of International and Comparative Law* 439.

[48] See, for example, S van der Merwe 'The Plea' in E du Toit, F de Jager, A Paizes, A St Q Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) 15-1; *S v Mamase and Others* 2010 1 SACR 121 (SCA) para 6: 'The trial commences with the evidence and ends with conviction. The plea is a procedure that initiates the trial and serves to define the issues that are submitted to the court for adjudication. If there is no plea there is no *lis* between the State and the accused.' (Footnote omitted).

[49] Kruger *Hiemstra's Criminal Procedure* 15-1.

[50] *Ibid* 15-1.

[51] Steytler *The Undefended Accused on Trial* 5.

[52] Snyman (1975) *CILSA* 103.

[53] Compare *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38G-H.

[54] See Labuschagne (1993) *De Jure* 356; Roodt (2004) *Fundamina* 139.

trial case which is brought before him or her.[55] The impartiality of judicial officers is an essential requirement of a constitutional democracy and is closely linked to the independence of courts.[56] As was noted above, the judiciary is also 'held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system.'[57]

As shall be considered in chapter six, the Constitutional Court has held that the accused's constitutionally guaranteed right to a fair trial includes the requirement of judicial impartiality, even though it is not specified as a discrete sub-right under the right to a fair trial enshrined in section 35(3) of the Constitution; the fairness of a criminal trial 'is clearly under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice.'[58] The same Court has also observed that 'the right to a fair trial must be understood in conjunction with the constitutional imperatives that the courts are independent and that they must apply the law impartially and without fear, favour or prejudice, that no person or organ of State may interfere with the functioning of the courts, and that organs of State must assist the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. The fairness of a trial is threatened if a court is not independent, does not apply the law impartially, or does not function free from interference.'[59] Moreover, '[t]he requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial… The impartiality of a judicial officer is crucial to the administration of justice. So too is the perception of his or her impartiality.'[60]

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[55] See sections 34 and 165(2) of the Constitution. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) paras 35-36, the Constitutional Court affirmed that section 165 of the Constitution 'provides that the judicial authority is vested in courts, that they are independent, and must apply the law impartially and without fear, favour or prejudice', and that '[c]ourts, therefore, must be independent and impartial.' The Court held moreover that the public must be reassured that the judiciary 'always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.' (*Ibid* para 32). See too *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) paras 28-30; *S v Basson* 2007 1 SACR 566 (CC) paras 23-25, with regard to the provisions of sections 34 and 165(2) of the Constitution.

In *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 16, the same Court similarly found that '[i]n our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially.'

[56] *S v Basson* 2007 1 SACR 566 (CC) para 24.

[57] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 11.

[58] *S v Basson* 2007 1 SACR 566 (CC) para 26.

[59] *S v Jaipal* 2005 1 SACR 215 (CC) paras 30-31 (footnotes omitted).

[60] *S v Basson* 2007 1 SACR 566 (CC) paras 26-27 (footnote omitted).

Relevant for present purposes is the fact that it is generally accepted that the core or essence of judicial independence is *inter alia* 'the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.'[61] The ability of a judge to make decisions 'free from external interference or influence' remains an important and necessary component of the principle of judicial independence.[62] Conceivably, then, judicial independence would connote that a court may not be influenced or swayed in its decision by

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[61] *Beauregard v Canada* (1986) 26 CRR 59 (SCC) para 21 (Westlaw), as endorsed by the Constitutional Court in *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 70; *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 19. In *De Lange* supra para 70, Ackermann J also drew attention to other key aspects of judicial independence as enunciated in the Supreme Court of Canada decision of *R v Valente (No. 2)* (1986) 23 CCC (3d) 193, in particular the requirement that judicial officers have security of tenure, a basic degree of financial security free from arbitrary interference by the executive arm of government, and institutional independence concerning matters that relate directly to the exercise of the judicial function, as well as judicial control over administrative decisions 'that bear directly and immediately on the exercise of the judicial function'. See too *Van Rooyen* supra para 29.

In *Valente* supra para 15 (Westlaw), the following distinction was drawn between judicial impartiality and judicial independence, as quoted with approval in *De Lange* supra para 71:

> 'Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial"… connotes absence of bias, actual or perceived. The word "independent"… reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.'

See also *Van Rooyen* supra para 19 n 22.

Independence is thus 'a structural or institutional requirement, as opposed to impartiality, which is concerned with actual or perceived bias in respect of specific judicial officers.' – J Brickhill & A Friedman 'Access to Courts' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 59-76. In other words, appertaining the status of a court in relation to others, judicial independence entails freedom from interference by the executive and legislative branches of government and by any other external force, such as business or corporate interests or other pressure groups - *De Lange* supra para 72, citing *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 18*f*.

In K Iles 'Access to Courts' in I Currie & J De Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 710 733 (para 31.4(*b*)), with reference to *South African Association of Personal Injury Lawyers v Heath and Others* 2001 1 SA 883 (CC) paras 25-26, it is pointed out that '[t]he independence of the courts is further underpinned by the doctrine of separation of powers… An important purpose of the doctrine is to ensure that the courts, which are responsible for testing the constitutionality of legislative and executive action against the Bill of Rights, are independent and are seen to be independent.' As was held in *Heath* supra para 26:

> 'The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined.'

[62] *Beauregard v Canada* (1986) 26 CRR 59 (SCC) para 22 (Westlaw), affirmed in *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 70. See also section 165(3) of the Constitution, which provides that: 'No person or organ of state may interfere with the functioning of the courts.'

comment or opinions expressed in the media concerning a criminal trial, especially comment that indicates or suggests whether an accused ought to be convicted or acquitted (or expresses a view that an accused is guilty or innocent), or which attacks or praises the accused's character, or which expresses a view on the character, demeanour or credibility of a witness, or which exhorts a judicial officer to disregard evidence, or which suggests the sentence that ought to be imposed on an accused; such having the potential, as was observed in chapter two, of being construed as prejudice to or interference with the administration of justice in pending judicial proceedings.[63] The court should also not be influenced by possible pressure that is brought to bear on it by society as expressed in the media for a particular outcome. The Supreme Court of Appeal has appositely observed that public opinion 'is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public.'[64] The Court affirmed in this regard that, instead, '"[p]erhaps the main duty of the court is to lead public opinion."'[65] A court is therefore to remain an independent arbiter despite a trial by media which condemns an accused or deems an accused to be innocent before the disposition of the case.

The role of the judicial officer in the South African accusatory trial is on the whole passive: he or she listens to the evidence and arguments presented by the prosecutor and the accused, and makes decisions when called upon to do so.[66] The core function of the judicial officer is to resolve the dispute on the basis of evidence presented by the opposing parties.[67] In this process, the court is to act independently and impartially, and must uphold the Constitution[68] and apply the law without fear, favour or prejudice.[69] The independent and impartial conduct of the trial by the judicial officer must also be manifest to all those who are concerned in the trial

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[63] Burchell *Principles of Criminal Law* 842.
[64] *S v Mhlakaza and Another* 1997 1 SACR 515 (SCA) 518*g*.
[65] *Ibid* 518*i-j*.
[66] Steytler *The Undefended Accused on Trial* 5.
[67] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 2 SACR 130 (CC) para 222.
[68] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 2 SACR 130 (CC) para 221, it was appositely held that '[t]he judiciary is the ultimate guardian of the Constitution'.
[69] See, for example, *S v Basson* 2007 1 SACR 566 (CC) para 26, affirming that the judicial officer must apply the law and assess the facts of the case impartially and without fear, favour or prejudice, failing which the fairness of the trial is clearly under threat.

and its outcome.[70] Judicial officers are 'to act independently and impartially in dealing with cases that come before them', and thus at an institutional level there must be no external interference in the exercising of the judicial function.[71] The judicial officer, on the evidence placed before him or her, must without fear or favour rule upon the charges, convicting where necessary or acquitting or discharging the accused, should that be the outcome.[72]

Judicial impartiality not only connotes the absence of bias, actual or perceived, in the adjudication of the case and conducting of the trial,[73] but also 'a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions' presented by the parties.[74] The Constitutional Court has described impartiality as 'that quality of open-minded readiness to persuasion - without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, "a mind open to persuasion by the evidence and the submissions of counsel"'.[75] 'In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean "a departure from the standard of even-handed justice which the law requires from those who occupy judicial office".'[76] Bias has been pointed out to be, in common usage, as 'a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which

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[70] See also *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) 2012 ZASCA 55 (30 March 2012) para 29, citing *S v Roberts* 1999 2 SACR 243 (SCA) para 25: 'In a trial the judge has to act as an impartial arbiter. The law requires that a judicial officer must conduct the trial open-mindedly, impartially and fairly and such conduct must be manifest to all those who are concerned in the trial and its outcome.'

[71] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 19.

[72] *S v Nkabinde* 1998 8 BCLR 996 (N) 1001C-D.

[73] *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 71; *R v Valente (No. 2)* (1986) 23 CCC (3d) 193 para 15 (Westlaw); *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 104 (Westlaw).

[74] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 104 (Westlaw); *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 48.

[75] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13.

[76] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21, quoting from the decision of *S v Roberts* 1999 2 SACR 243 (SCA) para 25. See also *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 105 (Westlaw).

sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.'[77]

Judicial impartiality 'helps to ensure that the decision is based on the merits of the controversy and not on any bias - negative or positive - on the part of the judge.'[78] In this context, '[i]mpartiality could be defined as such an attitude of the adjudicator that guarantees that the conflict is going to be decided on intrinsic rather than on extrinsic considerations. This means that the case will be decided on the basis of the information presented by the parties - information that is legally relevant - and not on extrinsic considerations such as, for example, race, religion, political orientation, national origin or any other such extrinsic aspect of the case.'[79]

Judicial independence and impartiality can in the circumstances be seen as seeking to achieve the objective of ensuring 'that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute.'[80]

In line with this fundamental objective of judicial independence and impartiality, the court's decision in a criminal case must be based solely on the evidence and arguments of the parties introduced and advanced in the trial, and may not in any way or to any extent be influenced by pre-trial publicity.

Indeed, '[t]he whole concept of a "fair trial" presupposes a trial in which the court decides on the issues before it on the basis of the evidence placed before it, and not on the basis of statements or opinions in the media.'[81]

The judicial officer is required to detachedly and objectively appreciate and adjudicate upon the issues being fought out before him or her by the litigants.[82] Judicial officers must make factual and credibility findings 'only after being open to, and giving proper consideration to, the views of all the parties before them.'[83]

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[77] *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 106 (Westlaw), endorsed in *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21.
[78] Sward (1989) *Indiana Law Journal* 308.
[79] Zupančič (2003) *European Journal of Law Reform* 95 n 162 (author's emphasis).
[80] *R v Généreux* (1992) 70 CCC (3d) 1 (SCC) 17*g-h*.
[81] Snyman *Criminal Law* 321.
[82] *S v Rall* 1982 1 SA 828 (A) 832C. See also Steytler *The Undefended Accused on Trial* 172.
[83] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 27.

Judicial officers are expected to '"undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them."'[84] These requirements accord with the judicial officer's presupposed or presumed impartiality.[85]

Active participation by the judicial officer in the trial 'may lead to a diminution in objectivity'.[86] If a judicial officer descends into the arena he or she is liable to have his or her vision '"clouded by the dust of the conflict."'[87]

The court's judgment must be confined to the issues before court as raised by the parties to the litigation; the court is not to decide on matters not germane or relevant or on 'extraneous issues'.[88] A court may not create new factual issues.[89] In our adversarial system, the judicial officer sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens in some foreign jurisdictions.[90] Judicial officers 'must base their decisions solely upon evidence heard in open court in the presence of the accused.'[91] While judicial officers as members of civil society are entitled to hold views about issues of the day and may express their views provided they do not compromise their judicial office, 'they are not entitled to inject their personal views into judgments or express their political preferences.'[92] An accused must also 'be tried solely on the evidence before the court, and not on any information received outside that context', such as pre-trial publicity.[93] Moreover, in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, the Constitutional Court affirmed that judicial officers are assumed to be

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[84] *Ibid* para 27, quoting with approval *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 40 (Westlaw).

[85] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) para 40; *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 12; *Bernert v ABSA Bank Ltd* 2011 3 SA 92 (CC) paras 31-32; *S v Basson* 2007 1 SACR 566 (CC) paras 30-31; *S v Tyebela* 1989 2 SA 22 (A) 29G-H, where it was held that a fair trial presupposes that the presiding judicial officer is fair and unbiased.

[86] Steytler *The Undefended Accused on Trial* 172, with reference to *S v Van Niekerk* 1981 3 SA 787 (T) 794H.

[87] *S v Rall* 1982 1 SA 828 (A) 832D, citing with approval *Yuill v Yuill* (1945) 1 All ER 183 (CA) 189B.

[88] *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) paras 15, 19.

[89] *Ibid* para 15; *Kauesa v Minister of Home Affairs and Others* 1996 4 SA 965 (NmS) 973H-974A.

[90] See *Ndlovu v Road Accident Fund* 2014 1 SA 415 (GSJ) para 106, citing with approval *Jones v National Coal Board* (1957) 2 All ER 155 (CA) 159A-B. See also *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) 2012 ZASCA 55 (30 March 2012) para 30, where it was pointed out that this principle, as enunciated in the *National Coal Board* case supra, governs trials in South Africa.

[91] Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 268.

[92] *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 16.

[93] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 31D.

people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances or merits.[94] It has been noted that in the case of *Pelser v Director of Public Prosecutions* (the *Krion* pre-trial motion), the Court had to deal with the question of whether the presiding judge in the criminal trial would be influenced by pronouncements in civil cases dealing with matters forming the basis of the indictment against the accused.[95] Ngoepe JP *in casu* espoused the notion that a judge is a trained judicial officer who knows that he or she must decide every case which comes before him or her on the evidence adduced in the case, adding that a judicial officer '"knows further that a decision on facts in one case is irrelevant in respect of any other case, and that he must confine himself to the evidence produced in the case he is actually trying."'[96] In *Brown v National Director of Public Prosecutions and others*, in relation to the question of the impact of adverse pre-trial publicity on the fairness of a criminal trial, this notion affirmed in *Pelser's* case was endorsed.[97] The Court in *Brown* also expressed itself as follows on the aspect in the context of pre-trial publicity:[98]

> Judges have years of experience and are aware of the dangers of media reports on "high profile" cases. The judge will, however, view each case based on its own merits.

The evidence adduced in a case upon which the court's decision must solely be based 'must be given upon oath or upon a solemn affirmation in lieu of an oath or upon a serious admonition to speak the truth'.[99] Unlike in inquisitorial systems,[100] the police case docket containing all the witness statements, documents and other evidence obtained by the police in their investigations,[101] is not given to the presiding

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[94] 1999 4 SA 147 (CC) para 40, citing with approval the Supreme Court of Canada decision of *R v S (RD)* (1997) 118 CCC (3d) 353 para 32 (Westlaw), in turn endorsing *United States v Morgan* 313 US 409 421 (1941) on this point.

[95] 2009 2 SACR 25 (T).

[96] *Ibid* para 9, quoting with approval *Danisa v British and Overseas Insurance Co Ltd* 1960 1 SA 800 (D) 801F-G.

[97] 2012 1 All SA 61 (WCC) para 115.

[98] *Ibid* para 115.

[99] Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 268. See also sections 162-164 of the Criminal Procedure Act.

[100] An aspect that was explored in the previous chapter.

[101] See, for example, *S v Du Toit* 1972 1 PH H50 (E). The Court in this case described a docket as 'a collection of documents compiled during police investigation of a case, including witnesses' statements, letters, documents of various kinds and notes on the cover'. In *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 1, it was observed that '[p]olice dockets, forming a prosecutor's brief, consist normally of three sections. Section A contains statements of witnesses, expert reports and documentary evidence. Section B contains internal reports and memoranda, and section C the investigation diary.' See also *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 2 SACR 761 (CC) para 10. In *S v Govender and Others* 2006 1 SACR 322 (E)

judicial officer, but to the prosecutor after the police have concluded their investigations; if the decision is to prosecute, the prosecutor decides which charge(s) to prefer against an accused based on the contents of the docket.[102] The case docket is, so to speak, 'a prosecutor's brief'.[103] It is a trite principle in our law that a presiding judicial officer may not 'take notice of documentary information (eg contained in the police docket) which had not been tendered as evidence' before court.[104] The judicial officer enters the trial *tabula rasa* as to the facts and evidence, that is, with a clean slate on which the parties are to inscribe the facts of the case.

However, the South African Law Reform Commission published a report in 2002 in which the importation of certain inquisitorial elements into South African criminal procedure was recommended, including granting presiding officers access to police case dockets, that is to say, access to those parts of the docket which the defence would be entitled to in disclosure, except a statement made by the accused.[105] A discussion paper preceded the report which firstly identified shortcomings in the adversarial process and secondly investigated whether there were ways of adapting the process in the interest of truth-finding, fairness, and efficiency. The discussion paper commenced with an outline of the basic elements of the adversarial and inquisitorial modes of criminal procedure, and thereafter gave an exposition of how the operation of the adversarial system in South Africa impedes the realisation of the objectives of the criminal trial.[106] The Commission was essentially of the view, under the rubric of greater judicial participation in the process of the trial, that if the presiding judicial officer was also provided with the material in the case docket that was available to the prosecution and the defence, it would enable him or her 'to make an informed decision as to what evidence is available to the prosecution; the extent to which witnesses materially depart from previous

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325*a*, it was observed that 'the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court.'

[102] See *S v Mashinini and Another* 2012 1 SACR 604 (SCA) para 15. See also *S v Sehoole* 2015 2 SACR 196 (SCA) para 10, affirming that the prosecutor as *dominus litis* is in control of the docket.

[103] *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 1.

[104] Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 268, with reference to *S v Du Toit* 1972 1 PH H50 (E).

[105] South African Law Commission, Project 73, *Fifth Interim Report on Simplification of Criminal Procedure (A more inquisitorial approach to criminal procedure – police questioning, defence disclosure, the role of judicial officers and judicial management of trials)* (August 2002) xxx-xxxi (paras 21-23 of the Executive Summary), 5 (para 1.10), 112-115 (paras 7.8-7.19), 126-127 (para 8.7) <http://salawreform.justice.gov.za/reports/r_prj73_intrep5_2002aug.pdf> (accessed 06-07-2017).

[106] *Ibid* 6 (para 1.12).

statements; and the extent to which the power to call [or examine] witnesses might usefully be exercised.'[107] According to the Commission, the judicial officer could be placed in a more advantageous position to properly, or effectively and fairly, exercise the power to intervene in adversarial proceedings by questioning or calling and examining a witness respectively in terms of sections 167 and 186 of the Criminal Procedure Act,[108] if he or she were also furnished with the relevant contents in the case docket, which would be the so-called A-section of the docket containing witnesses' statements taken by the police (mainly by the investigating officer), expert reports and documentary exhibits, save for any statement made by the accused.[109] The Commission noted that the current South African system where the judicial officer does not have access to the docket, has important consequences for the ability of presiding officers to control the process and it inhibits their ability to ascertain or seek the truth.[110] The view was expressed that 'if the docket were available to presiding officers, issues which would in the normal course of events take up days of cross-examination could be solved instantly. This would enhance the ability of judicial officers to participate actively in the trial and to control the judicial process, in particular with reference to the judicial officer's ability to ensure that all relevant witnesses are called or to prevent the calling of unnecessary witnesses.'[111] The Commission argued that there could be no prejudice to either the prosecution or the defence if the judicial officer was in possession of material contained in the case docket.[112] The Commission pointed out that the information encompassed by such material in the docket would not become admissible in evidence merely because it had been placed before the judicial officer.[113] The Commission argued that to the extent to which there are sound reasons for requiring facts to be proved in accordance with the rules of evidence, none of those reasons would be detracted from merely because the contents of the docket were made available to the judicial officer.[114] It was noted by the Commission that while there might have been an objection that the judicial officer could be influenced by

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[107] *Ibid* 112 (para 7.10).
[108] This limited inquisitorial power vested in the South African judicial officer is considered below.
[109] *Ibid* 111-112 (para 7.7).
[110] *Ibid* xxx (para 21 of the Executive Summary).
[111] *Ibid* xxx (para 21 of the Executive Summary).
[112] *Ibid* 112 (para 7.10).
[113] *Ibid* 112 (para 7.11).
[114] *Ibid* 112 (para 7.11).

information that was not capable of being proved, it had to be borne in mind that in the South African system of the criminal trial, in which the judicial officer is both judge and jury, 'it is common for information to come to the knowledge of the fact finder, from which he or she must disabuse the mind in reaching a conclusion.'[115] The Commission observed that the safeguard to ensure that this is done 'lies in the requirement that reasons be given for factual conclusions.'[116] The Commission remarked that to have access to the relevant information in the case docket 'places the judicial officer in no different position to that in which he or she would be once the prosecution has opened its case fully, as it is permitted to do by section 150 of the [Criminal Procedure Act]', in terms whereof the prosecutor may at trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating what evidence he or she intends adducing in support of the charge, and may then proceed to adduce evidence to prove the charge.[117] After receiving comments on the matter of judicial access to a case docket, where divergent views were expressed, some in support of and others against such a proposal, the Commission, notwithstanding opposition by some to the proposal, reiterated its stance on the aspect and accordingly proceeded to recommend that the Criminal Procedure Act be amended by the addition of a provision that would enable a presiding officer to have access to material in a police docket which an accused would be entitled to, except a statement by the accused, for the purpose of enabling the court to assess 'how to conduct the proceedings'.[118] Such recommendation was incorporated in a draft Criminal Procedure Amendment Bill, annexed to the Commission's report as 'Appendix B'.[119]

It is beyond the scope of this thesis to explore or analyse the merits or demerits of the recommendation by the Commission pertaining to judicial access to a

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[115] *Ibid* 112-113 (para 7.11).
[116] *Ibid* 113 (para 7.11).
[117] *Ibid* 113 (para 7.11).
[118] *Ibid* 113-115 (paras 7.12-7.19), 126-127 (para 8.7).
[119] *Ibid* 154-166. See also the discussion of this proposal by the Commission in Schwikkard *Possibilities of convergence* 24-27; Erasmus (2015) *Stellenbosch Law Review* 672-673. PJ Schwikkard, in Schwikkard *Possibilities of convergence* 24-25, observes that '[t]he rationale for allowing presiding officers access to the docket is to enhance judicial participation in the management of the trial – in order to increase trial efficiency, compensate for any inequalities between the parties which in turn should contribute to more accurate fact finding. At first glance this appears to be a substantial departure from the passive and impartial role assigned to presiding officers in adversarial trials. However, these provisions merely make it possible for presiding officers to exercise existing powers [particularly in relation to calling and examining witnesses] in a more effective and fair manner.'

police docket. Suffice it to point out that there is academic support for and opposition to such a proposal.[120] The draft Criminal Procedure Amendment Bill was also never enacted.[121] It may be said that some who expressed reservations to the Commission about the proposal were of the view that judicial access to a police docket 'would unduly influence the presiding officer and allow him or her to become too active in the trial with the result that his or her impartiality might be compromised.'[122] Whilst the contents of a case docket qualitatively are not 'evidence' formally adduced in court on which the court's decision must ultimately be based,[123] the ideal position of the presiding officer entering a trial *tabula rasa* as to the facts of the case, which aspect was explored in the previous chapter, and consequently his or her impartiality may be undermined if the presiding officer has access to the docket. For as Mirjan Damaška appositely points out:[124]

> Let me first allude to a number of problems with the nonadversary mode of developing testimonial evidence. It will be recalled that the judge must have some prior knowledge of the case in order to become an effective interrogator at trial. But his necessary prior knowledge is, at the same time, a considerable shortcoming from the epistemological point of view. Being somewhat familiar with the case, the judge inevitably forms certain tentative hypotheses about the reality he is called upon to reconstruct. More or less imperceptibly, these preconceptions influence the kinds of questions he addresses to witnesses. More

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[120] See Schwikkard *Possibilities of convergence* 24-28; Erasmus (2015) *Stellenbosch Law Review* 672-673. See also Steytler (2001) *Law, Democracy & Development* 27-28, where it is argued that:

> 'Placing the police docket in the hands of the court would enable it to play a more effective truth-finding role. In the case of the undefended accused, the court would at least be able to evaluate the reliability of state witnesses where the accused manifestly neglects to do so or call exculpating evidence. The court would also be aware if the prosecution fails to call a key state witness.
>
> Disclosing the police docket to the court would resemble the key position the *dossier* assumes in inquisitorial systems. Introducing this inquisitorial element in a mainly adversarial system does not give rise to insurmountable difficulties in our law. At present any material in the police docket disclosed to the defence becomes part of the court record only on being properly admitted in terms of the usual admissibility criteria of the law of evidence. When the testimony of a state witness differs from his or her police statement, the defence may seek to hand in the statement as an exhibit for the purposes of cross-examination. Conversely, a statement of a person who is not testifying is not to be admissible. By placing the docket before the court, the same rule would apply, its content does not become evidence unless it must be properly placed before court. It is not unusual for a court to have access to information which does not form part of the record. The clearest example is a confession which is held to be inadmissible. Where a court acts on the information contained in the docket, it must be properly admitted to the record.' (Footnote omitted).

[121] See Erasmus (2015) *Stellenbosch Law Review* 673.

[122] South African Law Commission, Project 73, *Fifth Interim Report on Simplification of Criminal Procedure* 114 (para 7.17). A similar stance is taken in Erasmus (2015) *Stellenbosch Law Review* 672.

[123] See also in this regard *S v Du Toit* 1972 1 PH H50 (E); ME Bennun 'The Mushwana Report and prosecution policy' (2005) 18 *South African Journal of Criminal Justice* 279 303.

[124] Damaška (1975) *University of Pennsylvania Law Review* 1091-1092 (footnote omitted).

> importantly, there is an ever-present danger that the judge will be more receptive to information conforming to his hypotheses than to that which clashes with them. Although the resulting dangers to accurate decisionmaking are somewhat decreased by the fact that judges are usually aware of this distorting psychological mechanism, the shortcomings of this arrangement cannot be entirely eliminated.

Damaška adds in this regard that in an adversarial system:[125]

> … prior knowledge of the case on the part of the judge is more readily associated with bias. The reasons for this are quite straightforward. If the judge obtains knowledge about the case independently of the dialectical process of courtroom inquiry, he can hardly decide which side emerged victorious from the disputation about the truth; he will be siding all the time with the party whose version of the facts accords with his independent knowledge.

It may thus happen that a trial court could be adversely influenced or affected by those parts of a case docket which implicate the accused (including incriminating documentary evidence and reports that will ultimately be admitted in evidence), to such an extent that a court becomes biased and prejudges the guilt of the accused before the trial commences. This may result in the court being closed to the accused's case and more receptive to the State's case that conforms with the court's early hypothesis of guilt.[126] The problem is compounded, or intensified, by the fact that the contents of a case docket may, as one writer correctly notes, 'be materially different from the evidence before the court at the end of the prosecution case after it has been tested and challenged in cross-examination.'[127] It is a well-recognised fact that 'police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable'.[128] Furthermore, 'the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court.'[129] Witness statements are also frequently recorded by the police in a language other than that spoken by the witness, where an interpreter may be required who is also a member of the police and not a trained interpreter.[130] A witness statement moreover is usually a summary of what the police is told by the

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[125] *Ibid* 1105.

[126] In, for example, *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21; *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) paras 105-106 (Westlaw), it was held that bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

[127] Bennun (2005) *SACJ* 290.

[128] *S v Xaba* 1983 3 SA 717 (A) 730B.

[129] *S v Govender and Others* 2006 1 SACR 322 (E) 325*a*.

[130] *Ibid* 325*a-b*.

witness and is expressed in a language or in terms normally used by the police and not necessarily the witness.[131] That in such circumstances 'discrepancies occur between a witness' evidence [in court] and the contents of that witness' police statement is not unusual nor surprising.'[132] There is a danger that if the presiding judicial officer is in possession of a witness' police statement that is inaccurate and taken down under conditions that are not ideal, he or she may doubt the credibility of the witness even in the case of minor or non-material contradictions or errors.[133] There are long-established mechanisms in place, albeit not always competently executed in practice, to deal with material discrepancies in a witness' evidence, namely cross-examination and the duty resting on prosecutors to disclose such discrepancies.[134] A police witness statement is normally not a complete or full account of what the witness will say in court.[135] The statement would therefore not be an entirely reliable indicator to the presiding officer of what the witness will testify. The problem of undue influence of the judicial officer would also be exacerbated by the fact that in terms of the recommendation of the Commission, the judicial officer before the trial starts would only have a one-sided account of the case against the accused on which the decision to institute a prosecution is based. The judicial officer would not be in possession of a possible exculpatory warning statement made by the accused. It may further be argued that there is a fundamental difference between the procedure in terms of section 150 of the Criminal Procedure Act and exposure of the judicial officer to untested or unchallenged prejudicial information contained in the police case docket before the trial commences, which material may ultimately not be admitted or adduced and tested in evidence such as in the case of hearsay or incriminating evidence unlawfully or unconstitutionally obtained. Moreover, some would argue that one cannot really unbite the proverbial apple of knowledge.

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[131] *Ibid* 325*b-c*.

[132] *Ibid* 325*d-e*.

[133] In Erasmus (2015) *Stellenbosch Law Review* 672, the comment is made with regard to the proposal of judicial access to a case docket, that '[i]t is well known that police statements taken from witnesses are often inaccurate and taken down under conditions that are not ideal. A real danger exists that a presiding officer may be influenced to doubt the credibility of witnesses if there are discrepancies between their statements and their evidence in court.' (Footnote omitted).

[134] In Erasmus (2015) *Stellenbosch Law Review* 672-673, it is argued that the procedure in terms of section 190 of the Criminal Procedure Act, pertaining to the impeachment of the credibility of any witness, is 'sufficient to address discrepancies between evidence contained in a witness' statement and evidence given under oath in court.'

[135] It often happens that when a prosecutor consults with a witness before the witness testifies, the witness gives more pertinent information that is not canvassed in the witness' police statement, and a witness may also explain more fully an aspect in his or her statement which needs to be clarified.

Impartiality requires the judicial officer to remain undecided until all the evidence is in by the prosecution and the accused,[136] to keep an open mind throughout the trial until judgment,[137] a position that clearly would be imperilled by judicial access to the police case docket. Ultimately, the judicial officer may quite unconsciously be affected in deciding what evidence on the various disputed facts he or she should accept, if he or she is exposed to the case docket before trial.[138] The present adversarial process that finds application in South African criminal trials, whereby the case docket is not presented to the presiding judicial officer but is under the control of the prosecutor, forming the prosecutor's brief, is necessary to prevent the natural human tendency of judging too swiftly in terms of the familiar that which is not yet fully known.[139]

The presiding officer in the South African accusatory trial cannot follow his or her own course of action or forge his or her own path to understanding in a case, but is bound to consider, evaluate and assess the facts and evidence adduced by the parties at trial,[140] and thus would be less likely to act upon any possible biases, or predispositions or preconceptions, occasioned by prejudicial pre-trial publicity. In the previous chapter it was also sought to be shown that passivity on the part of the arbiter enhances the prospects of impartiality and the appearance of impartiality.[141] It has moreover been observed that when a judicial officer plays an active role in the leading of evidence or takes the lead in conducting the proceedings, his or her neutrality would be placed at risk as he or she would appear to be putting on the case for one of the parties – the judicial officer would likely appear to be partisan and become embroiled in the contest thereby depriving him- or herself of the ability of objectively and dispassionately appraising the evidence and credibility of the witnesses. The presiding officer's detachment therefore preserves the appearance of fairness as well as fairness itself.

Although the judicial officer in the South African criminal trial is empowered to put questions to witnesses in terms of section 167 of the Criminal Procedure Act in

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136 Zupančič (2003) *European Journal of Law Reform* 95 n 162.
137 *R v Sole* 2001 12 BCLR 1305 (Les) 1330I-J.
138 For an analogous position, see *S v Bailey and Others* 1962 4 SA 514 (E) 517H.
139 The danger of judicial access to the police case docket or dossier, is discussed more fully in chapter three.
140 Snyman (1975) *CILSA* 103.
141 However, PJ Schwikkard, in Schwikkard *Possibilities of convergence* 25, argues that it is a mistake to equate judicial passivity with impartiality, and that depending on the circumstances, passivity may be tantamount to bias, where there is inequality of arms or the accused is undefended.

order to clarify aspects of evidence and may even call witnesses *mero motu* in terms of section 186 of the Act, he or she in the main must base his or her decision on the evidence produced by the prosecutor and the defence.[142] It is perhaps necessary to briefly consider the limited power which the presiding judicial officer has of questioning and calling witnesses.

South Africa does not have a 'pure' accusatorial system.[143] Elements of the inquisitorial approach have been adopted in our criminal procedure.[144] It is the 'prime function' of a presiding officer in a criminal trial to hear the evidence adduced by the parties and their arguments and to give a decision accordingly, but there is also an 'investigatory side' to the presiding officer's duties.[145] To ensure that justice is done, there may be instances where it would not be enough for the judicial officer to decide a case simply on what the parties place before the court.[146] While the presentation of evidence is normally left to the prosecutor and the accused, and thus the accusatorial element remains the dominant element,[147] the presiding judge or magistrate may nonetheless call a witness in terms of section 186 of the Criminal Procedure Act. Indeed, as section 186 provides, a court is obliged to call a witness if the evidence of such witness 'appears to the court essential to the just decision of the case.'[148] In interpreting what 'essential to the just decision of the case' means, the Supreme Court of Appeal said in *S v Gabaatlholwe and Another*:[149]

> In s 186 'essential to the just decision of the case' means that the court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is

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142 Steytler *The Undefended Accused on Trial* 5.

143 Redpath (2012) *Institute for Security Studies Monographs* 47.

144 *Ibid* 47. See also *S v Van den Berg* 1996 1 SACR 19 (Nm) 64*i*-72*c*; Schwikkard *Possibilities of convergence* 21-22, 25-26; Erasmus (2015) *Stellenbosch Law Review* 663-664, 669-671; Kruger *Hiemstra's Criminal Procedure* 23-15; Zeffertt & Paizes *The South African Law of Evidence* 923-924; Steytler (2001) *Law, Democracy & Development* 9, 21, 26.

145 *R v Gani* 1958 1 SA 102 (A) 108C-D.

146 Kruger *Hiemstra's Criminal Procedure* 23-15.

147 See *S v Van den Berg* 1996 1 SACR 19 (Nm) 65*g*.

148 See, for example, the discussion on the provisions of section 186 in Zeffertt & Paizes *The South African Law of Evidence* 923-927; A Paizes 'Witnesses' in E du Toit, F de Jager, A Paizes, A St Q Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) 23-13-23-14G; Kruger *Hiemstra's Criminal Procedure* 23-15-23-16.

149 2003 1 SACR 313 (SCA) para 6.

> non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.

It has also been said that 'the requirement for the testimony to be "essential" is met if it is evidence which will disturb the probabilities one way or the other.'[150]

Cases on section 186 'observe that the section has both a discretionary and a peremptory part. The peremptory requirement, which obliges a court to call for evidence, arises if the witness's evidence appears to the presiding officer to be essential for the "just decision of the case".'[151] The failure by a trial court to call a witness in the latter instance is an irregularity which vitiates the proceedings, that is to say it constitutes an error in law requiring a retrial.[152] Where the court merely exercises its 'discretion' to call a witness, such discretion must be exercised 'judicially',[153] that is, 'for a legally acceptable purpose'[154] in fulfilling its duty to arrive at the truth.[155] In such instances, the court does not call a witness because it regards the evidence of the witness as essential to the just decision of the case, but because it regards the evidence as 'desirable' for the purpose of assisting it to arrive at a right decision.[156] In other words, the court is not necessarily incapable of giving a just decision without such further evidence.[157] Before a duty arises for a court to call evidence in terms of section 186, the presiding officer 'must be satisfied that the further evidence will probably, not just possibly, affect the outcome. This would also take into account the value of the evidence tendered.'[158]

In respect of the purpose of section 186, the writers, DT Zeffertt and AP Paizes, observe that if a judicial officer considers that the material placed before him or her by the State and the accused is not sufficient to enable him or her 'to arrive at the truth, he or she may pursue the investigation him- or herself.'[159] In the well-known *dictum* of Curlewis JA in *R v Hepworth*, it was held in relation to a statutory

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[150] *S v Masooa* 2016 2 SACR 224 (GJ) para 24.
[151] *Ibid* para 20 (footnote omitted).
[152] See *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA). See too *S v B and Another* 1980 2 SA 946 (A) 953A-E; *S v Dawid* 1991 1 SACR 375 (Nm) 382*f-g*; *S v Van den Berg* 1996 1 SACR 19 (Nm) 63*e*-64*d*; *S v Gabaatlholwe and Another* 2003 1 SACR 313 (SCA) para 8; *S v Mofokeng* 2014 1 SACR 229 (GNP) para 22; *S v Masooa* 2016 2 SACR 224 (GJ) para 20.
[153] *S v Masooa* 2016 2 SACR 224 (GJ) para 21.
[154] Steytler *The Undefended Accused on Trial* 175.
[155] *S v Dawid* 1991 1 SACR 375 (Nm) 382*d-e*.
[156] *R v Majosi and Others* 1956 1 SA 167 (N) 172E; *S v Van den Berg* 1996 1 SACR 19 (Nm) 66*e-f*.
[157] *R v Majosi and Others* 1956 1 SA 167 (N) 172F-G.
[158] *S v Masooa* 2016 2 SACR 224 (GJ) para 25.
[159] Zeffertt & Paizes *The South African Law of Evidence* 924, a principle endorsed in *S v Van den Berg* 1996 1 SACR 19 (Nm) 65*f-g*.

predecessor of section 186 that a judicial officer is not likely to exercise the discretionary power to call a witness which the statutory provision confers on the court unless the judicial officer thinks that the evidence of such witness 'is essential to the just decision of the case.'[160] In his judgment, Curlewis JA interpreted the words 'just decision of the case' as meaning 'to do justice as between the prosecution and the accused.'[161] In this regard, section 186 recognises as follows apropos the ultimate function of the judge as an administrator of justice:[162]

> A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.

According to *Hepworth's* case, section 186 gives a judicial officer in a criminal trial 'wide discretion and power in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason, *inter alia*, of some omission, mistake or technicality.'[163] Thus, the object of section 186 is to enable a presiding officer to place evidence before the court 'which has been omitted by mistake or is necessary in order to rectify some technical deficiency',[164] or to clear up any obscurity, uncertainty or confusion in the evidence.[165] In a sense, section 186 is aimed at enabling 'the judge or magistrate to call a witness whose evidence will result in the accused's being convicted instead of acquitted, or *vice versa*.'[166]

In *Hepworth*, Curlewis JA proceeded to find that the discretion and duty under the section concerned can be exercised by the presiding officer whether the effect thereof is in favour of the State or the accused person, and that there is no distinction between the exercising of such power on behalf of the State or the accused, provided that 'the power is exercised for the purpose of doing justice as between the prosecution and the accused.'[167] This finding was reaffirmed by the

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[160] 1928 AD 265 277.
[161] *Ibid* 277.
[162] *Ibid* 277.
[163] *Ibid* 277. See also *R v Omar* 1935 AD 230.
[164] Steytler (2001) *Law, Democracy & Development* 23. See also Schwikkard *Possibilities of convergence* 25-26. Compare, for example, *R v Beck* 1949 2 SA 626 (N) 629-630.
[165] N Steytler 'Die onverdedigde beskuldigde: die inkwisatoriese rol van die voorsittende beampte' (1982) 6 *South African Journal of Criminal Law and Criminology* 278 282.
[166] Zeffertt & Paizes *The South African Law of Evidence* 924, with reference to *R v Beck* 1949 2 SA 626 (N); *R v Singh* 1948 3 SA 554 (N). Compare also, for example, *R v Evans* 1924 CPD 232 233.
[167] 1928 AD 265 278.

Supreme Court of Appeal in the more recent decision of *S v Gerbers*.[168] The Court in *Gerbers* remarked that the above principles enunciated in *Hepworth*, '[t]ime-worn' as they may be, 'remain as valid today [in the administration of justice in the sphere of the prosecution of crime] as they were when first propounded many years ago.'[169]

In *S v Gabaatlholwe and Another* it was held that even though section 186 'contemplates the exercise of the court's power at any time during criminal proceedings, the necessity of calling a witness in the interests of a just decision will usually be less apparent at the end of the State case than it would be after all the evidence has been heard. At the earlier stage the trial court does not know whether the accused will testify and, should they do so, precisely what will be placed in dispute. It can make assumptions only based on the plea and the substance of the cross-examination.'[170] It is important to emphasise, as PJ Schwikkard observes, that unlike an investigating judge in an inquisitorial system, a presiding officer in a South African criminal trial 'may not call witnesses from the outset, but may only do so in order to bring evidence before the court which has been omitted by mistake or is necessary to cure a technical deficiency.'[171] In *S v Jada* it was held that the purpose of section 186 is not to place the presiding officer in the position of the prosecutor by calling witnesses from the outset in order to prove the allegations contained in the charge sheet.[172] The Court in *Jada* noted that section 186 only grants a trial court the right to call witnesses to enable it, as an impartial arbiter, in light of the evidence already placed before it, to do justice through the hearing of further evidence.[173] In other words, it is grossly irregular for a judicial officer to assume the role of prosecutor or give the appearance of becoming a second prosecutor and seek to prove the State's case,[174] or to make a case for the prosecution where none existed before.[175] Section 186 would seem, then, as it were, to only grant a trial court the power to supplement evidence already adduced by the parties in the interests of justice.[176] Section 186 does not permit a trial court to call a witness to prove that an

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[168] 1997 2 SACR 601 (SCA) 606*e*.
[169] *Ibid* 606*a*.
[170] 2003 1 SACR 313 (SCA) para 5.
[171] Schwikkard *Possibilities of convergence* 25-26.
[172] 1985 2 SA 182 (E) 184G. See also *S v Kwinika* 1989 1 SA 896 (W) 902B-C.
[173] 1985 2 SA 182 (E) 184F-G. See too *S v Gerbers* 1997 2 SACR 601 (SCA) 606*j*-607*a*.
[174] *S v Kwinika* 1989 1 SA 896 (W). Compare also *S v Manicum* 1998 2 SACR 400 (N) 404*b*-*c*.
[175] *R v Singh* 1943 NPD 232 236. See also Steytler *The Undefended Accused on Trial* 176, and compare *S v Hlalele* 1978 1 PH H20 (O) where the court misdirected itself in calling the complainant.
[176] See *R v Singh* 1948 3 SA 554 (N) 556-557; Steytler (2001) *Law, Democracy & Development* 23.

offence charged was committed, when there is no evidence whatever at the conclusion of all the evidence, whether for the State or the defence, tending to show that the offence had been committed.[177]

As wide as the powers of the court are under section 186, they must always be 'sparingly and cautiously exercised'.[178] In *S v Gabaatlholwe and Another* it was noted that '[t]he role of a judicial officer in a criminal trial as an administrator of justice, open-minded, impartial and fair in fact and in demeanour… informs the exercise of its judgment in terms of s 186.'[179] According to the decision of *S v Gerbers*, there is obviously a potential tension between the need to fulfil the role of a judicial officer as described in *Hepworth's* case[180] and the need to avoid judicial conduct which is irregular and which could result in a failure of justice in the context of the exercise of the court's power under section 186 to call additional evidence.[181] The Court in *Gerbers* cautioned that 'it remains incumbent upon all judicial officers to constantly bear in mind that their *bona fide* efforts to do justice may be misconstrued by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial passivism and undue judicial intervention, they must ever strive to do so.'[182] PJ Schwikkard remarks that in order to avoid perceptions of bias, presiding officers need to exercise 'a fine sense of judgment' when they intervene judicially.[183] After all, as Deon Erasmus[184]

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[177] See *Naidoo v Rex* 1934 NPD 393 395. For a prime example of a case where section 186 was required to be followed by the trial court, see *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA). The presiding judge *in casu* failed to call a ballistics expert to explain an indeterminate finding contained in a ballistics report, the import of which the judge did not understand, which in turn wrongly led to the acquittal of one of the accused even though the State had proved its case beyond a reasonable doubt especially with DNA evidence linking the accused. The ballistics expert's evidence turned out to be essential to the just decision of the case. Had the trial court called the ballistics expert to explain the indeterminate finding, the accused would likely have been convicted as charged. In the circumstances, the failure by the trial court to call the ballistics expert was held by the Supreme Court of Appeal, on a State appeal in terms of section 319 of the Criminal Procedure Act, to be an error in law which resulted in the acquittal being set aside and a retrial ordered. If the trial court had called the ballistics expert, it would not have unduly built up a case for the prosecution against the accused, as the case for the State had already been established. Instead, the calling of the witness by the court would have enabled it to understand the ballistics report and consequently have enabled it to arrive at a just or proper decision. For a discussion of this case, see PJ Schwikkard 'The law of evidence' (2007) *Annual Survey of South African Law* 844 868-870.

[178] *R v Impey and Another* 1960 4 SA 556 (E) 562A-B.

[179] 2003 1 SACR 313 (SCA) para 5.

[180] 1928 AD 265.

[181] 1997 2 SACR 601 (SCA) 607*a-b*. See also *S v Helm* 2015 1 SACR 550 (WCC) para 100.

[182] 1997 2 SACR 601 (SCA) 607*b-c*.

[183] Schwikkard *Possibilities of convergence* 26.

[184] At the time of writing, Erasmus was Associate Professor at Nelson Mandela Metropolitan University.

comments, '[t]his is especially relevant in view of the fact that the test for bias does not require a finding that the presiding officer was, in fact, biased. It is sufficient for a finding of bias if a reasonable person in the position of the party who alleges bias would have a reasonable suspicion, based on reasonable grounds, that the presiding officer might be biased.'[185] A judicial officer must not only be impartial, but be seen to be impartial.[186] In *S v Masooa*, Spilg J observed that a court must ensure as best it can to 'balance its obligations under the peremptory provisions of s 186 with the ever present danger of the perception of bias', and that the amount of additional evidence which the presiding officer wishes to bring before the court 'calls for the exercise of great caution as it may be construed as descending into the arena.'[187] Spilg J also expressed the caveat that 'it is well recognised that the provisions of s 186 are in tension with the obligation of the state to prove its case beyond reasonable doubt and with the presumption of innocence.'[188] Spilg J proceeded to find that a court must:[189]

> … adopt absolute impartiality when considering whether to receive further evidence or not. And if further evidence is directed then the court must ensure that strict neutrality is maintained in the way questions are asked. The accused must also be afforded an opportunity to call further evidence in rebuttal, should any potentially adverse evidence be produced. A court cannot avoid the consequences of a post facto complaint of bias if the evidence turns out unfavourably for the accused. What it must ensure is that the motive for directing further evidence under s 186 is not partisan and that it is essential to receive it for the just decision of the case.

The intervention of a trial court in terms of section 186 must not be tantamount to taking over the prosecution and filling in the gaps in the State's case, in other words, it must not be 'prompted by undue partiality towards the cause of the state.'[190] Impartiality must be maintained.[191]

Another limited 'inquisitorial' power which a judicial officer has in a South African criminal trial is the questioning of witnesses or an accused.[192] As Deon

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[185] Erasmus (2015) *Stellenbosch Law Review* 673.
[186] *S v Mseleku and Others* 2006 2 SACR 237 (N) para 17.
[187] 2016 2 SACR 224 (GJ) paras 24-25.
[188] *Ibid* para 25.
[189] *Ibid* para 26.
[190] *S v Helm* 2015 1 SACR 550 (WCC) para 101. See also Kruger *Hiemstra's Criminal Procedure* 23-16.
[191] Kruger *Hiemstra's Criminal Procedure* 23-16.
[192] See *S v Ngcobo* 1999 3 BCLR 298 (N) 305I-J. See also section 167 of the Criminal Procedure Act; *S v Rall* 1982 1 SA 828 (A) 831C; Steytler (1982) *SACC* 282; Steytler (2001) *Law, Democracy &*

Erasmus notes with reference to the Appellate Division decision of *S v Rall*,[193] '[t]he purpose of examination by the court should be to *elucidate any points that may still be obscure or unclear after examination by the parties* where it is necessary in an attempt to discover the truth.'[194] In *Rall* it was held that a presiding officer is 'entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case.'[195] The Court in *Rall* observed further that much depends upon the particular circumstances of the trial itself as to whether, when, to what extent, and in what form or manner such questioning should be indulged in by the presiding officer.[196] Thus, if the accused is unrepresented, the judicial officer should and ordinarily would assist him or her to put his or her defence adequately, if necessary by the judicial officer him- or herself questioning prosecution witnesses as well as the accused and his or her witnesses.[197] The Court remarked that the need to do that would naturally be far less where the prosecution and defence are both represented by counsel.[198]

In *S v Mseleku and Others*,[199] judicial questioning at trial and the rules related thereto were explained *inter alia* as follows:

- [The Court may question a witness] at the end of the examination by the parties.[200]
- The purpose of the Court's examination should be to elucidate any points that may still be obscure after examination by the parties…[201]
- [The Court] should not cross-examine a witness…[202]
- [The Court] must remain impartial and this should be evident from the nature and scope of the examination…[203]
- If the Court examines any person… the prosecutor and the accused may put questions arising from such further questioning by the Court. Various principles have arisen which are to the effect that the Court may intervene at any time to elucidate a point, but should

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Development 9, 21; Schwikkard *Possibilities of convergence* 25; Erasmus (2015) *Stellenbosch Law Review* 663; Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-89-22-94D, 22-96-22-98; Kruger *Hiemstra's Criminal Procedure* 22-60-22-62, 23-15.

[193] 1982 1 SA 828 (A) 831C.

[194] Erasmus (2015) *Stellenbosch Law Review* 669 (my emphasis).

[195] 1982 1 SA 828 (A) 831C. See also *S v Van Niekerk* 1981 3 SA 787 (T) 794F.

[196] 1982 1 SA 828 (A) 831F-G.

[197] *Ibid* 831G.

[198] *Ibid* 831G.

[199] 2006 2 SACR 237 (N).

[200] *Ibid* para 11.

[201] *Ibid* para 12.

[202] *Ibid* para 13.

[203] *Ibid* para 13.

not take over the examination or put leading questions to support the State case before the parties have finished their examination of the witness…[204]

- [T]he Judge or presiding officer should not enter the arena…[205]
- In criminal proceedings the Court will, if it is necessary in order that justice be done, come to the aid of the accused who is represented by inexperienced counsel…[206]
- It is clear that in order to give the accused a fair trial a judicial officer must not only be impartial, but be seen to be impartial.[207]

Judicial questioning, then, is mainly limited to elucidation or clarification of evidence already presented by the parties.[208] In *S v Nnasolu and Another* the Court affirmed that a presiding officer 'is entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him or her desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case.'[209] Similarly to the object of the calling of a witness by a trial court in terms of section 186 of the Criminal Procedure Act, the overarching purpose of judicial questioning of witnesses or an accused is 'seeing that justice is done.'[210]

As with the procedure in terms of section 186 of the Criminal Procedure Act, a presiding officer may not, when it comes to judicial questioning, descend into arena and play the role of both prosecutor and judicial officer, such as occurred in, for example, the case of *S v Mathabathe*.[211] In that case the presiding officer took over the examination of the complainant called by the prosecution before the complainant could answer the prosecutor's first question. The presiding officer continued asking questions for the duration of the complainant's evidence-in-chief. When the presiding officer finished leading the complainant, the prosecutor had no questions to ask. When the accused, who was unrepresented, gave his evidence, the presiding officer did not lead his evidence, but instead passed comment on the evidence given by the accused and in effect cross-examined the accused. Many of the comments made and the questions put were sneering and sarcastic and the accused must have gained the impression that the presiding magistrate was hostile to him and was not

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[204] *Ibid* para 10.
[205] *Ibid* para 14.
[206] *Ibid* para 14.
[207] *Ibid* para 17.
[208] See Kruger *Hiemstra's Criminal Procedure* 22-61-22-62; *S v Mathabathe* 2003 2 SACR 28 (T) 30*b-c*; *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 20. See also Erasmus (2015) *Stellenbosch Law Review* 669; Steytler *The Undefended Accused on Trial* 172-173.
[209] 2010 1 SACR 561 (KZP) para 38. See also *S v Sigwahla* 1967 4 SA 566 (A) 568H.
[210] *S v Ngcobo* 1999 3 BCLR 298 (N) 305I-J. See also *R v A* 1952 3 SA 212 (A) 222C-D.
[211] 2003 2 SACR 28 (T).

attempting to get to the truth of the matter. The presiding officer certainly did not appear to be asking questions simply to get clarity on any issue. During the prosecutor's cross-examination there were frequent questions by the presiding magistrate which were also sarcastic and hostile. Very few of the questions were simply objective questions to clarify what had been said.[212] On review, the Court held that such conduct by the presiding officer was irregular and accordingly proceeded to set aside the conviction and sentence.[213]

The perception, then, must not be created when a presiding officer examines a witness or an accused that the presiding officer has taken over the role of the prosecutor.[214] The purpose of judicial questioning 'is not to place the presiding officer in the position of the prosecutor in order that evidence can from the outset be called to prove the allegations in the charge sheet'.[215] When a trial court intervenes, the court must not become the prosecutor or show bias in favour of the prosecution.[216] In the *locus classicus* decision concerning judicial questioning, *S v Rall*,[217] the following three fundamental principles (or broad, general guidelines) were laid down that must be observed by presiding officers when they wish to examine witnesses or accused persons:

- [T]he Judge must ensure that 'justice is done'. It is equally important… that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused… The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length,

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[212] *Ibid* 29*i*-30*c*.
[213] *Ibid* 33*e*-*f*.
[214] Kruger *Hiemstra's Criminal Procedure* 22-62.
[215] *Ibid* 22-62.
[216] *S v Matthys* 1999 1 SACR 117 (C) 119*d*-120*i*; *S v Mosoinyane* 1998 1 SACR 583 (T) 594*h*; *S v Le Grange and Others* 2009 1 SACR 125 (SCA); *S v Owies and Another* 2009 2 SACR 107 (C) para 11; Schwikkard *Possibilities of convergence* 25; Erasmus (2015) *Stellenbosch Law Review* 670; Steytler *The Undefended Accused on Trial* 148, 174; Steytler (2001) *Law, Democracy & Development* 24; *S v Buitendag* 1976 4 SA 23 (RA) 25F, crisply holding that: 'I do not think it is the duty of any court to attempt to prove the case for the prosecution or to attempt to prove the case for the defence.'

However, as is correctly noted in Steytler *The Undefended Accused on Trial* 148, the trite principle that a judicial officer may not assume the role of the prosecutor in questioning witnesses or direct the prosecutor as to how to conduct the prosecution, 'does not… prevent the court from questioning a witness on an aspect of the charge that the prosecutor has omitted. As much as the court has the power to call witnesses who may benefit the prosecution, it would enjoy the right to ask questions, even though these may aid the State case.' (Footnote omitted). Support for this comment by Steytler may be found, for instance, in the Appellate Division decision of *R v A* 1952 3 SA 212 (A) 221F-222D.
[217] 1982 1 SA 828 (A).

timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression…[218]

- A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. As Lord Greene MR observed in *Yuill v Yuill* (1945) 1 All ER 183 (CA) at 189B, if he does indulge in such questioning –

  'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.'…

  Or, as expressed by Wessels JA in *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E, the Judge may thereby deny himself –

  'the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts.'[219]
- A Judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility.[220]

A presiding officer who associates him- or herself too closely with the conduct of a case by, for example, taking over the prosecution from counsel for the State in examining witnesses or cross-examining an accused in a manner that is designed to produce answers favourable to the State, denies him- or herself the full advantage enjoyed by a judicial officer, who '"as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts".'[221] The court's power, then, to 'elicit and elucidate the truth more fully', is 'seen to be subsidiary, complementing the parties' efforts in searching for the truth',[222] or in that respect clearing up any 'uncertainty', omissions, mistakes, ambiguities, obscure matters or confusion in the evidence tendered by the parties.[223]

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[218] *Ibid* 831H-832B.
[219] *Ibid* 832C-E.
[220] *Ibid* 832F-G. See also *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 19, where these 'limitations' on judicial questioning were affirmed. See too *S v Nnasolu and Another* 2010 1 SACR 561 (KZP) para 38; Steytler *The Undefended Accused on Trial* 173-174.
[221] *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 28.
[222] Steytler *The Undefended Accused on Trial* 173.
[223] *S v Owies and Another* 2009 2 SACR 107 (C) para 10; *S v Van den Berg* 1996 1 SACR 19 (Nm) 67*f*, 68*c-d*; Steytler (1982) *SACC* 282. See also *S v Meroro and Another* 2013 1 NR 25 (HC) para 20, where the Court, endorsing *S v Mseleku and Others* 2006 2 SACR 237 (N), summarised the aforesaid principles governing the court's examination of any person in terms of section 167.

Allied to a court's power to question witnesses or an accused, as aforesaid, is the court's power to act inquisitorially by recalling and re-examining any witness, including an accused, already examined at the proceedings, in terms of section 167 of the Criminal Procedure Act.[224] Similar principles apply in respect of this provision as with section 186 of the Act.[225] Section 186 is said to be supplemented by or associated with section 167.[226] A court 'has a duty to exercise the power to recall a witness where it is necessary to attempt to discover the truth in order that substantial justice is done between the parties'.[227] Section 167 makes it obligatory for a court to examine, or recall and re-examine, a witness if the evidence of such witness 'appears to the court essential to the just decision of the case.'[228] The failure by a court to examine or recall and re-examine a witness in the latter instance is an irregularity that may give rise to a failure of justice and the consequent setting aside of proceedings.[229] Section 167 empowers a court to examine, recall and re-examine witnesses for clarification so as to elicit necessary information material to the adjudication of a point in dispute,[230] or 'to elucidate any points that may still be obscure after examination by the parties',[231] or to rectify any omission or mistake in the evidence.[232] Such is in line with the court's 'duty to search for the truth'.[233]

It has moreover been suggested that a trial court's duty to render assistance to an undefended accused may also constitute an inquisitorial element in South African criminal procedure at trial,[234] by reason of the fact that 'it requires a departure from the classic passive role assigned to judicial officers in adversarial

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[224] See, for example, Kruger *Hiemstra's Criminal Procedure* 22-61, 23-15. Compare, for instance, *S v Kemp* 1973 1 SA 924 (C) 927A-H; *S v Mseleku and Others* 2006 2 SACR 237 (N) paras 54, 69.

[225] For an instructive discussion of sections 167 and 186 and how these provisions ought to have been applied by the trial court, see *S v Van den Berg* 1996 1 SACR 19 (Nm) 63*e*-72*c*.

[226] See *S v Van den Berg* 1996 1 SACR 19 (Nm) 65*h*; Kruger *Hiemstra's Criminal Procedure* 23-15. See also *S v Dawid* 1991 1 SACR 375 (Nm) 383*a*-*b*, where it was held that sections 167 and 186 of the Criminal Procedure Act 'are clearly complementary' and grant to a trial court an inquisitorial role in certain important respects, which the court should not shy away from.

[227] Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-96A, with reference to *S v Van den Berg* 1996 1 SACR 19 (Nm).

[228] See *S v Mayiya* 1997 3 BCLR 386 (C) 395A-D.

[229] *Ibid* 395B-D, 396A-F. See also *S v Dawid* 1991 1 SACR 375 (Nm) 382*f*-*g*; *S v Moilwa* 1997 1 SACR 188 (NC).

[230] This is distinguishable from examination and cross-examination of a witness by the litigants – see *S v Moilwa* 1997 1 SACR 188 (NC) 192*h*-*i*.

[231] Kruger *Hiemstra's Criminal Procedure* 22-61, with reference to *S v Mseleku and Others* 2006 2 SACR 237 (N).

[232] See *S v Van den Berg* 1996 1 SACR 19 (Nm) 63*e*-*i*, 68*c*-*d*.

[233] *S v Dawid* 1991 1 SACR 375 (Nm) 382*e*. Compare also, for example, the circumstances in *S v Mseleku and Others* 2006 2 SACR 237 (N).

[234] See Steytler (1982) *SACC* 281-283.

proceedings'.[235] Indeed, for instance, as one court affirmed: '"[B]y remaining aloof where the accused is unable to test the State evidence, the judicial officer would actually be siding with the prosecution by letting the latter draw an unfair advantage from the accused's inept cross-examination."'[236] Judicial passivity in such an instance would therefore constitute an indicator of bias rather than impartiality.[237] Nico Steytler argues that a presiding officer must in all instances where the undefended accused cannot properly test the truthfulness of State witnesses, conduct such task in the interests of justice.[238] Steytler makes the observation that where a presiding officer in the case of an unrepresented accused duly tests independently the credibility or reliability of State witnesses' evidence, without cross-examining the witnesses, so as to be satisfied that the evidence is sufficiently reliable to found a possible conviction, and in circumstances where the accused is unable or fails to do so him- or herself, such judicial activity is in essence inquisitorial and is necessary to ensure that justice is done.[239] Steytler opines further in this regard that such judicial intervention is 'necessitated by the undefended accused's inability to play his role in the adversary system in the testing of the State evidence.'[240] Steytler explains that:[241]

> The undefended accused is consistently at a disadvantage in this regard in relation to the State, which is represented by a legal practitioner… This inequality is such that the court's duty to see that justice is done, demands that it assists the undefended accused where he will be prejudiced by the lack of legal representation. Moreover, should the court remain passive in such an unequal contest it would compromise its impartiality because, by allowing the prosecutor to take unfair advantage of the undefended accused's ignorance and incompetence, it sides indirectly with the prosecution.

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[235] Schwikkard *Possibilities of convergence* 22. The writer adds, however, that assistance rendered by a trial court to an unrepresented accused might also be viewed 'as being essential for the functionality of the adversarial system as a compensatory mechanism for the inequality of arms. Alternatively, judicial activism in this respect may be viewed as necessary to meet the standards of fairness set by the participatory model. This is an example of the irrelevance of labelling a particular activity or feature as inquisitorial or adversarial in determining whether the requirements of a fair trial have been met.' (*Ibid* 22).

[236] *S v Mosoinyane* 1998 1 SACR 583 (T) 595*b-c*, quoting with approval Steytler *The Undefended Accused on Trial* 150. See also Steytler (1982) *SACC* 282-283, where the writer similarly argues in this context that: 'Die moontlikheid bestaan wel dat indien die voorsittende beampte die onverdedigde beskuldigde aan sy eie onvermoë oorlaat, die afsydigheid [aloofness] van die beampte die indruk mag skep van 'n negatiewe houding jeens die beskuldigde en dat die hof in werklikheid ten gunste van die vervolging optree.'

[237] Schwikkard *Possibilities of convergence* 25.

[238] Steytler (1982) *SACC* 282.

[239] Steytler *The Undefended Accused on Trial* 148-150, 224-225.

[240] *Ibid* 174.

[241] *Ibid* 174-175.

According to Steytler, it is widely accepted that in the case of an undefended accused, the judicial officer 'may be more interventionist, questioning state witnesses in order to establish the truth.'[242] Indeed, Steytler posits that in the absence of adequate or quality legal representation, the unrepresented accused is reliant on the presiding officer to act inquisitorially on his or her behalf.[243] This is underpinned by the well-recognised fact that the proper and fair functioning of the accusatorial system is dependent on the parties presenting their respective cases to the best of their ability and on the parties carrying the necessary knowledge of the rules of procedure and the ability to use such rules effectively to their advantage.[244] It is also underpinned by the fact that justice requires that an accused be judged on evidence that is tested.[245] Steytler believes that although a court's questioning where the accused is unrepresented, in order to test the reliability of evidence presented by the State, is no real substitute for the services of defence counsel, 'it would at the very least place the conviction on a sounder factual basis.'[246]

A striking example of a case where the trial court misdirected itself by failing in its duty to test the State's evidence where the accused was unrepresented, is *S v Mayiya*.[247] In this matter the accused was charged with rape. The accused denied that he had sexual intercourse with the complainant. The complainant testified that the accused raped her on the back seat of his vehicle. However, subsequent to the complainant having testified, the doctor was called who examined the complainant later in the morning after the night when the rape was alleged to have been committed and after the complaint of rape was laid with the police. The doctor had noted in his report *inter alia* that the complainant's perineum was covered with grass and sand. This finding was inconsistent with the complainant's version that the accused raped her on the back seat of his car. The aspect was not explored further at trial, and the trial court did not recall the complainant in order that the aspect could be canvassed with her. The accused was later convicted as charged. On appeal it was held that the trial court was duty-bound, particularly where the accused was unrepresented and did not ask any questions on the aspect, to recall the

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[242] Steytler (2001) *Law, Democracy & Development* 21.
[243] Steytler (1982) *SACC* 283.
[244] *Ibid* 278.
[245] *Ibid* 282. See also Steytler *The Undefended Accused on Trial* 150.
[246] Steytler *The Undefended Accused on Trial* 150-151.
[247] 1997 3 BCLR 386 (C). See also the comments in relation to this case in Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-98.

complainant as a witness for questioning on the material discrepancy between her version of the events and the doctor's finding once it came to light in the doctor's evidence. The complainant ought to have been asked by the court to explain the contradiction which had a material bearing on her credibility. Such failure by the trial court to recall and examine the complainant in terms of section 167 of the Criminal Procedure Act, where in light of the above circumstances the witness' further evidence was essential to the just decision of the case, constituted an irregularity which amongst other factors warranted the setting aside of the conviction.[248] A further ground for interfering with the conviction lay in the fact that the prosecutor was in possession of the doctors' report at the time when the complainant testified. The medical report reflected that the complainant's perineum was covered with grass and sand. The prosecutor failed to bring the inconsistency between the complainant's version and the doctor's finding to the attention of the court during the complainant's testimony when the aspect could have been investigated. On appeal it was held that the prosecutor had a responsibility to assist the court in arriving at the truth and accordingly had a duty to reveal all facts that could possibly be favourable to the accused. It was found that particularly where an accused is unrepresented and unsophisticated such disclosure has a two-fold purpose. The first is that it enables the trial court to fulfil its duty effectively of guiding and assisting an undefended accused. The second is to enable an accused to test the credibility and reliability of witnesses in cross-examination in the interests of a fair trial and the proper administration of justice. These goals of disclosure could not be reached *in casu* where the prosecutor failed to timeously disclose the relevant facts to the court, and thus such failure constituted an irregularity.[249]

On Steytler's reasoning, the judicial officer's duty of assisting an undefended accused in (i) the formulation of questions to put to witnesses in cross-examination, (ii) clarifying issues in cross-examination, (iii) determining the facts in dispute by ascertaining from the accused the extent to which he or she disputes the witness' evidence, (iv) putting the accused's defence to State witnesses, and (v) in the presentation of the accused's case,[250] may be seen as an inquisitorial role played by

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[248] 1997 3 BCLR 386 (C) 395A-D, 396A-F.

[249] *Ibid* 394E-J, 396A-F. The prosecutor's duty to disclose exculpatory evidence or evidence unfavourable to his or her case to assist the court in arriving at the truth, is dealt with more fully *infra*.

[250] See *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO and Another* 1989 3 SA 368 (E) 378A-379A; Steytler *The Undefended Accused on Trial* 146-147, 168.

the judicial officer.[251] Be that as it may, the judicial officer must, as was noted above, ever bear in mind that even in the case of an unrepresented accused he or she is holding a balance between the parties, and that fairness to both the State and the accused should be his or her guiding star, and that his or her impartiality must be seen to exist.[252] Whereas a court may in a sense manifest a tendency to descend into the arena in assisting an unrepresented accused in the conducting of his or her defence, the court must still remain impartial and be able to form objective appraisals of the witnesses who appear before him or her, and avoid creating the impression of bias.[253] The impartiality of a judicial officer must always be actual and seen.[254] It is the right of both the State and the defence to demand complete impartiality from the court.[255] While judicial searching for the truth ought not *per se* to denote or be equated with bias even where it ultimately favours either the State or the accused,[256] judicial questioning must nonetheless exhibit open-mindedness,[257] and not a mind which is hostile to one of the parties or a mind which prejudges, and is indeed, closed to the issues.[258] After all, the only guarantee in the end of impartiality on the part of the courts 'is conspicuous impartiality.'[259]

Perceptions or impressions matter in the administration of justice; justice should not only be done, but should manifestly be seen to be done.[260] A judicial

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[251] In Roodt (2003) *Codicillus* 80-81, it is also suggested that a more inquisitorial approach in determining the facts may be expected of a trial court where the accused is unrepresented or where 'ignorance' or an 'omission' on the part of the defence 'jeopardises fairness'. The writer goes so far as to assert that the neutral role of the judicial officer 'requires adjustment, especially if the accused is unrepresented', and that basic notions of fairness could require the judicial officer 'to enter the arena in order to assist the accused, to ensure and facilitate the accused's participation in the proceedings, to advise the accused of his or her rights and duties or to assist with the exercise of these rights.' (*Ibid* 80-81).

See too Steytler *The Undefended Accused on Trial* 176-177 with regard to the inquisitorial power of a trial court to call and examine witnesses who may favour an undefended accused. In *S v Moilwa* 1997 1 SACR 188 (NC) it was held to be an irregularity where the court failed to assist an undefended accused in examining an essential witness called by the accused.

[252] See *S v Sigwahla* 1967 4 SA 566 (A) 568G-H.

[253] *Ibid* 568G-569A. Compare also *S v Brown* 2015 1 SACR 211 (SCA) para 145.

[254] *S v Sallem* 1987 4 SA 772 (A) 795A.

[255] *Ibid* 795B.

[256] In Steytler *The Undefended Accused on Trial* 150, it is observed that in contrast to cross-examination, questioning by a court aimed at establishing the reliability of the State evidence 'may be thorough but it is not partisan in its objective. Much will therefore depend on the manner and tone in which the questioning is done so as to avoid any suggestion of partiality on the part of the presiding officer.'

[257] Steytler (2001) *Law, Democracy & Development* 24-25, with reference to *S v Rall* 1982 1 SA 828 (A). See also Steytler *The Undefended Accused on Trial* 150.

[258] Compare *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 20.

[259] *Ibid* para 27.

[260] See *S v Kroon* 1997 1 SACR 525 (SCA) 531*f*.

officer 'must not only be impartial in practice but also give the appearance of being impartial.'[261]

The aforesaid inquisitorial elements that are accommodated in the South African accusatorial trial system,[262] do not detract from the fact that such a system

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[261] Steytler *Constitutional Criminal Procedure* 266, with reference to *S v Malindi and Others* 1990 1 SA 962 (A) 969H; *S v Kroon* 1997 1 SACR 525 (SCA) 531*d-f*. See also *S v Basson* 2007 1 SACR 566 (CC) para 27; *S v Sallem* 1987 4 SA 772 (A) 795A; *S v Mseleku and Others* 2006 2 SACR 237 (N) para 17; *S v Maasdorp* 2008 2 SACR 296 (NC) para 15; *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 21, where it was crisply held that: 'Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer.'

[262] Notions of basic fairness and justice may also require a presiding officer to act more inquisitorially to assist an inexperienced prosecutor, inasmuch as he or she may be required to assist inexperienced or incompetent defence counsel, especially during the transformation process of South Africa's legal system, to ensure ultimately that justice is properly administered – see *S v Mseleku and Others* 2006 2 SACR 237 (N) para 60; *S v Ngcobo* 1999 3 BCLR 298 (N) 306A-D; *S v Van den Berg* 1996 1 SACR 19 (Nm) 64*f-h*. In Kruger *Hiemstra's Criminal Procedure* 22-62, it is observed that '[i]n a developing country with a lack of sufficiently trained police, prosecutors and magistrates, presiding officers are obliged to ensure that substantial justice is done'. See also W Freedman 'Constitutional application: *The role of the judicial officer*' (2007) 20 *South African Journal of Criminal Justice* 123 123; Steytler (2001) *Law, Democracy & Development* 22-26. See too Steytler *The Undefended Accused on Trial* 175-176, where it is noted with regard to the provisions of section 186 of the Criminal Procedure Act that a court may '*assist* the prosecution by calling a witness who has been omitted by mistake or is necessary in order to rectify some technical deficiency.' (Author's emphasis).

Adopting a supine approach to a floundering prosecutor would not advance the proper, effective and fair administration of justice – see, for example, Roodt (2003) *Codicillus* 82, where it is appositely remarked that an inept prosecutor 'could thwart the goals of the criminal trial.' The South African Law Reform Commission has recognised that inasmuch as undefended accused are usually not competent adversaries and may as a result be wrongly convicted, the same applying to accused defended by incompetent counsel (see *S v Mafu and Others* 2008 2 SACR 653 (W)), '[u]nskilled prosecutors may cause unjustified acquittals.' – see South African Law Commission, Project 73, *Fifth Interim Report on Simplification of Criminal Procedure* 35. See also *S v Manicum* 1998 2 SACR 400 (N) 406*a-c*; Steytler (2001) *Law, Democracy & Development* 3-5, arguing that in terms of the logic of adversarial process, the objective of truth-finding may be defeated and the adversarial model may collapse, not only in the case of an undefended accused or an accused who is poorly defended (a lack of equality of arms), but also where the prosecutor is inexperienced or incompetent or lacks commitment. Compare moreover the circumstances in *S v Mseleku and Others* supra.

Rendering assistance to a prosecutor in the above circumstances, may be underpinned by the trite principle that a fair trial also requires fairness to the public as represented by the State – see, for example, *S v Shaik and Others* 2008 1 SACR 1 (CC) para 43; *S v Van den Berg* supra 72*b-c*; *S v Dawid* 1991 1 SACR 375 (Nm) 383*c*. Compare also *S v Mseleku and Others* supra para 62. Moreover, 'a criminal trial is not a game. The case law emphasises that [the judicial officer] is an administrator of justice, who has to direct and control the proceedings according to recognised rules of procedure and see that justice is done' - *S v Mseleku and Others* supra para 63. See also *S v Van den Berg* supra 71*d*: 'The issues are not merely fought out by the *litigants* in criminal trials with the presiding judicial officer only there to pose the question "how's that?", but the judicial officer must attempt to discover the truth with the means put at his or her disposal by provisions such as ss 167 and 186.' (Court's emphasis). A further factor that would tend to underscore the need for judicial assistance to an inexperienced prosecutor is that it is 'axiomatic that justice is achieved when the guilty are convicted and the innocent acquitted after a fair and just procedure.' - *S v Mseleku and Others* supra para 58.

What must not happen is for the trial court to take sides with the prosecutor. The court must not perform the function of or take up the cudgels on behalf of the prosecutor (*S v Ngcobo* supra 304B-C), particularly where there is no evidence whatsoever against the accused (Steytler *The Undefended Accused on Trial* 176; *S v Hlalele* 1978 1 PH H20 (O)), and must refrain from conducting cross-examination (*S v Mseleku and Others* supra paras 60, 66, 70). Cross-examination must be avoided as such 'incorporates *partisan* questioning as practised by prosecutors and defence lawyers

remains party-orientated and that consequently the trial court is in the main bound by the evidence which the parties produce in reaching its decision. Even a court witness called in terms of section 186 of the Criminal Procedure Act, may be cross-examined by the prosecutor and the accused,[263] which is in sharp contrast to inquisitorial procedure. Sight should not be lost of the fact that our Constitution embraces predominantly adversarial/accusatorial trial procedure over against inquisitorial procedure.[264] It is patently clear that a presiding officer may participate

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in their pursuit of a conviction or acquittal respectively. Should the court indulge in cross-examination, it would certainly sacrifice its image of impartiality.' - Steytler *The Undefended Accused on Trial* 150, with reference to *S v Sallem* 1987 4 SA 772 (A) 795A-D (author's emphasis). See also *S v Maseko* 1990 1 SACR 107 (A) 118*c-f*; *S v Mafu and Others* supra para 37; Kruger *Hiemstra's Criminal Procedure* 22-62, stating that:

> 'It is important that a distinction be drawn between questioning by the court and cross-examination. If questioning by the presiding officer amounts to cross-examination, the court undoubtedly loses its appearance of impartiality. The presiding officer's right to question an accused and witnesses for the accused is therefore mainly limited to elucidation or clarification of the evidence presented.'

A court must not take over the prosecution, where he or she, in the words of one writer, 'inadvertently assumes the role of an adversary' - A St Q Skeen 'Descending into the arena: Rall 1982 1 SA 828 (A)' (1982) 6 *South African Journal of Criminal Law and Criminology* 180 181. A judicial officer 'can legitimately ask vital questions overlooked by the prosecutor so long as he does not abandon, or is seen to abandon, his impartiality' – *ibid* 182. Judicial intervention 'to ascertain the truth is not *per se* irregular, provided the judicial officer does not do the work of the prosecution or tell the prosecution how to conduct its case' - Roodt (2003) *Codicillus* 82. See also the comments in *S v Moshoeu* 2007 1 SACR 38 (T) 41*e-h*. Judicial questioning must reveal a desire to investigate the truth and not to cross-examine an accused to prove a non-existent case against him or her – see *S v Mseleku and Others* supra para 71.

Although a presiding judicial officer is sometimes obliged to ask questions of witnesses, 'it is important to guard against conduct which could create the impression that the judge is descending into the arena of conflict or is partisan or has already decided issues which should only be decided at the end of the trial. Nor should a presiding officer put attacking propositions to an accused person, as such conduct is capable of creating the impression that the judge is acting as a cross-examiner, associating himself with the case for the state.' - *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) 2012 ZASCA 55 (30 March 2012) para 43.

Perceptions of partiality may 'be provoked by the manner in which a judge conducts proceedings in a dispute before him or her, by "descending into the arena" to too great a degree and not acting sufficiently like a neutral umpire' - H Corder 'Judicial accountability' in C Hoexter & M Olivier (contributing eds) *The Judiciary in South Africa* (2014) 200 231. Again, a judicial officer is not to conduct him- or herself in any manner that might compromise his or her impartiality or perceived impartiality (*S v Mseleku and Others* supra paras 13, 17, 64), and any judicial assistance of a prosecutor should not violate the accused's right to a fair trial (Freedman (2007) *SACJ* 123).

When a judicial officer intervenes, such must not be done in a manner that conveys the impression that he or she is not fair, impartial or open-minded, or in a manner that prevents him or her from objectively adjudicating on the issues, or in a manner which intimidates or disconcerts witnesses or unduly influences the quality or nature of their replies – reaffirmed in *S v Mseleku and Others* supra para 16; *S v Le Grange and Others* 2009 1 SACR 125 (SCA) para 19, as broadly being the limits within which judicial intervention should be confined.

[263] See *S v Longano* 2017 1 SACR 380 (KZP) para 28. See also Paizes 'Witnesses' in *Commentary on the Criminal Procedure Act* 23-14F.

[264] *S v Nkabinde* 1998 8 BCLR 996 (N) 1001C-E; Cowling (2006) *Annual Survey of South African Law* 718. See also the remarks in *S v Masooa* 2016 2 SACR 224 (GJ) paras 25, 27. However, it was pointed out in *Masooa's* case that judicial intervention is also necessary to ensure that the rights of the accused 'have content' where counsel for the accused may be inexperienced. The Court said in

in the proceedings in order to see that the rules are followed and that justice is done as between the prosecution and the accused, but if he or she partakes in the game effectively as an adversary he or she abandons the whistle and exceeds his or her mandate.[265] Once the accused contests the charge against him or her, the presumption of innocence places the onus on the State to prove the accused's guilt beyond a reasonable doubt by means of evidence, the production of which is firmly based on the adversary mode of procedure.[266] It is the State that must lead evidence to prove every allegation contained in the charge that is in dispute.[267] In order to enhance truth-finding, fairness and efficiency in such a system, it has been suggested that instead of endowing criminal courts with more inquisitorial powers, emphasis could be laid on such practical mechanisms as (i) judicial training that is focused on balancing judicial passivism and judicial intervention, (ii) adherence to the *Code of Judicial Conduct* by judges,[268] and (iii) the training, mentorship and co-ordination of defence counsel, the majority of whom are in the employ of Legal Aid South Africa, or instructed by that institution, and prosecutors employed by the National Prosecuting Authority so that they are better equipped to fulfil their respective adversarial functions properly and adequately in the interests of a fair trial and the proper administration of justice.[269]

Judicial impartiality applies not only to the decision itself but also to the process by which the decision is made.[270] The Constitutional Court has held that a trial is 'a dynamic process where the issues develop under the supervision of the

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the latter regard that an example would be 'where a version is not put when it should have been. In the result questions may be asked as to why a version was not put and adverse inferences might be drawn that the version eventually presented was fashioned only after hearing all the evidence that the state could present. Another example is where counsel may not correctly assess the gravamen of the evidence led, particularly of experts, resulting in a failure to challenge the underlying premise whether it is scientific, analytical or factual.' (*Ibid* para 25).

[265] Skeen (1982) *SACC* 182.

[266] Steytler *The Undefended Accused on Trial* 135.

[267] *Ibid* 135.

[268] Adopted in terms of section 12 of the Judicial Service Commission Act 9 of 1994, published in GN R 865 in *GG* 35802 of 18-10-2012. See also *Code of Conduct for Magistrates*, as per Schedule E read with Regulation 54A of Regulations for Judicial Officers in Lower Courts, 1994, under the Magistrates Act 90 of 1993. For a further discussion on the *Code of Judicial Conduct*, see, for example, Corder 'Judicial accountability' in *The Judiciary in South Africa* 224-226. In respect of the *Code of Conduct for Magistrates*, it is noted in Olivier 'The magistracy' in *The Judiciary in South Africa* 341, that the code 'affirms principles of independence, impartiality, integrity and professional conduct.'

[269] Erasmus (2015) *Stellenbosch Law Review* 673-675.

[270] *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 109, with reference to *The Bangalore Principles of Judicial Conduct* 2002, as endorsed by the United Nations General Assembly and adopted in South Africa <http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> (accessed 12-07-2017).

presiding judicial officer' and where oral testimony is led.[271] The nature of such a process 'imposes duties of evaluation on the Judge or magistrate, who is required to gauge the personal attributes of the witnesses who are called and to hold an even hand between the contenders.'[272]

The presiding judicial officer not only acts as a trier of fact, but must also ensure, 'as far as humanly possible', that a fair trial takes place.[273] The judicial officer in a criminal trial is the arbiter of the guilt or innocence of the accused, but is moreover 'the ultimate repository of the fairness of the trial' insofar as his or her control of the parties and otherwise in his or her conduct of the trial are concerned.[274] In the Constitutional Court decision of *S v Thebus and Another*, Yacoob J held in a concurring judgment that the accused is entitled to a fair trial and that it is the duty of every presiding officer to ensure that this constitutional right is fulfilled.[275] Yacoob J observed that the proper exercise of this duty carries a number of implications, including firstly 'that all courts in the present constitutional era have a duty to ensure substantive fairness instead of being limited to mere procedural fairness as were courts in the pre-constitutional regime.'[276] 'The second is that all courts have a duty to give substance to the notion of a fair trial.'[277] Yacoob J pointed out further that another implication of the court's duty of ensuring a fair trial is that all the separate sub-rights subsumed under the right to a fair trial 'must be given meaning in the light of a notion of a fair trial.'[278] Yacoob J held moreover that '[a]lthough a principal and important consideration in relation to a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice.'[279] In *S v Zuma and Others*, the Constitutional Court, per Kentridge AJ, held that the right to a fair trial requires criminal trials to be

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[271] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 40.
[272] *Ibid* para 40.
[273] *S v Sebofi* 2015 2 SACR 179 (GJ) para 81. See also, for example, *Moussa v The State and Another* 2015 2 SACR 537 (SCA) para 29; *S v Du Toit en Andere (2)* 2004 1 SACR 47 (T) 65*b*; *R v Sole* 2001 12 BCLR 1305 (Les) 1342B-C.
[274] *R v Sole* 2001 12 BCLR 1305 (Les) 1342B-C.
[275] 2003 2 SACR 319 (CC) para 106.
[276] *Ibid* para 106.
[277] *Ibid* para 106.
[278] *Ibid* para 107.
[279] *Ibid* para 107.

conducted in accordance with 'notions of basic fairness and justice', and that all courts hearing criminal trials must 'give content to those notions.'[280] In *S v Maliga*, the Supreme Court of Appeal said that the accused's right to fair trial enshrined in the Constitution compels presiding officers, as indeed with all officers of the court, 'to play a role during the course of a trial in order to achieve a fair and just outcome.'[281]

In a sense, the judicial officer in the South African accusatory trial is 'both judge and jury'.[282] South African trial courts are 'unitary', where presiding officers decide both law and fact.[283] In a criminal trial, the presiding judicial officer makes the final decision on whether to convict or acquit, and has to rule on whether evidence is admissible or not and on procedural issues.[284] Presiding officers in criminal trials are also enjoined to control and manage trial proceedings within the bounds of the law of criminal procedure without compromising or sacrificing their impartiality.[285] In *Take and Save Trading CC and Others v Standard Bank of SA Ltd*, it was appositely held as follows in the latter regard:[286]

> [A] Judge is not simply a 'silent umpire'. A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources… A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray.

This finding was endorsed by the Constitutional Court in *S v Basson*.[287] In *S v Mseleku and* Others, the Court expressed the view that 'it always has to be borne in mind that a criminal trial is not a game. The case law emphasises that the Judge is an administrator of justice, who has to direct and control the proceedings according to recognised rules of procedure and see that justice is done.'[288] In *S v Maliga*, it was affirmed that a trial court 'without compromising objectivity, has a duty to

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[280] 1995 1 SACR 568 (CC) para 16.
[281] 2015 2 SACR 202 (SCA) para 19.
[282] South African Law Commission, Project 73, *Fifth Interim Report on Simplification of Criminal Procedure* 113.
[283] Schwikkard *Possibilities of convergence* 27.
[284] See, for example, *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 11.
[285] See *S v Legote en 'n Ander* 2001 2 SACR 179 (SCA) para 8.
[286] 2004 4 SA 1 (SCA) paras 3-4 (footnotes omitted).
[287] 2007 1 SACR 566 (CC) para 33.
[288] 2006 2 SACR 237 (N) para 63.

manage a criminal trial within the law governing criminal procedure. For example, the court has a duty to ensure that the accused is properly defended and that his or her constitutional rights are not negatively affected either by commission or omission. If at the end of the state's case the state has not made out a prima facie case, in other words, there is nothing for the accused to answer, the presiding officer must raise this question mero motu, especially in the absence of an application for discharge. It seems that this duty is not dependent on whether the accused is represented or not.'[289] The Supreme Court of Appeal in *City of Johannesburg Metropolitan Council v Ngobeni*, again cautioned that when a presiding officer participates in proceedings a balancing act '"is required because there is a thin dividing line between managing a trial and getting involved in the fray."'[290]

4.3 The appointment and function of assessors

Judges or magistrates are 'the sole decision makers except in those rare instances where they are assisted by one or more assessors.'[291] A criminal case in the High Court may be tried either by a judge sitting alone, or by a judge and one or two assessors.[292] It is entirely in the discretion of the presiding judge whether assessors are to be summoned or not.[293] An assessor is a person who, in the opinion of the presiding judge, 'has experience in the administration of justice or skill in any matter

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[289] 2015 2 SACR 202 (SCA) para 18.

[290] (314/11) 2012 ZASCA 55 (30 March 2012) para 29, quoting *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 4 SA 1 (SCA) para 4.

[291] Schwikkard *Possibilities of convergence* 21. Compare the notable trial of Oscar Pistorius.

[292] See section 145 of the Criminal Procedure Act; *S v Jaipal* 2005 1 SACR 215 (CC) para 33. For a discussion on general aspects relating to assessors appointed by judges in High Court criminal cases, see S van der Merwe 'Trial before Superior Court' in E Du Toit, F De Jager, A Paizes, A St Q Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) 21-4-21-6; Kruger *Hiemstra's Criminal Procedure* 21-4-21-7; Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 260-262; A St Q Skeen 'Criminal Procedure' in WA Joubert (founding ed) *The Law of South Africa: Volume 5(2)* 2 ed (2004) para 291. For a critical analysis of the assessor system, see, for example, Steytler *Constitutional Criminal Procedure* 263-265; S Nel 'Evaluering van die jurie- en assessorestelsel in die lig van die strewe om die regbank in die strafhowe meer verteenwoordigend van die gemeenskap te maak' (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 311 315-327; D van Zyl Smit & N Isakow 'Assessors and Criminal Justice' (1985) 1 *South African Journal on Human Rights* 218 228-235; MS Huebner 'Who Decides? Restructuring Criminal Justice for a Democratic South Africa' (1993) 102 *The Yale Law Journal* 961 977-980; J Dugard 'Lay Participation in the Administration of Justice' (1972) 1 *Crime, Punishment and Correction* 55 56-57.

[293] See WLR de Vos 'The jury trial: Reflections of a South African observer in Western Australia' (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 253 275; Skeen 'Criminal Procedure' in *The Law of South Africa: Volume 5(2)* para 291; Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 318.

which may be considered at the trial.'[294] In this regard, the authors M Basdeo, MG Karels and JP Swanepoel explain that '[u]sually the judge procures the services of advocates for this purpose, but occasionally magistrates (especially retired magistrates), attorneys and professors of law serve in this capacity. In cases in which expert evidence on a particular topic is expected to be led, the judge may sit with an assessor who is professionally qualified in the field in question (eg in medicine, engineering, accountancy).'[295] Albert Kruger similarly notes that '[t]he judge decides before the trial commences whether it would be advisable to use assessors. Usually assessors will be able to make a contribution where complex factual or legal questions are envisaged. The assessors must have experience of the administration of justice or otherwise particular knowledge of a matter which will have to be considered in the trial, for instance an accountant [may] be useful in a particularly complicated commercial case.'[296] Where issues in a case 'require a detailed knowledge of matters beyond the reach of the ordinary judge, such as medicine, engineering or accountancy', the judge may consider summoning assessors who are experts in the relevant field.[297]

In *S v Porritt and Another*, the Court decided not to appoint expert assessors, as initially suggested by the State supported by the accused, despite the specialised nature of the issues that would be involved in a complex commercial crime case.[298] The Court indicated that it believed that it was sufficiently qualified and had sufficient knowledge and experience to understand and deal with the legal and factual issues that were anticipated to arise in the case, and which would involve corporations, corporate structures, tax and listings or other JSE-related issues, financial statements and presumably accounting records.[299] While the Court recognised, as

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[294] See section 145(1)(*b*) of the Criminal Procedure Act. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 33; Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 260.

[295] Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 260.

[296] Kruger *Hiemstra's Criminal Procedure* 21-4-21-5. See also Van der Merwe 'Trial before Superior Court' in *Commentary on the Criminal Procedure Act* 21-4, where it is said that '[t]he interpretation of the term "a person experienced in the administration of justice" in practice leads to the appointment of advocates, magistrates, attorneys and legal academics as assessors. Persons with a specific skill will include such persons as accountants or auditors'. See too FG Richings 'Assessors in South African Criminal Trials' (1976) *The Criminal Law Review* 107 110-111; PM Bekker 'Assessore in Suid-Afrikaanse Strafsake' in SA Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 32 37-39; De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 274-275. Richings and Bekker provide an instructive analysis of the types of persons who may be appointed as assessors.

[297] Richings (1976) *The Criminal Law Review* 110.

[298] 2016 2 SACR 700 (GJ) paras 63-66.

[299] *Ibid* para 64.

was argued by the accused, that 'two additional heads with specialised knowledge are better than one', this the Court held was 'true for every case.'[300] The Court pointed out that what also had to be considered was the availability of the category of qualified experts which the parties had in mind. The Court added that there would be significant cost implications and there was no guarantee that suitably qualified persons would be amenable to sit as assessors. In this regard, not only were assessor rates circumscribed, but, also more significantly, any assessor would be obliged to agree in advance to make themselves available for at least a year, and possibly up to three years, based on the accused's estimate.[301] A further factor according to the Court which militated against the appointment of assessors was the potential prejudice to the accused if an assessor became unavailable for periods at a time, which would have the result of unduly delaying the trial.[302] Given these practical considerations, the Court chose not to appoint assessors.

It seems clear that the purpose of expert assessors is to explain technical evidence, as it were, led to the other member(s) of the court, and not themselves to act as a source of evidence.[303] Laypersons, apart from experts, are excluded from being appointed as assessors in the High Court.[304] It also rarely happens in practice that members of professions other than the legal profession are called up as

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[300] *Ibid* para 64.
[301] *Ibid* para 65.
[302] *Ibid* para 65.
[303] See Richings (1976) *The Criminal Law Review* 110.
[304] *Ibid* 111. While certain commentators argue that consideration can or ought to be given to the appointment of 'lay assessors', that is persons without a legal qualification (see, for example, Dugard (1972) *Crime, Punishment and Correction* 57-59; Van Zyl Smit & Isakow (1985) *SAJHR* 233-234; Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 322-323), other commentators are opposed to such a proposition – see PM Bekker 'The American grand jury: judicial empowerment of the South African population in general?' in JJ Joubert (ed) *Essays in honour of SA Strauss* (1995) 19 21; Huebner (1993) *The Yale Law Journal* 982-990, where it is argued that judges would heed assessors more who have legal expertise, and assessorships can be used to provide invaluable training to future black jurists in the process of transforming or making the judiciary more representative. Huebner makes the point that where assessors are drawn from the legal profession, this would make for better judging in that judges would consult with them on the facts and the law and they would also 'have to explain and justify themselves to knowledgeable and interested peers.' (*Ibid* 988). Huebner opines further that such a process would moreover 'bring judicial reasoning "into the sunshine," exposing and precluding any insidious attempts to let impermissible factors such as racism figure into the judicial determination.' (*Ibid* 988).

In Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 38, the observation is made that apart from other problems that may arise with the inclusion of laypersons as assessors, it can be accepted that accused persons may have serious objections to being tried by laypersons. Such is a reality that cannot be ignored. Bekker pertinently notes in a separate work that 'it is not practicable for a professional functionary to function on exactly the same footing as complete laymen' – see Bekker 'The American grand jury: judicial empowerment of the South African population in general?' in *Essays in honour of SA Strauss* 21. It is nonetheless beyond the scope of the present thesis to explore this aspect further.

assessors.[305] One commentator opines that insofar as legally qualified or trained persons serving as assessors are concerned, the ideal assessor would be a person who has extensive practical court and life experience. After all, he or she together with the presiding judge are the triers of fact and hence it can be expected of a good assessor to have the ability to sift or evaluate the evidence and accordingly make proper determinations on the credibility of witnesses and the facts of the case.[306]

Before a trial commences, an assessor appointed by the judge must take an oath that he or she will 'give a true verdict upon the issues to be tried, on the evidence placed before him or her.'[307] As soon as this oath has been administered by the judge, the assessor becomes a member of the court.[308] Assessors appointed by a judge are members of the court and participate in all decisions of the court on questions of fact.[309] In such instances, 'the finding of the majority of the court on questions of fact shall be the decision of the court.'[310] In the Appellate Division decision of *S v Malindi and Others*, Corbett CJ, for the Court, explained that:[311]

> Where the Judge sits with two assessors the decision of the majority (on factual questions) constitutes the decision of the Court. Where, on the other hand, the Judge sits with only one assessor, then in the event of a difference of opinion the decision of the Judge prevails… An accused person has a right to have his case considered by every member of the fact-finding tribunal…

Two assessors may thus 'overrule' or 'outvote' the judge on factual questions.[312]

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[305] See De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 274. Compare also, for example, *S v Prinsloo and Others* 2016 2 SACR 25 (SCA), a complex commercial, Ponzi-scheme case (the *Krion* trial), where the presiding Judge appointed two legal practitioners as assessors instead of qualified experts in the relevant field. In *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 117, the Court noted that assessors appointed in the High Court 'are usually people who have had legal training and practical experience in the operation of our legal system'. See too Swanepoel (2006) *Ecquid Novi* 9.

[306] Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 38 ('Die ideale assessor is… myns insiens die juris wat die wyds moontlike praktiese hofervaring en lewenswysheid opgedoen het. Hy is, tesame met die regter, die beoordelaar van feite en daarom kan van die goeie assessor verwag word om met feite te kan werk').

[307] *S v Jaipal* 2005 1 SACR 215 (CC) para 33. See also section 145(3) of the Criminal Procedure Act; Kruger *Hiemstra's Criminal Procedure* 21-5; Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 44-45: ''n Assessor hoor geen getuienis aan nie tensy hy eers 'n eed aflê of 'n bevestiging doen wat deur die voorsittende regter waargeneem word, dat hy, op die getuienis wat voor hom geplaas word, 'n ware uitspraak sal gee oor die punte wat bereg moet word.'

[308] See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 261.

[309] See *S v Malindi and Others* 1990 1 SA 962 (A) 970G; *S v Jaipal* 2005 1 SACR 215 (CC) para 34.

[310] Van der Merwe 'Trial before Superior Court' in *Commentary on the Criminal Procedure Act* 21-5. See also section 145(4)(*a*) of the Criminal Procedure Act; *S v Jaipal* 2005 1 SACR 215 (CC) para 34.

[311] 1990 1 SA 962 (A) 970G-H. See also section 145(4)(*a*) of the Criminal Procedure Act; *S v Jaipal* 2005 1 SACR 215 (CC) para 34.

[312] See *S v Jaipal* 2005 1 SACR 215 (CC) para 34; *R v Bellingham* 1955 2 SA 566 (A); Kruger *Hiemstra's Criminal Procedure* 21-5; Van Zyl Smit & Isakow (1985) *SAJHR* 225; Skeen 'Criminal

'Only in the far rarer cases where a judge sits with one assessor is the decision of the judge on the facts automatically conclusive in the sense that it becomes the finding of the court.'[313] Where the judge sits with two assessors, and all three members of the court disagree or have a difference of opinion on the facts, for example, where one assessor would convict of murder, the other of culpable homicide, while the judge is in favour of an acquittal, the trial is rendered abortive in that it is impossible for a verdict to be given. In such instances it would then be left to the Director of Public Prosecutions to institute a trial *de novo*.[314] One writer observes, however, that disagreements are rare and 'it also seldom happens that the assessors override the verdict of the trial judge.'[315] On this score it is further believed that sometimes 'a dissenting assessor will not press his opinion, or a "compromise" verdict will be returned, involving conviction of a lesser offence.'[316] Indeed, an empirical investigation shows that in respect of determinations of fact, 'judges were very rarely outvoted by their assessors when it came to public pronouncements on guilt or innocence'.[317] From the statistical evidence the conclusion was that 'the actual influence of assessors on the verdict is slight.'[318] When asked to comment on the actual influence of assessors, judges emphasised that 'the verdict reached jointly was the product of continual interaction throughout the trial.'[319] It is further pointed out in the study that:[320]

> One judge remarked that he and his assessors worked as a team and explained:
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> > 'We tend to have discussions throughout the case and attempt to reach consensus. We always speak of impressions gained of, for example, witnesses immediately upon adjournment. If there is disagreement it tends to be resolved in favour of the freedom of the individual.'

Procedure' in *The Law of South Africa: Volume 5(2)* para 291; Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 45; Steytler *Constitutional Criminal Procedure* 264.

[313] Van Zyl Smit & Isakow (1985) *SAJHR* 225. See also, for example, *S v Jaipal* 2005 1 SACR 215 (CC) para 34; Richings (1976) *The Criminal Law Review* 113; Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 45; De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 275.

[314] Compare *R v Ndoko* 1945 EDL 87. See also Richings (1976) *The Criminal Law Review* 113; Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 45.

[315] Richings (1976) *The Criminal Law Review* 113. The writer indicates that a notable exception to this 'was the case of *Duncan*, Durban Supreme Court, October 1952 (unreported)… Here a finding by the trial judge that the accused was guilty only of being an accessory after the fact to murder, was overridden by the two assessors.' (*Ibid* 113 n 49).

[316] Richings (1976) *The Criminal Law Review* 113.

[317] Van Zyl Smit & Isakow (1985) *SAJHR* 229.

[318] *Ibid* 230.

[319] *Ibid* 230.

[320] *Ibid* 230.

> The idea that disagreements were often resolved in the accused's favour was expressed by a number of the judges. However, this sentiment was not universal. Certainly, the possibility remains that a judge could easily persuade assessors to follow his view. One of the judges articulated something similar when he remarked:
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> > 'There is discussion and difference but I have yet to find an assessor who on a question of fact in a difficult matter does not give in to the judge.'

A judicial pronouncement on this aspect is to be found in the Appellate Division case of *R v Von Zell*, where Van Den Heever JA remarked that:[321]

> It is true that I have experienced upon occasion that a magistrate acting as an assessor and as a full member of the Court as triers of fact might be loth to dissent and give a dissenting judgment.

It is precisely for this reason that the writers of the empirical paper suggest reform of the system of assessors to dispel the notion that assessors are mere 'yes men' and that there is 'a system of patronage in which work is provided for retired brethren of the profession who might need extra support', and to ensure the independence of assessors in the decision-making process.[322] The writers underscore such reform with the following observation:[323]

> Public manifestations of the decision-making process of criminal tribunals are… of great symbolic importance for the legitimacy of the administration of justice as a whole. For this reason alone it is highly desirable that all possible speculation about the relationship between the judge and the assessor be eliminated by procedural reform.

If the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor(s) assisting him or her do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him or her, the judge alone shall decide upon such question, and he or she may for this purpose sit alone.[324] A judge, then, may, in his or her discretion, together with the assessors determine the admissibility of any confession or other statement made by the accused.[325] A presiding judge alone shall decide upon any other question of law (for example a question as to whether certain evidence is hearsay or not), or upon any question whether any matter constitutes a question of law or a question of fact, and

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321 1953 3 SA 303 (A) 312E.
322 Van Zyl Smit & Isakow (1985) *SAJHR* 230-235.
323 *Ibid* 231.
324 See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 261.
325 *Ibid* 261. See also section 145(4)(*a*) and (*b*) of the Criminal Procedure Act; *S v Ngcobo and Others* 1985 2 SA 319 (W) 320E-321E; *S v Hendricks* 1990 2 SACR 375 (C) 376*i*-377*a*. Compare also *S v Zulu and Another* 1998 1 SACR 7 (SCA) 10*d*-*g*.

he or she may for this purpose sit alone.[326] An application at the close of the State's case for the discharge of an accused in terms of section 174 of the Criminal Procedure Act is a question of law, and the decision in this respect is that of the judge alone.[327]

A judge presiding at a criminal trial in the High Court must give reasons for his or her decision where he or she decides any question of law or whether any matter constitutes a question of law or a question of fact.[328] The judge must also give the reasons for the decision or finding of the court upon any question of fact or the question of the admissibility of any confession or other statement made by the accused, whether the judge sits with or without assessors.[329] Where the judge sits with assessors and there is a difference of opinion upon any question of fact or upon the question of the admissibility of any confession or other statement made by the accused, the judge must give the reasons for the minority decision, or where the presiding judge sits with only one assessor, the decision of such assessor.[330] In practice, then, 'the judge always articulates the decision of the assessors whether they are in the majority or the minority.'[331]

Assessors also have the right to participate in the course of the trial and may question witnesses as fully as the judge. Where the assessor asks questions directly, the same legal principles apply as with judicial questioning.[332] Some judges prefer to put questions on behalf of the assessors – a practice which has the merit of excluding those questions which may be improper or 'inadmissible'.[333]

Sentencing is the function of the presiding judge alone, but it is not irregular for the judge to discuss the matter with the assessors provided that the judge

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[326] See section 145(4)(*c*) of the Criminal Procedure Act; *S v Ngcobo and Others* 1985 2 SA 319 (W) 321C-D; *S v Jaipal* 2005 1 SACR 215 (CC) para 34; *S v Naidoo and Another* 1998 1 SACR 479 (N) 486*a*-487*b*; Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 261-262.

[327] See *R v Mgomezulu and Others* 1955 3 SA 557 (N); *S v Magxwalisa and Others* 1984 2 SA 314 (N) 317A; Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 262.

[328] See section 146(*a*) of the Criminal Procedure Act. See also Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 262.

[329] See section 146(*b*) and (*c*) of the Criminal Procedure Act. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 35; Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 262.

[330] See section 146(*d*) of the Criminal Procedure Act. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 35; Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 262.

[331] Van Zyl Smit & Isakow (1985) *SAJHR* 228. See too Skeen 'Criminal Procedure' in *The Law of South Africa: Volume 5(2)* para 291: 'A judge must give reasons for all decisions on questions of law and/or fact, and where an assessor differs from the judge on a question of fact, he or she must state the assessor's reasons.'

[332] Compare *S v Phallo and Others* 1998 3 BCLR 352 (B) 356H-363B.

[333] See Richings (1976) *The Criminal Law Review* 112-113.

decides on sentence him- or herself.[334] Assessors are members of the court only for purposes of the trial and their oath is to give a true verdict according to the evidence upon the issues to be tried, where a trial is the determination of the matters put in issue and concludes with the verdict.[335] Where the judge takes the advice of the assessors into account in determining an appropriate sentence, and the judge and assessors hold disparate views on sentence, it would then be impermissible for the judge to succumb to the will of the assessors in the belief that they constitute the majority of the court; sentence must ultimately be decided by the judge alone.[336]

'As members of the Court, assessors have to be as impartial as the Judge. Bias on the part of assessors, or interference with them in the performance of their judicial functions, will be irregular.'[337] When an assessor receives extra-curially information adverse to the accused, that is information which has not been proved in evidence, the assessor must retire from the case.[338] In *R v Matsego and Others*, it was held in the latter regard that:[339]

> It is essential in the interests of the proper administration of justice that an assessor should retire from the case as soon as it is proved that he has been given information detrimental to the accused which has not been proved in evidence, for nothing should be done which creates even a suspicion that there has not been a fair trial.

The Appellate Division in *Matsego* noted that an accused is entitled to demand that each member of the Court should keep an open mind until the announcement of the verdict.[340] However, where such information detrimental to the accused is received by an assessor, such would be a ground for setting aside a conviction 'only where it cannot be said that the result would inevitably have been the same.'[341] A verdict will be set aside on account of an irregularity having been occasioned by damaging information relating to the accused having been disclosed to an assessor *dehors* the

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[334] See Skeen 'Criminal Procedure' in *The Law of South Africa: Volume 5(2)* para 291, with reference to *S v Sparks and Another* 1972 3 SA 396 (A) 403F-405A. See also *S v Lekaota* 1978 4 SA 684 (A) 688C-E; *S v Botha* 2006 2 SACR 110 (SCA) paras 20-21, 24; Van der Merwe 'Trial before Superior Court' in *Commentary on the Criminal Procedure Act* 21-5-21-6; Kruger *Hiemstra's Criminal Procedure* 21-7.

[335] See *S v Sparks and Another* 1972 3 SA 396 (A) 404F-H.

[336] See *S v Botha* 2006 2 SACR 110 (SCA) para 20.

[337] *S v Jaipal* 2005 1 SACR 215 (CC) para 37, observing further that: 'The importance of the impartiality of assessors has always been recognised by our Courts.' (*Ibid* para 40).

[338] See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 262; Skeen 'Criminal Procedure' in *The Law of South Africa: Volume 5(2)* para 291. See also the comments in Richings (1976) *The Criminal Law Review* 114-115.

[339] 1956 3 SA 411 (A) 418A-B. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 40.

[340] 1956 3 SA 411 (A) 417H-418A.

[341] Skeen 'Criminal Procedure' in *The Law of South Africa: Volume 5(2)* para 291.

trial proceedings, when it cannot be said that there is no room for doubt that the accused would have been convicted anyway in the absence of the information in question and when the scales might have been turned, perhaps unconsciously, by the assessors' knowledge of the information.[342] The Constitutional Court has thus found that influencing an assessor outside the formal proceedings of a trial could 'indeed be an irregularity resulting in a failure of justice.'[343]

It needs to be emphasised that assessors 'are regarded as being in the position of a jury, who have to decide *solely on the evidence in court*.'[344] In terms of the oath that assessors must take before hearing any evidence, namely that they must give a verdict on the issues to be tried on the evidence placed before them,[345] 'information which is not placed before the assessors by way of evidence can play no part in influencing the verdict - even if that information would be legally admissible if led in evidence'.[346] Thus, 'an assessor may base his or her verdict *only on evidence placed before him or her in a proper manner*'.[347]

In *R v Solomons* it was affirmed that an assessor must retire from the case as soon as it is proved that he or she has been given information detrimental to the accused but which has not been proved in evidence.[348] In contrast to *Matsego's* case supra, the matter of *Solomons* pertained to detrimental information regarding the accused that was revealed to the assessors in the trial itself, but which was not presented in evidence. This notwithstanding, the Appellate Division in *Solomons* held that the same principle as enunciated in *Matsego's* case applied in the instant case, where the information was of so detrimental a nature as to be potentially

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[342] See *R v Matsego and Others* 1956 3 SA 411 (A) 418F-H. See also *The State v Molefe* 1962 4 SA 533 (A) 535H-536G.

[343] *S v Jaipal* 2005 1 SACR 215 (CC) para 40.

[344] Skeen 'Criminal Procedure' in *The Law of South Africa: Volume 5(2)* para 291 (my emphasis).

[345] Section 145(3) of the Criminal Procedure Act. In Kruger *Hiemstra's Criminal Procedure* 21-5, it pointed out in this respect: 'The assessors must take an oath or affirmation that they will give a true verdict in accordance with the evidence. Unless they take that oath or affirmation they are not members of the court.'

[346] *S v Anthony* 1981 1 SA 1089 (A) 1096A.

[347] Skeen 'Criminal Procedure' in *The Law of South Africa: Volume 5(2)* para 291 n 11 (my emphasis). See also *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38F.

[348] 1959 2 SA 352 (A) 361F-G. In this case, it was moreover affirmed that an accused will not receive a fair trial if inadmissible evidence which is damaging to the accused is divulged to the assessors (*ibid* 361F). It should be mentioned, however, that when it comes to the question of the admissibility of a confession made by an accused, it would not constitute an irregularity if the accused in the trial-within-a-trial is cross-examined, before the Judge and assessors, on the truth of the contents of the confession so as to test the credibility of the accused where he or she alleges that the confession is false and that the contents were prescribed to him or her by the police – see *S v Talane* 1986 3 SA 196 (A) 205H-206D.

prejudicial to the accused's receiving a fair trial on the actual evidence led.[349] The Court was of the view that the assessors gave their verdict after the information, that was highly prejudicial to the accused, had been communicated to them without the information being led in evidence.[350] As a result of the highly prejudicial nature of the information in question, it was 'not possible to say with any degree of certainty that the assessors were not, perhaps even unconsciously, influenced thereby in reaching their verdict'.[351] The proceedings at trial were therefore irregular 'in that the assessors proceeded to verdict after gaining information highly detrimental to the accused but which was not led in evidence.'[352] According to the Court, it was not possible to reach the conclusion that a reasonable court would inevitably or without doubt have convicted the accused without the irregularity in question.[353] In the result, there was a failure of justice and the conviction and sentence were accordingly set aside.[354]

The Constitution makes provision for the use of assessors in court decisions.[355] The regulation or administration of the assessor system is however left to national legislation.[356] As noted above, assessors are fully-fledged members of the court with status equal to that of the judicial officer, with their role or function

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[349] 1959 2 SA 352 (A) 364H-365B.
[350] *Ibid* 365G.
[351] *Ibid* 366A.
[352] *Ibid* 366B.
[353] *Ibid* 366C-H.
[354] *Ibid* 366H. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 40; *S v Maselela* 1996 2 SACR 497 (T) 499*e*-501*a* (per Cameron J, as he then was); Richings (1976) *The Criminal Law Review* 115; Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 49.
[355] See section 180(*c*) of the Constitution. See also Steytler *Constitutional Criminal Procedure* 263; Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 316.
[356] See Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 316. In Steytler *Constitutional Criminal Procedure* 263, the observation is made that legislation governing the appointment of assessors as lay members of a court must comply with the constitutional requirement of judicial independence, but that present legislation 'falls short of this constitutional mark.' See also Steytler's further remarks on the imperative of judicial independence existing between all members of the court, the judge and assessors, and that the method of appointment of assessors and their allocation to cases should thus be regulated by law to ensure that it takes place independently of the presiding judicial officer. (*Ibid* 264-265).

Steytler notes that there should not be 'an objective perception that an assessor might be influenced in his or her decision-making because his or her next appointment may depend on the goodwill of the judicial officer in question.' (*Ibid* 265). The writer is therefore critical of a system where routine appointments of a small number of assessors is dependent on the goodwill of a particular presiding officer, which 'can lead to such assessors being hesitant to contradict decisions of the presiding officer in case they risk losing the profitable opportunity of being called again. The low number of dissenting opinions from assessors may bear testimony to this fact.' (*Ibid* 264). (Footnote omitted). 'Every member of a court, both professional and lay, is subject only to the Constitution and the law, and should not be subject to any form of control or undue influence by any other member of the court.' (*Ibid* 264-265).

essentially being to decide, along with the presiding officer, issues of fact.[357] The importance and underlying purpose of the appointment of assessors was enunciated as follows in the Constitutional Court decision of *S v Jaipal*, per Van der Westhuizen J:[358]

> The importance of the role of assessors lies not only in their participation in judicial decision making based on their experience in the administration of justice or their skills in specific matters which may have to be considered at the trial. The participation of assessors in criminal trials allows for the involvement in the Court system of persons other than Judges. Assessors do not have to be magistrates or even lawyers. They may be lay persons, as long as they have the required experience and skills, at least in the opinion of the Judge. In principle assessors, if chosen carefully, could represent a significant degree of community involvement in the judicial process.

Albert Kruger notes with reference to *Jaipal's* case that '[t]he importance of assessors lies not only in their participation in judicial decision-making but in the fact that they represent community involvement'.[359] Van der Westhuizen J in *Jaipal* went on to find, as to the status of assessors in the South African criminal justice system, that 'assessors have considerable power and could play an important role in the functioning as well as the legitimacy of criminal courts. Their dignity, status and needs must be respected by all those who interact with them in the performance of their judicial duties. Assessors must also be aware of the significance of their role and act accordingly.'[360]

According to Sanette Nel,[361] the ideal position would be for two assessors to sit with the presiding judge in all High Court criminal cases, not only from the standpoint of the credibility of the judiciary (or 'regbank'), but also because complex and serious matters are tried in such court, and such a system would give rise to greater community involvement in the judicial or adjudication process and the decision of the court would be the result of the input, opinions and discussion or deliberation of different persons serving as members of the court.[362] Especially where life imprisonment may be imposed, it could be argued that these

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[357] See also Steytler *Constitutional Criminal Procedure* 264.

[358] 2005 1 SACR 215 (CC) para 36, citing *inter alia* Richings (1976) *The Criminal Law Review* 107; Van Zyl Smit & Isakow (1985) *SAJHR* 218; Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 32.

[359] Kruger *Hiemstra's Criminal Procedure* 21-5.

[360] 2005 1 SACR 215 (CC) para 53.

[361] At the time of writing, Nel was Associate Professor in the Department of Criminal and Procedural Law, University of South Africa.

[362] Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 320.

considerations have greater force.[363] For Nel it appears that there are two distinct aims of the assessor system: firstly, to bring legal expertise or knowledge, experience and different perspectives to the bench in order that the facts and the law can be discussed and deliberated on from different angles and standpoints with the presiding judicial officer before a decision is reached; and secondly, so that effect can be given to transformation of the judiciary by the training of legal practitioners through assessorships.[364] Marshall S Huebner holds a similar view.[365] Huebner argues that assessors should be drawn from the legal profession and ought not to be comprised of laypersons, as judges seem to heed assessors more who have legal expertise.[366] And besides the training of assessors involved in the process, a system where judicial officers sit with legal professionals as assessors makes for better judging 'since the judges will have to explain and justify themselves to knowledgeable and interested peers.'[367] It would also 'bring judicial reasoning "into the sunshine," exposing and precluding any insidious attempts to let impermissible factors such as racism figure into the judicial determination.'[368] Sanette Nel moreover suggests that provision could be made for the possible appointment in exceptional circumstances of a third assessor whose expert knowledge on a particular matter which may be considered at trial would in the opinion of the presiding judge be needed to decide the case.[369] Nel opines that laypersons can also make a contribution to the bench especially laypersons who have extensive knowledge and understanding of local or indigenous customs and practices of a particular race or ethnic group, where such persons could enable the presiding judge to better understand evidence which is adduced from sources which emerge from a social context foreign to his or her own, and to gain better insight into the crime and background against which the crime is committed.[370] In an extra-curial work, Justice JH Steyn observed in the latter respect:[371]

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[363] *Ibid* 318. See also Van der Merwe 'Trial before Superior Court' in *Commentary on the Criminal Procedure Act* 21-4.
[364] Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 325.
[365] Huebner (1993) *The Yale Law Journal* 982-990.
[366] *Ibid* 984.
[367] *Ibid* 988.
[368] *Ibid* 988.
[369] Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 326.
[370] *Ibid* 322. See also Van Zyl Smit & Isakow (1985) *SAJHR* 235.
[371] JH Steyn 'Public participation in the prevention of crime' (1971) 88 *The South African Law Journal* 210 218 (footnote omitted). Steyn also noted that 'where the decision of guilt or innocence requires a

> [The judicial officer] must constantly be aware of the fact that there is always the danger that, in view of his comparative isolation, he may cease to reflect the constantly changing realities of society and by his application of justice, removed from current attitudes as he is, forfeit the confidence of those whose mutual relationships he is supposed to regulate. The only safeguard the judge has in this respect is to choose his assessors wisely so that his court is balanced and, to some extent, representative also of the community.[372]

The appointment of suitable assessors may also serve as a safeguard against the 'vagaries' of a single judicial officer.[373]

In *S v Jaipal*, Van der Westhuizen J pointed out that '[t]he participation of assessors in criminal trials was sometimes debated within the context of calls for the re-introduction of the jury system in South Africa in debates preceding the constitutional drafting process.'[374] One writer had previously stated that the function of assessors is that of a jury.[375] Marshall Huebner indicates that '[a]s the jury system was being phased out in South Africa, the assessor system was being incorporated into the country's statutory law, ostensibly to protect defendants from the judiciary's structural insulation. The new system was intended to substitute for the jury - as a means of informing and broadening judicial decisionmaking.'[376] Courts, including the Appellate Division, have likened assessors to jurors.[377] This is essentially because assessors, as with jurors, are finders of fact and do not decide legal issues, save possibly in High Court matters on the question of the admissibility of any confession

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special skill, such as, for example, a knowledge of accountancy or psychiatry, the judicial officer should, perhaps even more frequently than at present, avail himself of the skills of the expert in this field.' (*Ibid* 218).

[372] With reference to Steyn, it is pointed out in Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 316, that the observation has been made that the assessor system protects the accused from one-sided decisions as a result of the possible isolation of the judicial officer from the community.

[373] Van Zyl Smit & Isakow (1985) *SAJHR* 235.

[374] 2005 1 SACR 215 (CC) para 36 n 31.

[375] JA Chubb 'Some notes on the Commonwealth and Empire Law Conference, 1955, and an address on the jury system' (1956) 73 *The South African Law Journal* 191 202. See also Nel (2001) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 316, where it is observed that with the phasing out of the jury system, the assessors had to take over the role of the jury.

[376] Huebner (1993) *The Yale Law Journal* 976 (footnote omitted).

[377] See *R v Mabaso* 1952 3 SA 521 (A) 524G; *S v Nieuwoudt (3)* 1985 4 SA 510 (C) 515D. See also Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 37. In *R v Solomons* 1959 2 SA 352 (A) 363-364, the role of assessors was compared with that of a jury. The Appellate Division in *Solomons* nevertheless remarked that in practice it may not always be essential for assessors to be precisely equated with members of a jury 'in all respects'. (*Ibid* 364F-G). In *Nieuwoudt's* case supra (515D), it was said that assessors have to some extent been regarded as corresponding to members of a jury. Such is the position in respect of High Court trials. In relation to lower court proceedings, where assessors may also be appointed, assessors have been called 'a sort of "mini jury"' – see *S v Gambushe* 1997 1 SACR 638 (N) 643*b*. See also *S v Maphanga* 2001 2 SACR 371 (W) para 16. In *S v Maselela* 1996 2 SACR 497 (T) 500*b-i*, Cameron J recognised that lay assessors in the magistrate's court are, to some extent, 'in a comparable position to jury members'.

or other statement made by the accused.[378] However, 'the differences between assessors and juries *are substantial and compelling*' in that assessors 'determine questions of fact *with* the Judge and *their reasoning is made public*', and they may participate in the trial proceedings by putting questions to witnesses and the accused.[379] Moreover, where the presiding judge sits with assessors, a single judgment is delivered by the judge '*after consultation with the assessors*, either on the Bench - if the case is clear - or in chambers. Where the verdict is a majority one, any differences of opinion that exist are normally indicated in the judgment, but it is unusual to disclose the identity of a dissenting assessor. The practice of calling upon each member of the court in turn to deliver a separate judgment has been disapproved of, as has a summing up to the assessors by the judge - this being a course appropriate only to jury trials.'[380] 'Upon conclusion of a trial the judge and assessors retire to the judge's chambers and *deliberate together on the guilt of the accused*.'[381] John Dugard alludes to the fact that assessors do not constitute a separate fact-finding entity: they sit together with the judge, discuss the case with him or her during adjournments and finally participate fully in the deliberation with the judge preceding the court's verdict, inevitably with the judge taking the lead in this process.[382] Unlike jurors, assessors are '*under the constant supervision of the presiding judge* (ie the judge or magistrate) *with whom they make a joint deliberation* and if they disagree with the presiding officer *they are required to give reasons for their decision*.'[383] There is a close relationship and interaction between the judge and assessors throughout the duration of the trial up to the verdict.[384] Most judges

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[378] See Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 15-16 (para 1 6).

[379] See *S v Jaipal* 2005 1 SACR 215 (CC) para 45 (my emphasis); HR Hahlo & E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 262; Richings (1976) *The Criminal Law Review* 112-113; Bekker 'Assessore in Suid-Afrikaanse Strafsake' in *Huldigingsbundel vir WA Joubert* 37. See also *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 37D-F.

[380] Richings (1976) *The Criminal Law Review* 113 (footnotes omitted) (my emphasis).

[381] De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 275 (my emphasis).

[382] Dugard (1972) *Crime, Punishment and Correction* 58.

[383] Schwikkard *Possibilities of convergence* 21 (my emphasis).

[384] See *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 117. See also *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 37D-F, 38H, where the '*ready access* the assessors have to the trial judge' was affirmed, and it was found that the relationship of assessors 'to the trial judge is *closer than that of jurors*. They sit on the bench on either side of the judge. It is open to them to discuss the case with the judge during the course of the trial and *they tend to do so*. The guidance a judge may give them is private and ongoing… [A]ssessors share the responsibility of deciding issues of fact *with the trial judge*. All have an equal say in such determination. *The judge will consult with them up to the stage of verdict*.' (My emphasis).

consult with assessors 'on all aspects of the trial including issues of law.'[385] Not surprisingly, assessors are always consulted on the facts.[386]

The fundamental distinction between jury systems and the South African system of assessors, in relation to both High Court and lower court trials, is summed up best by SE van der Merwe, as follows:[387]

> Assessors in lower courts and in the High Court can to some extent be compared with jurors as they are all finders of fact and do not decide legal issues. But our system of adjudication differs materially from trial by jury. The role of jurors can briefly be summarised as follows: jurors are lay people and sole finders of fact. They listen to the evidence and hear arguments, and they receive a summing-up and instructions from the presiding judicial officer. They are then called upon in their capacity as sole finders of fact to consider and reach their verdict *in the absence of the presiding judicial officer*. *And they are not required to advance reasons in support of their verdict*. But in our system the judge or magistrate is at all times either a sole finder of fact or, where assessors are involved, a co-finder of fact. *A judge must give reasons for his verdict*. *Magistrates almost invariably do give reasons for their verdict and are at any rate legally required to do so*. It is true that the function of assessors can be compared with the function of jurors, because the function of assessors is - with one exception - also limited to fact-finding. But assessors - unlike a jury - *must give reasons for their verdict*. *They either agree or disagree with the presiding judicial officer's reasons and finding, and in the event of a disagreement must furnish their own reasons in a separate judgment which is read out in court by the presiding judicial officer*. And assessors - unlike jurors - *are under constant and immediate judicial guidance in the sense that a judge (or magistrate) and the assessors involved in the trial have joint deliberations in reaching their respective verdicts*. *During these deliberations the presiding judicial officer can and must draw the attention of lay assessors to certain rules which govern the evaluation of evidence*.

As alluded to above, statutory provision is also made for the use of assessors in lower courts (district and regional magistrate's courts).[388] Laypersons may be appointed as assessors in these courts.[389] In a district or regional court trial, the magistrate may, if he or she deems it expedient for the administration of justice,

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[385] Huebner (1993) *The Yale Law Journal* 977. See also Van Zyl Smit & Isakow (1985) *SAJHR* 227-230.

[386] See Van Zyl Smit & Isakow (1985) *SAJHR* 227.

[387] Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 15-16 (para 1 6) (footnotes omitted) (my emphasis).

[388] See section 93*ter* of the Magistrates' Courts Act 32 of 1944.

[389] See *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 116; Schwikkard *Possibilities of convergence* 21; E Kahn 'Restore the jury? or "Reform? Reform? Aren't things bad enough already?" V' (1993) 110 *The South African Law Journal* 322 324; SS Nel 'Evaluering van die assessorestelsel in die landdroshowe' (2002) 35 *De Jure* 65 66-67; Swanepoel (2006) *Ecquid Novi* 9, noting that persons with no legal background can be appointed as assessors. See also J Seekings & C Murray *Lay assessors in South Africa's Magistrates' Courts* (1998), where an empirical analysis and evaluation of laypersons serving as assessors in lower courts are given.

before any evidence has been led or in considering a community-based punishment in respect of any person who has been convicted of any offence, summon one or two assessors to assist him or her at the proceedings.[390] When an accused stands trial in the regional court on a charge of murder, it is peremptory that the judicial officer be assisted by two assessors unless the accused requests that the trial be proceeded with without assessors.[391] Where the accused makes such a request, 'the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor.'[392] In such a case the quorum prescribed by section 93*ter*(1) of the Magistrates' Courts Act 32 of 1944 is three members, namely the regional magistrate and two assessors, unless the accused requests that the trial proceed without assessors, in which event the regional magistrate in his or her discretion can, sitting alone, constitute a quorum.[393] The regional magistrate must therefore inform the accused, before the commencement of a trial on a charge of murder, that it is a requirement of the law that he or she must be assisted by two assessors unless the accused requests that the trial proceed without assessors.[394] Where the regional magistrate fails to do so, such constitutes an irregularity which vitiates the proceedings.[395]

In terms of section 93*ter*(2)(*a*) of the Magistrates' Courts Act, the judicial officer, in considering whether summoning assessors would be expedient for the administration of justice, shall take into account such factors as the cultural, social and educational background of the accused, the nature and seriousness of the offence, the punishment or potential punishment, and any other relevant factor.[396]

Before the trial or the imposition of punishment, as the case may be, the magistrate shall administer an oath to the person or persons whom he or she has called as an assessor(s), in terms whereof the assessor(s) must swear or solemnly affirm that he or she or they will give a true verdict or a considered opinion according to the evidence upon the issues to be tried or regarding the punishment, and

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[390] See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 259. See also section 93*ter*(1) of the Magistrates' Courts Act.
[391] See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 259. See also section 93*ter*(1) of the Magistrates' Courts Act.
[392] *S v Gayiya* 2016 2 SACR 165 (SCA) para 8. See also section 93*ter*(1) of the Magistrates' Courts Act.
[393] *S v Gayiya* 2016 2 SACR 165 (SCA) para 11.
[394] *Ibid* para 8.
[395] *Ibid*.
[396] See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 259.

thereupon he or she or they shall be a member or members of the court subject to the following provisions:[397]

> (*a*) Any matter of law arising for decision at [the] trial, and any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judicial officer and no assessor shall have a voice in any such decision;
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> (*b*) the presiding judicial officer may adjourn the argument upon any such matter or question as is mentioned in paragraph (*a*) and may sit alone for the hearing of such argument and the decision of such matter or question;
>
> (*c*) whenever the said judicial officer shall give a decision in terms of paragraph (*a*) he shall give his reasons for that decision;
>
> (*d*) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judicial officer in which case the decision or finding of such judicial officer shall be the decision or finding of the court if there is a difference of opinion;
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> (*e*) it shall be incumbent on the court to give reasons for its decision or finding on any matter made under paragraph (*d*);
>
> (*f*) in the event of a conviction the question of the punishment to be inflicted shall, except in a case contemplated in subsection (1) (*b*), be deemed, for the purposes of paragraph (*a*), to be a question of law.

Thus, unless an assessor is appointed to assist a magistrate in considering a community-based sentence, such as correctional supervision or a suspended sentence where the performance of community service as a condition of suspension is contemplated,[398] the assessor shall not have a say in the imposition of sentence.[399] It is clear that with regard to matters of fact, the decision of the court is that of the majority thereof.[400] Two assessors can, as in High Court cases, outvote the magistrate on factual issues.[401] If there is only one assessor, 'the decision or finding of the magistrate prevails.'[402] 'Matters of law (and deciding whether a matter

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[397] See section 93*ter*(3) of the Magistrates' Courts Act. See also Nel (2002) *De Jure* 68, where it is said:

> 'Voordat die assessore hul plek op die regbank kan inneem, moet hulle deur die voorsittende regsprekende amptenaar ingesweer word en hulle moet onderneem om 'n ware uitspraak of oorwoë mening te gee, na gelang van die geval, ooreenkomstig die getuienis ten opsigte van die geskilpunte by die verhoor of ten opsigte van die straf.'

In respect of the verdict, then, the oath is similar to that administered for assessors in the High Court.

[398] See section 93*ter*(2)(*b*) of the Magistrates' Courts Act.

[399] Kahn (1993) *SALJ* 325. See also Nel (2002) *De Jure* 79-80.

[400] See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 259. See also Nel (2002) *De Jure* 80.

[401] See Swanepoel (2006) *Ecquid Novi* 9. Compare also *S v Gambushe* 1997 1 SACR 638 (N).

[402] Kahn (1993) *SALJ* 325. See also Nel (2002) *De Jure* 80.

for decision is a matter of law) are decided by the judicial officer.'[403] On all matters of fact and any matter of law arising for decision at trial, the court is obliged to give reasons for its decision.[404] SS Nel observes that the interaction between the role or function of assessors and that of the presiding magistrate as regards the decision on matters of fact, is as follows: assessors are limited in their participation in the decision-making process to evaluating the evidence and deciding which set of facts to accept, whilst the magistrate has to test the facts against the law and takes the responsibility of deciding whether the accused is guilty or not guilty ('Die wisselwerking tussen die rol van assessore en dié van die voorsittende amptenaar is kortliks soos volg: Assessore word beperk tot deelname aan die besluitnemingsproses oor die waarde van gelewerde (en toelaatbare) getuienis en welke feitestel aanvaar behoort te word; die regsprekende amptenaar moet dan die feite aan die reg toets en die verantwoordelikheid neem om te besluit of 'n persoon skuldig of onskuldig is').[405] Where an assessor is a layperson, in other words not legally trained, it is advisable that when the court must decide a legal question, especially the question of the admissibility of evidence, the presiding magistrate ought to adjourn the proceedings for argument on any such matter and sit alone when hearing such argument and deciding the issue. In this way the possibility of inadmissible evidence coming to the attention of and unduly influencing the lay assessor is avoided.[406]

The magistrate has a discretion as to whether or not to appoint an assessor, except where the accused is to be arraigned on a charge of murder in which case, as noted above, the appointment of two assessors is obligatory unless the accused requests that the trial proceed without assessors.[407] While it is so that persons with no legal knowledge or a particular skill may be appointed as assessors in the lower courts in terms of the wider discretion which a judicial officer has in such courts than judicial officers in the High Court in selecting assessors,[408] and whilst such 'unskilled'

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[403] See Basdeo, Karels & Swanepoel 'The trial courts' in *Criminal Procedure Handbook* 259. See also Nel (2002) *De Jure* 80.
[404] See Nel (2002) *De Jure* 80.
[405] *Ibid* 80. See also *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 116, where it was held that assessors merely give their 'input' to the presiding magistrate, with the final decision being left for the magistrate. But they may outvote the magistrate.
[406] See Nel (2002) *De Jure* 80-81.
[407] Nel (2002) *De Jure* 66; *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 116.
[408] Steytler *Constitutional Criminal Procedure* 264.

assessors have been likened to 'a sort of "mini jury"',[409] it again must be emphasised that such assessors, unlike jurors, are under constant and immediate judicial guidance in the sense that the magistrate and the assessors involved in the trial have joint deliberations in reaching their respective verdicts. During these deliberations the presiding judicial officer can and must draw the attention of lay assessors to certain rules which govern the evaluation of evidence. And importantly, the assessors must give reasons for their verdict.[410] Lay assessors, in contrast to a jury, would not be 'independent' of the judicial officer in the sense of constituting 'a separate fact-finding entity.'[411]

The underlying purpose of the use of lay assessors with reference to the factors to be considered in terms of section 93*ter*(2)(*a*) of the Magistrates' Courts Act in deciding to summon them or not, was enunciated in *S v Gambushe* as follows:[412]

> As I understand the object of these provisions, it was to bridge what was conceived to be the cultural gap between the magistrates, on the one hand, and the large number of intellectually unsophisticated and uneducated accused persons who frequently came to trial before them, on the other. What was contemplated was that the presence of the assessors would make

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[409] *Ibid* 264; Swanepoel (2006) *Ecquid Novi* 9; *S v Gambushe* 1997 1 SACR 638 (N) 643*b*. See also *S v Maselela* 1996 2 SACR 497 (T) 500*b-i*; *S v Maphanga* 2001 2 SACR 371 (W) para 16.

[410] See Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 15-16 (para 1 6). See also *Brown v National Director of Public Prosecutions and others* 2012 1 All SA 61 (WCC) para 116; Schwikkard *Possibilities of convergence* 21. In Van der Merwe 'Trial before Superior Court' in *Commentary on the Criminal Procedure Act* 21-14, it is affirmed that where there is disagreement in opinion on the facts between the judicial officer and assessors, 'the practice is that the reasons of the assessor(s) concerned are set out in a separate judgment read out in open court by the presiding judicial officer.'

See too *S v Gambushe* 1997 1 SACR 638 (N) 644*c-e*, 644*i*-645*c*, where the Court referred to the 'tuition' or directions which the presiding officer would, perforce, need to give assessors - who lack legal or procedural knowledge or experience or expertise - preparatory to their analysis of the evidence at the end of the case, such as with regard to the approach to the evidence of a single witness or the evidence of accomplices. The presiding officer would also need to explain to the assessors why such rules of evidence are in place. The giving of such directions or instructions would be analogous to a court's directions to a jury, and would have to form part of the trial record. In *Gambushe* it was moreover underlined that the court would be required to give reasons for its verdict, including for any dissenting verdict, and in this regard it would be necessary for the judgment to reflect clearly whether the views expressed as to the acceptability of each material aspect of the evidence are the unanimous views of the members of the court. (*Ibid* 644*f-h*). The Court also pointed out that where an assessor has special knowledge of some custom or habit peculiar to the community from which the witness or the accused comes, which may affect his or her conclusion as to the facts, he or she should inform the court of this knowledge and the existence or otherwise of the custom (and, of course, its effect on the assessment of the evidence) can then be properly aired in evidence and form part of the record in the trial. (*Ibid* 644*h-i*). With reference to *Gambushe*, it is commented in Steytler *Constitutional Criminal Procedure* 264, that 'unskilled' assessors would 'require different procedures for the performance of their task.'

See moreover Nel (2002) *De Jure* 86-87 on the aspect of critical training that lay assessors need to understand trial court procedure and to fulfil the task of proper decision-making.

[411] Dugard (1972) *Crime, Punishment and Correction* 58.

[412] 1997 1 SACR 638 (N) 642*g*-643*a*.

> the trial of the accused more of a 'trial by peers' and constitute some protection against the conduct or reactions of the witnesses and the accused being judged by incorrect yardsticks not applicable to those of the environment and community to which those witnesses and the accused belong. In a limited sense, then, the assessors were intended to give the magistrate the benefit of their expertise and experience of the community from which the accused comes and of its communal values and standards, which might often explain conduct or reactions which a stranger to that community might regard as doubtful or suspicious.[413]

It is said that by enabling the judicial officer through the use of lay assessors to better understand the community from which the accused and/or witnesses come, a better decision can be reached or a greater degree of justice can be attained.[414] It is also claimed that the lay assessor system makes judicial officers more accountable.[415]

4.3.1 Procedural safeguards apropos assessors in the face of pre-trial publicity

It is submitted that what may be gleaned from the afore-going considerations as regards the function and role of assessors in the South African accusatory trial, is that the following safeguards exist to protect the fairness of a criminal trial when assessors are confronted with adverse pre-trial publicity, as enumerated in *Banana v Attorney-General*:[416]

(i) The solemnity of the oath administered to the prospective assessors; and *the presumption that they will perform their bounden duty with integrity, and determine the guilt or innocence of the accused free from extraneous considerations, and free from either prejudice against, or favour for, the accused*.

(ii) The *instruction or reminders of the trial judge to the assessors that the case is to be decided solely on the evidence elicited at the trial*.

(iii) *The nature of a trial being to focus the minds of the assessors on the evidence put before them rather than on prior publicity detrimental to the accused*.

(iv) *The participation of the trial judge in the fact-finding process*.

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[413] For further reading on the aims and value of, as well as the criticism levelled by judicial officers against, the use of lay assessors in magistrates' courts, see Nel (2002) *De Jure* 70-71, 74, 78-79, 89-90.

[414] *Ibid* 89-90.

[415] *Ibid* 90. See also Seekings & Murray *Lay assessors in South Africa's Magistrates' Courts* 139, where the observation is made that:

> 'Whether or not assessors make a difference in court in terms of what they bring to the bench, their very presence helps to keep "the magistrate on his toes", as one put it. In small towns, especially, magistrates come to wield a lot of power; the lay assessor system opens them to potential challenge, and thereby makes them more accountable.'

[416] 1999 1 BCLR 27 (ZS) 38F-J (my emphasis).

(v) The ready access the assessors have to the trial judge and *the ongoing guidance he or she is able to provide to them at all stages of the trial*.

(vi) *The statutory requirement that reasons for any factual finding must be furnished*…, with the prospect of an appeal if such findings are not justified on the admissible evidence.

(vii) The experience required of persons in order to qualify for appointment as assessors.

With regard to the last factor, it was explained in *Banana* that 'assessors are selected because they possess the type of experience that is prescribed'; '[t]hey are intelligent people who are deemed to posses the ability to judge'; and 'unlike jurors, assessors acquire a familiarity with criminal trials. Theirs is not an isolated participation never to occur again. Almost invariably they have been members of a trial court on many occasions.'[417] Assessors would therefore know or be reminded by the presiding officer that they are to decide the case solely on the basis of the evidence and submissions of the prosecutor and the defence presented at trial, and not on any extraneous information such as pre-trial publicity.[418]

In the circumstances, as Gubbay CJ held in *Banana*, '[t]he risk of any particular publicity and notoriety of the accused person having the effect of destroying an assessor's indifference or impartiality between the State and the defence is, to my mind, *of far lesser degree than in the case of a juror*.'[419] What is more, in the event that an accused reasonably apprehends possible bias on the part of an assessor on the grounds of virulent pre-trial publicity, he or she has the right to challenge the appointment of the assessor, or may, presumably on good cause, seek the recusal of the assessor.[420]

4.4 The prosecutor to be dedicated to the achievement of justice and his or her duty to truth

> When a public prosecutor is convinced of the guilt of an accused, the case should be prosecuted with energy and skill but with propriety and fairness.[421]

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[417] *Ibid* 37C-D.

[418] See Hill (2001) *SAJHR* 567; Cleaver (1993) *SALJ* 534. But see Swanepoel (2006) *Ecquid Novi* 9.

[419] 1999 1 BCLR 27 (ZS) 37B (my emphasis).

[420] *Ibid* 39A-B. On the recusal of an assessor, see also *S v Malindi and Others* 1990 1 SA 962 (A) 969I-970E. As to the test for the recusal of an assessor, similar considerations apply as in the case of the recusal of judicial officers – see, for example, Van der Merwe 'Trial before Superior Court' in *Commentary on the Criminal Procedure Act* 21-6-21-8; Kruger *Hiemstra's Criminal Procedure* 21-5-21-7. See too *S v Mbatha and Others* 2004 2 SACR 152 (W) para 13.

[421] *Jennings v United States* 364 F.2d 513 516 paras 6, 7 (1966).

The prosecutor conducts the case 'for one of the two sides in a trial, namely the state, as representing the citizenry.'[422] It is the function of the prosecutor 'to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime.'[423] 'The prosecutor must provide, independent of the accused, proof of any accusation made.'[424] This is in line not only with the accused's constitutional right to be presumed innocent, but also the adversarial/accusatorial system which is party-driven, in terms whereof each party conducts his or her own investigation and in a partisan way builds a case.[425] The prosecutor is moreover *dominus litis*, and thus '[t]he presiding officer must always resist the temptation to descend into the arena to a point where he/she coaches or advises the public prosecutor on how to conduct his/her case.'[426] As *dominus litis*, the prosecutor 'has a discretion regarding prosecution and pre-trial procedures. For instance, the state may decide inter alia whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute; when to withdraw charges, and so forth.'[427] As *dominus litis*, the prosecutor is also 'the party who dictates the route a case will take towards being finalised.'[428]

Prosecutors in South Africa's traditional common-law criminal justice system 'serve as the gatekeepers of the system. Not only do they evaluate the conduct of the police and the strength of the state's case, they also actively present the case to the court and represent the interests of society throughout the proceedings.'[429] In other common-law jurisdictions the prosecutor similarly 'plays his most important role as the gatekeeper of the criminal courts and as advocate of the state in criminal trials.'[430] Prosecutors are gatekeepers of the criminal justice system because without their intervention judicial sanctions cannot occur.[431] The effects of the work

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[422] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.
[423] *Ibid* para 11. See also *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 50.
[424] Steytler (2001) *Law, Democracy & Development* 3.
[425] *Ibid* 3.
[426] *S v Moshoeu* 2007 1 SACR 38 (T) 41*e*. See also *S v Matthys* 1999 1 SACR 117 (C) 119*e-f*.
[427] *S v Sehoole* 2015 2 SACR 196 (SCA) para 10.
[428] *S v Khalema and Five Similar Cases* 2008 1 SACR 165 (C) para 22.
[429] *S v Sithole and Others* 2012 1 SACR 586 (KZD) para 7. See also WP de Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' (2011) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*Journal of Contemporary Roman-Dutch Law*) 247 256.
[430] Felkenes (1975) *Southwestern University Law Review* 98.
[431] MT Mokoena 'Taming the prosecutorial beast: of independence, discretion and accountability' (2012) 23 *Stellenbosch Law Review* 297 300.

of the prosecutor reverberate through every component of the criminal justice system: the police, the judiciary and correctional services.[432] It follows that the integrity of the system is largely dependent on the integrity of the prosecutor.[433] Few public officials can so affect the lives of others as can prosecutors.[434] Prosecutorial decisions to prosecute or not to prosecute clearly 'affect accused persons and their families, victims, witnesses, law enforcement agencies and the public.'[435] The prosecutor possesses the greatest power to take away the freedom of a person.[436] The discretionary power exercised by the prosecutor 'in initiation, accusation, and discontinuance of prosecution gives him more control over an individual's liberty and reputation than any other public official.'[437] The United States Supreme Court has held in this respect that:[438]

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.

A former prosecutor in the United States of America, Kenneth Melilli, observes that '[n]o government official can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime. In many cases, the prosecutor determines the fate of those accused, at least in those cases where the evidence or statutory sentencing structure renders the ultimate outcome of the prosecution largely a foregone conclusion.'[439] Melilli explains that even when a criminal charge does not result in a conviction, the mere filing of the charge can have a devastating effect on an individual's life, including potential pre-trial detention, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defence, and the emotional stress and anxiety attendant upon awaiting the finalisation of the case.[440] According to Melilli, '[s]uch consequences may well have

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[432] Felkenes (1975) *Southwestern University Law Review* 98.
[433] *Ibid* 98.
[434] SA Reiss 'Prosecutorial Intent in Constitutional Criminal Procedure' (1987) 135 *University of Pennsylvania Law Review* 1365 1365.
[435] P du Toit 'Criminal procedure' (2015) 28 *South African Journal of Criminal Justice* 85 85.
[436] Gershman (2001) *Georgetown Journal of Legal Ethics* 311.
[437] Note 'Prosecutor's Discretion' (1955) 103 *University of Pennsylvania Law Review* 1057 1057.
[438] *Young v United States ex rel Vuitton et Fils SA* 481 US 787 814 (1987).
[439] KJ Melilli 'Prosecutorial Discretion in an Adversary System' (1992) *Brigham Young University Law Review* 669 671 (footnotes omitted). At the time of writing, Melilli was Professor of Law, Albany Law School of Union University.
[440] *Ibid* 671-672. For a similar judicial observation, see *Mahupelo v Minister of Safety and Security and Others* 2017 1 NR 275 (HC) para 132.

a permanent effect that is not cured even by an acquittal at trial.'[441] Melilli opines therefore that prosecutors, as many do, should 'regard the possibility of charging an innocent person as "the single most frightening aspect of the prosecutor's job."'[442] Percy Yutar likewise indicates that a decision to prosecute should not be made lightly 'because once you institute a prosecution against a person, even though he may subsequently be acquitted, you have done that person irreparable harm.'[443]

The first most important function, then, that must be exercised by a prosecutor is the decision to charge a person with a crime.[444] The prosecutor has an enormous and unique discretion in deciding whether to prosecute, defining the particular crime, and in affecting the punishment.[445] The role of the prosecutor 'comes with great responsibility as he is vested with the power to charge and try accused. [Prosecutors] must seek justice, do justice, protect the innocent and charge the guilty.'[446] The public must have the assurance that those who wield this far-reaching power will be guided by their sense of public responsibility for the attainment of justice.[447] A 'sensible discretion'[448] and 'circumspection'[449] should be exercised by the prosecutor in deciding whether to institute a prosecution. After all, '"it is excellent to have a giant's strength, but it is tyrannous to use it like a giant."'[450] A prosecutor should be just that, not a persecutor. As public officials and in giving effect to the

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[441] Melilli (1992) *Brigham Young University Law Review* 672.

[442] *Ibid* 672.

[443] P Yutar 'The Office of Attorney-General in South Africa' (1977) 1 *South African Journal of Criminal Law and Criminology* 135 136. Yutar, writing in his capacity as Attorney-General and in connection with prosecutors, adds on this score:

> 'We have, and we do use, however, what the law gives us and that is a discretion. It is a very valuable safeguard, because one has to take into account when deciding whether to prosecute someone, what the consequences to him may be, apart from any penalty which a court of law might inflict. If, in our view, the consequences are out of all proportion to the gravity of the offence committed, we are permitted to exercise our discretion and decline to prosecute – and we do so.' (*Ibid* 136).

[444] Melilli (1992) *Brigham Young University Law Review* 671. See also Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-49, describing the decision to prosecute or not as 'one of the core responsibilities of the prosecution.'

[445] MH Freedman 'The Professional Responsibility of the Prosecuting Attorney' (1967) 55 *The Georgetown Law Journal* 1030 1034.

[446] De Villiers (2011) *THRHR* 256. See also Felkenes (1975) *Southwestern University Law Review* 98, where it is similarly observed that the prosecutor must 'shoulder heavy responsibilities' in the system of criminal justice, in that he or she initiates judicial actions against criminal suspects and from the inception of the judicial process, the prosecutor must take charge and see that justice is done.

[447] *Young v United States ex rel Vuitton et Fils SA* 481 US 787 814 (1987).

[448] *S v Macrae and Another* 2014 2 SACR 215 (SCA) para 30. See also Du Toit (2015) *SACJ* 85.

[449] FG Richings 'The Prosecutor's Discretion: A Plea for Circumspection' (1977) 1 *South African Journal of Criminal Law and Criminology* 143 146, commenting on a prosecution that ought not to have been instituted on account of the tragic personal circumstances of the accused.

[450] *Ibid* 146.

aspect of prosecutorial accountability, decisions by the prosecutor should not be 'arbitrary'.[451] Prosecutorial discretion should 'be exercised fairly, intelligently, and in accordance with what is required at each stage of the criminal justice process.'[452]

Prosecutors in South Africa, as with prosecution authorities in other Anglo-American jurisdictions, 'enjoy a virtually unfettered discretion as to whether a person suspected of criminal conduct should be prosecuted or not, and if prosecuted, with which offences and before which court.'[453] Indeed, 'the prosecution of crime is a

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[451] Mokoena (2012) *Stellenbosch Law Review* 302.

[452] JM Visser, H Oosthuizen & T Verschoor 'A critical investigation into prosecutorial discretion and responsibility in the presentation of expert evidence' (2014) 131 *The South African Law Journal* 865 880.

[453] Richings (1977) *SACC* 143. See also, for example, *S v Yengeni* 2006 1 SACR 405 (T) para 52, finding that the 'untrammelled exercise' of the prosecutor's powers 'in a spirit of professional independence is vital to the functioning of the legal system.'

However, a decision to prosecute or not to prosecute may be subject to judicial review and set aside where the prosecutor's discretion was exercised improperly or the decision is illegal and irrational. After all, the principle of legality expresses the fundamental idea that the exercise of public power is only legitimate where lawful and it requires that the exercise of public power must be rationally related to the purpose for which the power was given – decisions by a public authority must be rationally connected to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement. Rationality is a minimum requirement applicable to the exercise of all public power. See, for instance, *Booysen v Acting National Director of Public Prosecutions and Others* 2014 2 SACR 556 (KZD); *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 1 SA 254 (GNP) para 124, where Murphy J observed as follows: 'Courts will interfere with decisions to prosecute where the discretion is improperly exercised (illegal and irrational), mala fides, or deployed for ulterior purposes. They will do so on the ground that such conduct is in breach of the principle of legality. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.' (Footnotes omitted). See too *S v Sehoole* 2015 2 SACR 196 (SCA) para 12; *Minister of Police and Another v Du Plessis* 2014 1 SACR 217 (SCA) para 31, where Navsa ADP, for a Full-Bench of the Court, held:

> 'Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court which can intervene where such a discretion is improperly exercised… Indeed a court should be obliged to, and therefore ought to, intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated.' (Footnote omitted).

For notable cases dealing with a review of decisions not to prosecute, see *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 1 SA 254 (GNP); *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 4 SA 298 (SCA) (affirming that judicial review of a decision not to prosecute is limited to grounds of legality and rationality – para 27(*e*)); *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 2 SACR 1 (GP) (where the decision not to prosecute former president Jacob Zuma was set aside on the basis that the decision by the Acting National Director of Public Prosecutions was made impulsively and irrationally); *Zuma v Democratic Alliance and Others* 2018 1 SA 200 (SCA) (affirming that the decision to terminate the prosecution of Jacob Zuma was irrational and was also liable to be set aside because the wrong statutory provisions were invoked by the ANDPP to review the continuance of the prosecution).

In *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 4 SA 298 (SCA) paras 25-26, the Court espoused the principle that while decisions to prosecute or not to prosecute are not immune from judicial review, the power to review is one to be sparingly exercised in order to safeguard the independence of the prosecuting authority and given the great width of the prosecutor's discretion and the polycentric character that generally accompanies its decision-making, including considerations of public interest and policy. See also Du Toit (2015) *SACJ* 90.

matter of importance to the State.'[454] There is a constitutional obligation on the State to prosecute crime; prosecuting those accused of offences which threaten or infringe the rights of citizens 'is of central importance in our constitutional framework.'[455] The importance of the State's duty to prosecute crime was recognised in the Constitutional Court decision of *S v Basson*[456] as being implicit in section 179(2) of the Constitution, which provides that: 'The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.' In *Basson* it was explained that: 'By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective.'[457] It was also held:[458]

> In our constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime.

In Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-31; De Villiers (2011) *THRHR* 257, it is said that in principle a court cannot interfere with a *bona fide* decision of the prosecuting authority. See also in the latter respect, *Mohan v Director of Public Prosecutions, Kwazulu-Natal and Others* 2017 2 SACR 76 (KZD) para 42; *General Council of the Bar of South Africa v Jiba and Others* 2017 1 SACR 47 (GP) para 43, where it was held:

> '*Courts have on rare occasions expressed their disapproval of the fact that a prosecution was instituted*. Courts do not interfere with the prosecuting authority's bona fide exercise of its discretion because the prosecuting authority has the power to decide to prosecute and, once the accused is on trial, he or she will have the fullest opportunity to put his defence to the court, cross-examine prosecution witnesses and to rely on his right not to be convicted unless the prosecution can prove his guilt beyond reasonable doubt, based on admissible evidence and presented in terms of a regular procedure. *Courts can intervene where mala fides are alleged, or where it is alleged that the prosecuting authority never applied its mind to the matter or acted from ulterior motive*.' (Court's emphasis). (Footnotes omitted).

See too, for example, *Wilson v Director of Public Prosecutions* 2002 1 All SA 73 (NC) para 19.

[454] *S v Basson* 2007 1 SACR 566 (CC) para 144.

[455] See *S v Basson* 2004 1 SACR 285 (CC) paras 32-33.

[456] *Ibid* para 33.

[457] *Ibid* para 33 (footnote omitted). See also *S v Basson* 2007 1 SACR 566 (CC) para 144; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 2 SACR 349 (CC) para 53. In *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 13, the same Court observed that '[t]here is no doubt a pressing social need for the effective prosecution of crime.' For a similar finding, see *S v Thebus and Another* 2003 2 SACR 319 (CC) para 40.

Having special regard to the rights of victims, 'it would be unconstitutional if the prosecuting authority would refuse to prosecute "where there is a strong case and adequate evidence to do so".' - L Wolf 'The prosecuting discretion: a power under administrative law or criminal law?' (2011) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 703 713, citing *Nkadimeng and Others v National Director of Public Prosecutions and Others* (32709/07) 2008 ZAGPHC 422 (12 December 2008) para 15.4.4 *SAFLII* <http://www.saflii.org/za/cases/ZAGPHC/2008/422.pdf> (accessed 01-08-2016).

[458] *S v Basson* 2004 1 SACR 285 (CC) para 31.

Nevertheless, 'all decisions by the prosecuting authority to prosecute or not to prosecute must be taken impartially, without fear, favour or prejudice.'[459] Section 32(1)(*a*) of the National Prosecuting Authority Act[460] provides as follows: 'A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.'[461] Wium de Villiers[462] writes in this regard:[463]

> The manner in which decisions to prosecute or not are reached is crucial to the criminal justice system. This requires that the manner in reaching such decisions must be impartial and fair. Prosecutorial decisions should only be made with due attention to the requirements of the law, while not forgetting the public interest implications of legal decisions.

In *S v Van der Westhuizen*, the Supreme Court of Appeal pointed out that the concept of prosecutorial impartiality, as it is understood under South African law and in terms of international instruments,[464] does not mean that the prosecutor may not act adversarially, but it denotes 'acting even-handedly, ie avoiding discrimination; and the duty to act impartially is therefore part of the more general duty to act without fear, favour or prejudice.'[465]

The independence of the prosecutor is also rooted in section 32(1)(*b*) of the NPA Act,[466] which provides that: 'Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties

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[459] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2016 1 SACR 308 (SCA) para 24. This is in line with section 179(4) of the Constitution and section 32(1)(*a*) of the National Prosecuting Authority Act 32 of 1998.

[460] Act 32 of 1998 ('the NPA Act').

[461] Italics in the legislative text.

[462] De Villiers is Professor, Department Procedural Law, University of Pretoria.

[463] De Villiers (2011) *THRHR* 263.

[464] See section 179(4) of the Constitution; section 32 of the NPA Act; *Code of Conduct for Members of the National Prosecuting Authority* published in GN R 1257 in *GG* 33907 of 29-12-2010 (contained in 'National Prosecuting Authority' in E Du Toit, F De Jager, A Paizes, A St Q Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS 59 2017) Prosecuting-53-Prosecuting-56); *United Nations Guidelines on the Role of Prosecutors* adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana, 27 August to 7 September 1990; *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* developed by the International Association of Prosecutors as tabled at the 17th session of the UN Commission on Crime Prevention and Criminal Justice (adopted in Amsterdam in April 1999).

[465] 2011 2 SACR 26 (SCA) para 9.

[466] In *S v Yengeni* 2006 1 SACR 405 (T) paras 50-52, the Court dealt with the independence required of prosecutors with reference to section 32(1)(*a*) of the NPA Act. See also Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-8.

and functions.'[467] The provisions of section 32(1)(*a*) and (*b*) of the NPA Act, and the related oath that prosecutors must take in terms of section 32(2) of the Act to uphold these provisions, give effect to section 179(4) of the Constitution, which states: 'National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.' Section 179(4) of the Constitution guarantees not only prosecutorial impartiality, but also the independence of the prosecuting authority in the exercise of its functions.[468] The statutory imperative of prosecutorial independence and impartiality also applies to outside persons appointed as prosecutors in terms of section 38 of the NPA Act.[469]

It is clear from the afore-going that when a prosecutor decides to prosecute or declines to prosecute, the prosecutor's discretion must be exercised independently and impartiality, without fear, favour or prejudice. Prosecutors 'must invoke criminal law as generally applicable law. This ties in closely with the equal treatment clause [section 9 of the Constitution], which precludes selective prosecutions because they would discriminate against other accused who are prosecuted and/or against victims of crime whose cases are shelved.'[470] The prosecuting authority, which is integral to the rule of law, must act in good faith and in a manner consistent with constitutional and legal prescripts and must uphold the rule of law.[471] As regards the discretion of the prosecutor, the 'fundamental principle' is that a prosecutor is required to 'act

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[467] Italics in the legislative text.

[468] *Tshilidzi v S* (650/12) 2013 ZASCA 78 (30 May 2013) para 8; De Villiers (2011) *THRHR* 258.

[469] See *Moussa v The State and Another* 2015 2 SACR 537 (SCA) para 28.

[470] Wolf (2011) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 713 (footnote omitted). See also Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-52A-1-52B, in this connection:

> '[D]iscretionary prosecution is no licence for discriminatory prosecution. This means that in the exercise of the discretion to prosecute there must be no selective enforcement or non-enforcement of the criminal law, amounting to unjustifiable distinctions between persons in similar circumstances. Discriminatory prosecution not only conflicts with the equal protection and due process principles or ideals of the criminal justice system, but also with s 9(1) of the Constitution: "Every person is equal before the law and has the right to equal protection and benefit of the law."'

See, moreover, *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 2 SACR 1 (GP) para 90, where the Court drew attention to the fact that the ANDPP in acting impulsively and irrationally in the decision to withdraw the charges against Jacob Zuma, 'did not allow himself time to consider the question whether the very decision he was about to take could be regarded by other people, facing similar charges throughout South Africa, as a breach of the principles of equality before the law, or that it would be an abuse of process to discontinue charges against people of high profile or standing in the community.'

There should be no favouritism shown in decisions relating to prosecutions – see *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) para 44.

[471] See also *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) paras 44-45.

within the Constitution and the law'.[472] Prosecutorial decisions 'involve the exercise of public power, must comply with the Constitution and are subject to the constraints set out in the Constitution and the rule of law'.[473] Prosecutors 'have always owed a duty to carry out their public functions independently and in the interests of the public.'[474] A 'principled approach' to the exercise of the prosecutor's discretion is called for; '[t]he governing ethos may be described as equality before the law, objectivity and responsibility to the public.'[475] The prosecutor 'must act fairly towards the accused and dedicate himself or herself to the achievement of justice'.[476]

In relation to the decision that must be made by the prosecutor to prosecute or not to prosecute, prosecutorial independence would require that the discretion[477] to be exercised must be free from party political pressures; it must not be subject to the influence of any political, economic or power grouping.[478] The discretion must be free from any interference by 'the powerful, the well-connected, the rich and the peddlers of political influence.'[479] The prosecutor must be able to make prosecutorial decisions without regard to political considerations and his or her prosecutorial discretion must not be subject to the authority of government.[480] Prosecutors are to be protected against arbitrary action by the government in order to ensure that they

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[472] JA van S d'Oliveira 'The prosecuting authority: Seeking a bridle for the unicorn?' in G Carpenter (ed) *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 71 80.

[473] P Swanepoel 'Aspects of the prosecutorial functions and responsibilities' (2012) 25 *South African Journal of Criminal Justice* 120 133, with reference to *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA) paras 27-32.

[474] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2002 1 SACR 79 (CC) para 72. Self-evidently, it would ordinarily be in the public interest that crime be prosecuted, and indeed, conscientiously and vigorously so. For a discussion on the nature of prosecutorial independence and accountability, see, for example, Mokoena (2012) *Stellenbosch Law Review* 300-304. See also *S v Yengeni* 2006 1 SACR 405 (T) paras 51-52; Beinart (1962) *Acta Juridica* 123; Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-8-1-9; De Villiers (2011) *THRHR* 256-263.

[475] D'Oliveira 'The prosecuting authority' in *Suprema Lex* 80.

[476] Du Toit (2015) *SACJ* 85, citing *inter alia S v Rozani; Rozani v Director of Public Prosecutions, Western Cape and Others* 2009 1 SACR 540 (C) 549*j*-550*a*, where it was observed that '[a] prosecutor is expected at all times to act in a manner which is responsible and fair to the accused'.

[477] In Mokoena (2012) *Stellenbosch Law Review* 301, it is noted that prosecutorial discretion, as an essential feature of the criminal justice system, 'forms the cornerstone of prosecutorial independence… Such discretion is required, as a matter of course, in order to insulate the prosecutor from political interference, and to promote impartiality and independence. The discretion may also assist in fostering an amenable balance between independence from, and subordination to, the Executive.' (Footnotes omitted). The writer also indicates that 'the manner and the process through which prosecutorial discretion is exercised are central to the quality of the criminal justice system.' (*Ibid* 301).

[478] *Ibid* 301.

[479] *S v Yengeni* 2006 1 SACR 405 (T) para 51.

[480] De Villiers (2011) *THRHR* 256. See also *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 32.

are able to carry out their professional responsibilities independently.[481] An accused 'has a constitutional right to a prosecutor that is independent from political influence.'[482] 'Prosecutors should in general be entitled to perform their professional functions without intimidation, hindrance, harassment or improper interference.'[483] The prosecutor cannot be forced to prosecute, neither can he or she be forced to terminate a prosecution.[484] The *Code of Conduct for Members of the National Prosecuting Authority* also enjoins prosecutors to 'strive to be and to be seen to be consistent, independent and impartial', and provides that '[t]he prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, *public* and judicial interference.'[485]

Wium de Villiers remarks that '[t]he underlying rationale for this independence in prosecutorial discretion stems from the fact that the decision should be made based on pure legal criteria. Only then will the law be applied fairly and equally to all.'[486] Moreover, according to the Court in *S v Yengeni*, since the independence of the judiciary is in part directly related to, and depends upon, the independence of the prosecuting authority, the undermining of prosecutorial independence by 'outside influence' would lead to the entire legal process, including the functioning of the

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[481] De Villiers (2011) *THRHR* 257.

[482] *Ibid* 248. For further cases affirming the constitutional imperative of prosecutorial independence, see *S v Basson* 2004 1 SACR 285 (CC) para 33; *Pikoli v President of Republic of South Africa and Others* 2010 1 SA 400 (GNP) 406A-F (observing that a principle of prosecutorial independence has long been part of our law); *Democratic Alliance v President of the Republic of South Africa and Others* 2012 1 SA 417 (SCA) para 70; *Democratic Alliance v President of the Republic of South Africa and Others* 2013 1 SA 248 (CC) paras 13, 24; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) para 146 (finding that section 179(4) of the Constitution provides that 'national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.'); *Nkabinde and Another v Judicial Service Commission and Others* 2016 4 SA 1 (SCA) paras 89-92; *Corruption Watch (RF) NPC and another v President of the Republic of South Africa and others and a related matter* 2018 1 All SA 471 (GP) para 55; *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* (2018) ZACC 23 paras 18-21. The Supreme Court of Appeal has also rejected the notion that a prosecutor is to be regarded as part of the executive. The National Prosecuting Authority is an institution falling under Chapter 8 of the Constitution, that pertains to courts and the administration of justice. See *Nkabinde and Another v Judicial Service Commission and Others* supra para 88.

[483] De Villiers (2011) *THRHR* 257.

[484] *Ibid* 262. See also, for example, *S v Dubayi* 1976 3 SA 110 (Tk). Furthermore, the inability of a court to compel the prosecuting authority to proceed with a prosecution accords with the separation-of-powers doctrine - see *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 4 SA 298 (SCA) para 51.

[485] See paragraphs A(d) and B of the Code - 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-54 (my emphasis).

[486] De Villiers (2011) *THRHR* 256.

judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.[487]

B Beinart[488] crisply captures the essence of the fundamental factors that ought to govern the exercising of the prosecutor's discretion, writing that the decision to institute criminal prosecutions should 'be in the hands of an impartial person who will judge independently of the executive and of the police whether a prosecution should be instituted – a person, who is under a duty to enforce the criminal law against all offenders and who will act in a quasi-judicial way, that is to say in a just and proper manner.'[489]

The decision in 2009 by the then Acting National Director of Public Prosecutions, Mr Mokotedi Mpshe, to discontinue the prosecution against Jacob Zuma on serious racketeering, money laundering, fraud and corruption charges in a very high profile case of national public importance, is a striking example of a prosecutor who due to political 'pressure' abandoned his independence and the oath of his office which demanded of him to act without fear, favour or prejudice.[490] According to the Gauteng Division of the High Court, the now former NDPP, Shaun Abrahams, in seeking to defend this decision by Mpshe until the eleventh hour,[491] and in so doing associating himself on all material issues with the position of Zuma, also showed himself to be lacking in the independence required of his office.[492]

It further goes without saying that the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings, as well the power to discontinue criminal proceedings, are 'awesome powers' and 'it is central to the preservation of the rule of law that they be exercised with the utmost integrity. That must mean that the people employed by the prosecuting authority must themselves be people of integrity who will act without fear, favour or prejudice.'[493]

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[487] 2006 1 SACR 405 (T) para 52.
[488] At the time of writing, Beinart was Professor of Roman and Comparative Law, University of Cape Town.
[489] Beinart (1962) *Acta Juridica* 123.
[490] See *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 2 SACR 1 (GP) paras 85, 92, pointing out that pressure was brought to bear on Mpshe to make a hasty decision due to the imminent swearing in of Zuma as President of the Republic.
[491] See *Zuma v Democratic Alliance and Others* 2018 1 SA 200 (SCA) para 92.
[492] See *Corruption Watch (RF) NPC and another v President of the Republic of South Africa and others and a related matter* 2018 1 All SA 471 (GP) para 97.
[493] *Democratic Alliance v President of the Republic of South Africa and Others* 2012 1 SA 417 (SCA) para 72.

For present purposes, the question arises what the constitutional imperatives of prosecutorial independence and impartiality mean in the making of a decision to prosecute or not to prosecute in the context of pre-trial publicity. Firstly, the prosecutor cannot become, as it were, an extension of the media – the prosecutor must act independently of the media, that is to say he or she must not base his or her decision on media reports or opinions or sentiments expressed in the media, nor in exercising his or her discretion may he or she yield to or be influenced by pressure placed on the prosecuting authority by the media or the public as expressed through the media. Besides political and judicial interference, the prosecutorial discretion to institute and stop criminal proceedings must also be free from '*public*' interference.[494] Surrounding publicity may result in a prosecutor being reluctant to withdraw a case notwithstanding that he or she has personal doubts concerning the accused's guilt, because by doing so he or she runs the risk of being perceived in the public domain as soft, fearful and lacking the skills to win the difficult case.[495] Where a case generates media attention, there may be 'enhanced pressure' upon the prosecutor to obtain a conviction.[496]

Secondly, integral to the principle of prosecutorial impartiality, in terms whereof prosecutors should perform their duties without fear, favour or prejudice, is that although prosecutors in fulfilling such duties should take into account the 'public interest', this is clearly distinct from 'media or partisan interests and concerns, however vociferously these may be presented'.[497]

When instituting or maintaining criminal proceedings, the prosecutor should proceed only when a case is well founded, upon evidence contained in the police case docket reasonably believed to be reliable and admissible, and should not continue such proceedings in the absence of such evidence,[498] that is, if there is no *prima facie* case. 'Prosecutors should thus not initiate or continue proceedings when an impartial investigation shows the charge to be unfounded.'[499] This is recognised

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[494] *Democratic Alliance v President of the Republic of South Africa and Others* 2016 2 SACR 494 (WCC) para 24; Paragraph B of the *Code of Conduct for Members of the National Prosecuting Authority* - 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-54 (my emphasis).

[495] Melilli (1992) *Brigham Young University Law Review* 688.

[496] *Ibid* 688.

[497] See Paragraph (C)(*c*) of the *Code of Conduct for Members of the National Prosecuting Authority* - 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-54.

[498] *Mahupelo v Minister of Safety and Security and Others* 2017 1 NR 275 (HC) para 136.

[499] *Ibid* para 136. See also *R v Sole* 2001 12 BCLR 1305 (Les) 1330H-I.

by the common-law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated (or maintained).[500] On the latter requirement, the Supreme Court of Appeal expressed itself as follows in *S v Lubaxa*:[501]

> Clearly a person ought not to be prosecuted in the absence of *a minimum of evidence* upon which he might be convicted… That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated…, and the constitutional protection afforded to dignity and personal freedom… seems to reinforce it.[502]

In *Beckenstrater v Rottcher and Theunissen*, Schreiner JA for the Appellate Division, in relation to the test for a malicious prosecution being the institution of a prosecution without reasonable and probable cause, explained that '[w]hen it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged'.[503]

In terms of the *Prosecution Policy* of the National Prosecuting Authority,[504] a prosecutor in deciding whether or not to institute criminal proceedings against an accused person, 'must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be

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[500] *Mahupelo* supra para 136. See also *Minister of Police and Another v Du Plessis* 2014 1 SACR 217 (SCA) para 31.

[501] 2001 2 SACR 703 (SCA) para 19 (my emphasis).

[502] As quoted with approval in *Minister of Police and Another v Du Plessis* 2014 1 SACR 217 (SCA) para 30. See also *Beckenstrater v Rottcher and Theunissen* 1955 1 SA 129 (A) 135C-E, where it was held: 'For it is of importance to the community that persons who have reasonable and probable cause for prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect or improper motives.' This finding in *Beckenstrater* was endorsed in *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 37; *Relyant Trading (Pty) Ltd v Shongwe and another* 2007 1 All SA 375 (SCA) para 14.

[503] 1955 1 SA 129 (A) 136A-B, as cited with approval in *Relyant Trading (Pty) Ltd v Shongwe and another* 2007 1 All SA 375 (SCA) para 14. See also the discussion in *Minister of Safety and Security v Tyokwana* 2015 1 SACR 597 (SCA) paras 13-16, on the general principles pertaining to malicious prosecution.

[504] In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2016 1 SACR 308 (SCA) para 24, it was pointed out that in making a decision to prosecute or not to prosecute, such decision must not only be taken by a prosecutor impartially, without fear, favor or prejudice, but the prosecutor must also 'adhere to prosecuting policy and policy directives', the aim of which axiomatically 'must be to serve the interests of justice for the benefit of the public in general.'

Although this decision was overturned in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Others* 2017 1 SACR 284 (CC), this does not affect the validity of the above finding in relation to the prosecution policy – see P du Toit 'Criminal procedure' (2017) 30 *South African Journal of Criminal Justice* 85 93-94.

commenced or continued.'[505] The *Prosecution Policy* provides further that the 'test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution.'[506] The *Prosecution Policy* states that various factors are to be considered when the prosecutor evaluates evidence, notably (i) the strength of the case for the State, (ii) the admissibility of evidence, (iii) whether the State witnesses are likely to be credible, (iv) the reliability of evidence, (v) the availability of evidence, and (vi) the strength of the case for the defence (that is, is the probable defence of the accused person likely to lead to his or her acquittal in the light of the facts of the case?).[507] Prosecutors are thus clearly 'bound by the principle of legality' in exercising their discretion to prosecute or not to prosecute, and must ensure that the elements of a crime as required by the criminal law can be proved before a prosecution is instituted.[508]

The *Prosecution Policy* provides that '[o]nce a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.'[509] In the latter respect, the *Prosecution Policy* indicates that '[t]here is no rule in law stating that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.'[510] However, when considering whether or not it would be in the public interest to prosecute, prosecutors must consider all relevant factors, including (i) the nature and seriousness of the offence, (ii) the interests of the victim and the broader community, and (iii) the circumstances of the offender.[511] Moreover, in *Freedom Under Law v National Director of Public Prosecutions and Others*,

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[505] *Prosecution Policy* (Revision date: June 2013) Part 3.A – see 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-45. See also the observations in Du Toit (2017) *SACJ* 93-94.

[506] *Prosecution Policy* Part 3.A – 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-45.

[507] *Prosecution Policy* Part 3.B – 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-45-Prosecuting-46.

[508] Wolf (2011) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 712-713. See also Visser, Oosthuizen & Verschoor (2014) *SALJ* 865: 'Before a case appears in court for trial, the prosecutor dealing with the case docket must ensure that adequate and valid evidence has been generated throughout the different stages of the criminal investigation to prove all the elements against the accused.'

[509] *Prosecution Policy* Part 3.C – 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-46.

[510] *Ibid* Prosecuting-46.

[511] *Ibid* Prosecuting-46-Prosecuting-47.

Murphy J held that in terms of the prosecution policy directives, there would have to be 'compelling reasons' to withdraw charges in the face of 'formidable evidence' against the accused.[512] Even though there is no closed list of 'compelling reasons' not to prosecute, legal precedent has, however, established that where the offence is trivial, the accused is very old or very young, or where there are tragic personal circumstances of the accused (for example, a father who has through his negligent driving caused the death of his child),[513] this may amount to a compelling reason that justifies a decision not to prosecute a prospectively successful case.[514] The fact remains that 'a decision of the prosecuting authority not to prosecute… must be made for a good reason.'[515] It goes without saying that it is ordinarily in the public interest that crime be prosecuted; there is, as noted above, no doubt a pressing social need for the effective prosecution of crime.[516] The discretion to be exercised in deciding whether to institute a prosecution or not 'is constrained by the duty to prosecute prospectively successful cases in the absence of a clear and legitimate public interest to decline to prosecute.'[517] 'The prosecution has a pivotal role in modern criminal justice. In each criminal case it is a prosecutor who represents the public interest in prosecuting crime.'[518] Wium de Villiers notes that even though prosecutors 'may take the public interest into account in their decisions whether to

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[512] 2014 1 SA 254 (GNP) para 182.

[513] See generally Richings (1977) *SACC* 143, commenting on the abuse of the prosecutor's discretion to institute a prosecution, in a case where a father caused a motor vehicle accident which resulted in the death of two of his children. Any right-thinking person would suppose that the accused had suffered enough, without the State adding to his misery by bringing him before a court of law on a charge of culpable homicide, alternatively reckless or negligent driving. The writer thus questions how the interests of justice were served by prosecuting the accused (*ibid* 145).

[514] Redpath (2012) *Institute for Security Studies Monographs* 48-49; Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-50-1-51; SE van der Merwe 'The prosecution of crime' in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 47 73:

> 'Occasionally there might be good grounds for refusing to prosecute despite the fact that a *prima facie* case exists. Such grounds may be the triviality of the offence…; the advanced age or very young age of an accused…; where a plea bargain was struck between the prosecution and the defence…; the antiquated nature of the offence…; or the tragic personal circumstances of an accused, for example, a father who has through his negligent driving caused the death of his young children'.

See too Visser, Oosthuizen & Verschoor (2014) *SALJ* 880, where it is observed that 'certain conditions justify the abandoning of a prosecution, even where a prima facie case exists; for example, where the age or state of health of the accused would render a criminal prosecution grossly unreasonable, or where the offence is of such trivial nature that the burden of prosecution greatly outweighs the probable punishment for the offence.'

[515] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2016 1 SACR 308 (SCA) para 25. See also Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-51.

[516] See, for example, *S v Coetzee and Others* 1997 1 SACR 379 (CC) para 13.

[517] Redpath (2012) *Institute for Security Studies Monographs* 54.

[518] *Ibid* 54.

prosecute, the factors that may be taken into account in determining whether the public interest requires a prosecution *are not political considerations*.'[519] 'When the discretion to decline to prosecute is wielded in politically sensitive matters on weak grounds, the appearance of a lack of independent operation of the prosecution service arises. The constitutional mandate of the NPA to prosecute carries with it an obligation.'[520] SE van der Merwe appositely comments that '[i]t is important that the prosecution process is seen to be transparent and that justice is seen to be done.'[521] As indicated above, the public interest similarly excludes extra-legal interests of the media or a trial by media.

It is clear from the above that prosecutors must pay meticulous attention to police dockets before deciding to institute a prosecution,[522] and in this respect they must act with objectivity.[523]

Once a decision has been made to prosecute, the prosecutor in taking the matter to court may act adversarially,[524] and he or she would seek the interests of the State and primarily aim at obtaining a conviction.[525] Despite discordant views on the aspect, a prosecutor may legitimately seek to obtain a conviction. In this regard, the Supreme Court of Appeal in *S v Van der Westhuizen* held as follows:[526]

> In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court, and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly, but fairly and dispassionately, to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses, with a view to discrediting such evidence for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system… Where an accused is represented, it is not the function of a prosecutor… to call evidence which is destructive of the State case, or which advances the case of the accused. The prosecutor is not obliged to play chess against him- or herself.[527]

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[519] De Villiers (2011) *THRHR* 256 (my emphasis). For an instructive analysis of the matter of the public interest in the exercising of prosecutorial discretion, especially in relation to 'political' prosecutorial decisions in high-profile controversial cases and the need for non-partisan prosecutorial decision-making in such cases, as well as the dangers of taking into consideration 'extra-legal interests', see Mokoena (2012) *Stellenbosch Law Review* 306-310.
[520] Redpath (2012) *Institute for Security Studies Monographs* 55.
[521] Van der Merwe 'The prosecution of crime' in *Criminal Procedure Handbook* 75.
[522] Du Toit (2015) *SACJ* 87.
[523] *Minister of Police and Another v Du Plessis* 2014 1 SACR 217 (SCA) para 34.
[524] *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 9.
[525] Cole (2010) *SACJ* 333; *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 50.
[526] 2011 2 SACR 26 (SCA) paras 11-12 (footnotes omitted).
[527] Reiterated by the same Court in *S v Prinsloo and Others* 2016 2 SACR 25 (SCA) para 181; *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.

The same Court has reaffirmed that it is not the function of the prosecutor 'to place contradictory evidence before a court and expect the court to find its way through the maze… It [is] therefore not the obligation of the prosecutor to call witnesses who are firmly vested in the camp of the accused.'[528]

The same Court has moreover recognised, in relation to the role that prosecutors play in adversarial criminal proceedings, that in such a system 'it is inevitable that prosecutors will be partisan. They conduct the case for one of the two sides in a trial, namely the state, as representing the citizenry. They often carry out their prosecutorial functions vigorously and zealously. A prosecutor's role in a criminal prosecution therefore makes it inevitable that he or she would be perceived to be biased. Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong view, that accused persons are guilty. That is permissible'.[529]

As a practical matter, any adversarial prosecutor who goes to trial in a criminal case will invariably seek to prove his or her case against the accused and obtain a conviction.[530] Petro Swanepoel states that 'in a competitive world it is well nigh impossible to find perfect justice and although it is not the prosecutor's duty to secure a conviction at all costs, any dedicated prosecutor, being human, would endeavour to win his or her cases.'[531] Commenting on *S v Van der Westhuizen's* case supra, Swanepoel opines that '[t]he Supreme Court of Appeal rightly held that the very essence of the function of the prosecutor is not to obtain a conviction at all cost, but rather to prosecute the case objectively with what appears to be essential and credible evidence and to challenge any evidence presented by the defence, with a view to discrediting such, in order to obtain a conviction.'[532] One commentator correctly notes that '[e]nsuring the infliction of deserved punishment is part and parcel of the prosecutor's job, so that "the prosecutor's attitude toward the defendant in a hard-fought criminal case is seldom benign or neutral."'[533] In outlining the

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[528] *S v Prinsloo and Others* 2016 2 SACR 25 (SCA) paras 181-182.
[529] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13 (footnote omitted).
[530] See, for example, Swanepoel (2012) *SACJ* 120-123.
[531] *Ibid* 120-121.
[532] *Ibid* 122.
[533] Reiss (1987) *University of Pennsylvania Law Review* 1387, citing *United States v Andrews* 633 F.2d 449 459 (1980), where Merritt J held:

> 'By necessity the public prosecutor must take hard positions contrary to the liberty interests of the accused… Public prosecutors, like the public at large, are sometimes motivated by a

'definite, independent, and conflicting functions' under the adversary system of the prosecutor, on the one hand, and the accused, on the other, Mirjan Damaška observes that the role of the prosecutor 'is to obtain a conviction', while the accused's role 'is to block this effort', adding that:[534]

> In his charge the prosecutor determines which factual propositions he will attempt to prove and must marshal evidence in support of his factual contentions. Not only does he have the burden of persuasion with respect to the latter, but also the burden of presenting evidence in court. In doing so he is expected to be partisan. The defendant decides which facts favorable to his theses he will attempt to prove, and must adduce evidence in support of all his factual contentions.

The adversarial format of the criminal trial is 'directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence.'[535] When a decision is made to prosecute, and in so doing a 'good faith determination' has been made as to the accused's guilt, a prosecutor is entitled to 'pursue a conviction.'[536] Clearly a prosecutor is inevitably involved in some form of a determination of the guilt of an accused to found the very institution of criminal proceedings, pursuant to which the prosecutor is to do his or her duty and lead his or her case.[537] Furthermore, obtaining a just conviction must be the purpose of a prosecution, lest the prosecution be deemed to be malicious or to have been brought for an ulterior purpose.[538] One writer observes that the prosecutor's 'primary duty is to earnestly and vigorously present the government's case, using every legitimate means to bring about a conviction' of the 'guilty', 'in a manner consistent with recognized principles of justice.'[539] The prosecutor must 'vindicate' the State's and the public's interest 'in securing the conviction of the guilty', 'yet be mindful to protect the innocent.'[540] 'As an advocate and an integral part of the adversary court proceedings', it is incumbent on the prosecutor to 'present persuasively' all the

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> desire for retribution in criminal cases. Whether he is motivated by deterrence or retribution or some more complicated but less explicable state of mind, the prosecutor's attitude toward the defendant in a hard-fought criminal case is seldom benign or neutral.'

534 Damaška (1973) *University of Pennsylvania Law Review* 563.

535 *Randall v The Queen* (2002) 1 WLR 2237 para 10 (Westlaw), per Lord Bingham, endorsed in *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 11.

536 Zacharias (1991) *Vanderbilt Law Review* 51.

537 *R v Sole* 2001 12 BCLR 1305 (Les) 1330H-1331D.

538 *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 38.

539 HB Vess 'Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument' (1973) 64 *The Journal of Criminal Law and Criminology* 22 22.

540 BR Civiletti 'The Prosecutor as Advocate' (1979) 25 *New York Law School Law Review* 1 1. See also Felkenes (1975) *Southwestern University Law Review* 110: 'The prosecutor is charged with two functions - to obtain the conviction of the guilty and to secure the release of the innocent.'

evidence favourable to the State's case - to do anything less is to 'abridge' the prosecutor's responsibility of public office.[541] If honestly convinced of the accused's guilt, 'the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means.'[542] After all, the prosecutor's function is 'to prosecute.'[543] One American Court has held that '[z]ealous advocacy in pursuit of convictions forms an essential part of the prosecutor's proper duties and does not show the prosecutor's participation [is] improper.'[544]

Prosecutors, however, 'must not prosecute in single-minded pursuit of a conviction. They have a duty towards the accused to ensure that an innocent person is not convicted. In this regard they have a duty to disclose, in certain circumstances, facts harmful to their own case.'[545] Although the prosecution and the accused in the adversarial trial 'are treated on an equal footing, the prosecutor is burdened with different and more onerous duties, as he is required not merely to obtain a conviction, but to see that justice is done.'[546] The prosecutor stands in a special relation to the court in the sense of assisting the court in ascertaining the truth and in dispensing justice.[547] As an officer of the court, the prosecutor has a fundamental duty to see that the truth emerges at trial.[548] Simply put, the prosecutor has a duty to truth.[549] What is more, in performing the function of achieving justice, the prosecutor must assist the court in arriving at the truth fairly.[550] The United States Supreme Court articulated the matter thus in *Berger v United States*: [551]

> [The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods

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[541] Felkenes (1975) *Southwestern University Law Review* 118.
[542] *Wright v United States* 732 F.2d 1048 1056 (1984).
[543] *In re Perlin* 589 F.2d 260 264 (1978).
[544] *People v Vasquez* 137 P.3d 199 211 (2006).
[545] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.
[546] Steytler *The Undefended Accused on Trial* 5. See also Banks *Criminal Justice Ethics* 115.
[547] See *S v Jija and Others* 1991 2 SA 52 (E) 68A; *S v Shaik and Others* 2008 1 SACR 1 (CC) para 67; *Minister of Police and Another v Du Plessis* 2014 1 SACR 217 (SCA) para 28 (adding that a prosecutor must not act arbitrarily, but must act with objectivity and must protect the public interest); *S v Maliga* 2015 2 SACR 202 (SCA) para 20.
[548] Steytler *The Undefended Accused on Trial* 135.
[549] See generally the instructive discussion on this fundamental principle in Gershman (2001) *Georgetown Journal of Legal Ethics* 309.
[550] Banks *Criminal Justice Ethics* 115.
[551] 295 US 78 88 (1935).

> calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[552]

The *Prosecution Policy* of the NPA expressly provides as follows in this regard:[553]

> Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases must therefore be presented fearlessly, vigorously and skilfully. At the same time, prosecutors must present the facts of a case to a court fairly. They must disclose information favourable to the defence (*even though it may be adverse to the prosecution case*)…

Whilst donning the hat of the adversarial prosecutor or fighting advocate in the dialectic process of the trial, the prosecutor's job is nevertheless 'to fight fairly and firmly with all his might to see that truth and justice prevail.'[554] The prosecutor 'must be on constant watch that his or her advocate's instincts do not interfere with the singular goal of accomplishing justice.'[555] Wium de Villiers notes that '[t]he criminal process is not a relentless pursuit to obtain a conviction. There are certain boundaries which the prosecution may not cross in order to obtain a conviction.'[556] The writer observes in a separate work that '[t]he prosecution has a unique and special role. The accepted norms of seeking justice, doing justice, protecting the innocent and convicting the guilty are embedded in South African law… and in numerous other legal systems'.[557] Rowland JV Cole states that while the prosecutor seeks the interests of the State and primarily aims at obtaining a conviction, he or she is also in a sense 'a minister of the truth' and his or her mandate should not go beyond the prosecution of the guilty.[558]

Where the accused is legally represented and the prosecutor knows of evidence in favour of the accused, the prosecutor must disclose and make such evidence available to the defence.[559] Where the accused is unrepresented, who

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[552] Quoted with approval in *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 11. See also De Villiers (2010) *THRHR* 124.

[553] *Prosecution Policy* Part 6 – 'National Prosecuting Authority' in *Commentary on the Criminal Procedure Act* Prosecuting-49-Prosecuting-50 (emphasis in the policy document).

[554] WN Seymour Jr 'Why Prosecutors Act Like Prosecutors' (1956) 11 *The Record of the Association of the Bar of the City of New York* 302 313. See also HR Uviller 'The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA' (1973) 71 *Michigan Law Review* 1145 1159.

[555] Melilli (1992) *Brigham Young University Law Review* 704.

[556] W de Villiers 'Chaos in our criminal courts: What can be done to improve their efficiency?' (2004) 67 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*Journal of Contemporary Roman-Dutch Law*) 67 73-74.

[557] De Villiers (2010) *THRHR* 124.

[558] Cole (2010) *SACJ* 333. At the time of writing, Cole was a lecturer in the Department of Law, University of Botswana.

[559] See *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 13; *Smyth v Ushewokunze and Another* 1998 3 SA 1125 (ZS) 1131C-D; *S v Masoka and Another* 2015 2 SACR 268 (ECP) para 12; *R v Filanius* 1916 TPD 415 417.

thus cannot be regarded as an adversary equal to the State, and the prosecutor knows of a credible witness 'who can speak of facts which go to show the innocence of the accused', the prosecutor must him- or herself call that witness as part of the duty of the prosecutor to bring out any point in favour of the accused so that justice is properly served.[560] Moreover, where the accused is unrepresented and a material discrepancy arises between the testimony of a witness and that witness' prior police statement, the prosecutor 'must forthwith disclose the discrepancy to the court.'[561] It goes without saying that the suppression by the prosecutor of exculpatory evidence or evidence materially favourable to the accused 'would seriously impede the search for truth.'[562] The prosecutor thus has a constitutional and ethical duty to disclose evidence favourable to the accused that has the potential to illuminate the truth.[563] The prosecutor is required to play fairly in the sense that he or she cannot hide the truth if it is known to be favourable to the accused.[564] This duty also stems from the fact that 'the prosecution has all the resources of the State, including finances, the police and vital information, at its disposal.'[565]

The role of the prosecutor in an adversarial system is perhaps best summed up in the decision of *S v Masoka and Another*, where it was held:[566]

> The purpose of a criminal trial is not to obtain a conviction at all costs. The duty of a prosecutor is to gather all relevant information and evidence, and then decide whether such evidence is sufficient to result in a conviction. If not, the decision must be made not to prosecute. If the evidence is sufficient, his/her duty is to place all such evidence before the court. In cases where the accused is represented by counsel or an attorney, the evidence which the prosecutor does not intend to place before the court must be made available to the accused's legal representative before the trial commences. In cases where an accused is

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[560] *Smyth v Ushewokunze and Another* 1998 3 SA 1125 (ZS) 1131C-D. See also *S v Mayiya* 1997 3 BCLR 386 (C) 394G-J; *S v Masoka and Another* 2015 2 SACR 268 (ECP) para 12; Steytler *The Undefended Accused on Trial* 136; *S v Van Rensburg* 1963 2 SA 343 (N) 343F, where, in relation to an unrepresented accused, the Court crisply stated that 'it cannot be too strongly emphasised that it is part of the duty of a prosecutor to bring to the notice of the court information in his possession which may be favourable to the accused.'

[561] *S v Xaba* 1983 3 SA 717 (A) 730B. See too *S v Naude* 2005 2 SACR 218 (W) 222*g-j*, pertaining to a similar duty which rests on the State even where the accused is defended, but where defence counsel despite docket disclosure does not deal with a material discrepancy in cross-examination. However, with docket disclosure, it would generally be left to defence counsel to cross-examine a State witness on a material inconsistency between the witness' *viva voce* evidence and a previous statement, so as to discredit the witness.

[562] Gershman (2001) *Georgetown Journal of Legal Ethics* 328.

[563] *Ibid* 328.

[564] Goodpaster (1987) *The Journal of Criminal Law and Criminology* 136.

[565] *Smyth v Ushewokunze and Another* 1998 3 SA 1125 (ZS) 1131F. See also *R v Filanius* 1916 TPD 415 417-418.

[566] 2015 2 SACR 268 (ECP) paras 12-13, applying *S v Van der Westhuizen* 2011 2 SACR 26 (SCA).

> unrepresented, all such evidence, even evidence pointing to the innocence of the accused, must be placed before the court.
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> By the above remarks I do not intend to convey that the role of a prosecutor is both to prosecute the state's case and also to defend the accused. A conviction must be sought and argued firmly and without fear or favour. However, it must be done in an even-handed, open and honest manner, always recognising an accused's right to a fair trial.

Where there may be enhanced pressure on a prosecutor to obtain a conviction in a notorious case that has attracted negative or virulent media attention,[567] the prosecutor may not allow him- or herself to be influenced by such to the prejudice of the accused, by for example suppressing exculpatory evidence or foisting his or her opinion in the matter upon the Court, but must remain committed to his or her duty to, in the words of Glanville Williams, 'bring the facts before the court';[568] the prosecutor must remain faithful to his or her duty to ensure that the truth ultimately emerges at trial and that justice prevails – the prosecutor must, so to speak, look after the facts despite the negative publicity which a case generates. Such would be the task of, for instance, the prosecutors in the pending, notorious Jacob Zuma criminal trial, in circumstances where previous reported findings of the trial and appellate courts in the related case of Schabir Shaik suggest Zuma's involvement in corrupt dealings,[569] and where an extensive, unfavourable media narrative surrounds Zuma spanning many years relating in part to the fraud and corruption case. Whilst it would not be untoward for the prosecutor to entertain a mental inclination or predisposition towards the guilt of the accused, the prosecutor at the same time must accept that he or she may be wrong in the matter and that ultimately the court must be the arbiter: in other words, the prosecutor must despite the firmness of his or her personal conviction also keep an open mind as the accused's guilt or innocence.[570] No matter how much pressure is put on the prosecutor due to the heinous nature of an offence, the surrounding publicity, or the parties involved, the prosecutor must retain an inward sense of impartiality and display outward objectivity.[571] 'Clearly the prosecutor's role involves a duty to be fair to the accused in the administration of

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[567] In PR Wallace 'Prosecuting in the Limelight' (2004-2005) 22 *Delaware Lawyer* 20 21, it is observed:

> 'When a particularly heinous crime is committed, or a well-known person is suspected, the added media attention can visit incredible pressure upon the prosecutor.'

[568] Williams *The Proof of Guilt* 30.

[569] See *S v Shaik and Others* 2007 1 SACR 142 (D); *S v Shaik and Others* 2007 1 SACR 247 (SCA).

[570] *R v Sole* 2001 12 BCLR 1305 (Les) 1331B.

[571] WC Gourlie 'Role of the Prosecutor: Fair Minister of Justice with Firm Convictions' (1982) 12 *Manitoba Law Journal* 31 37-38.

criminal justice. Political, personal and private considerations must be set aside so far as the exercise of discretionary power is inherent in the office of the prosecutor.'[572] One commentator cautions that where pressure is brought to bear on a prosecutor in a heinous case, or a case involving a well-known person, with added media attention, 'the prosecutor must be careful not to institute charges [which otherwise may be a generally popular move] or permit the continuation of a criminal case in the absence of admissible evidence sufficient for a conviction.'[573] And the prosecutor is both legally and ethically bound to turn over evidence helpful to the accused.[574] Prosecutors in high-profile cases 'must balance many important but often-competing interests when carrying out their duties'.[575] The pressure of intense publicity taxes the resources and tests the abilities of prosecutors to remain focused upon the true goal in any criminal case - to serve the public with the utmost integrity, and to ensure that a just result is obtained.[576] Ultimately for prosecutors, success is not to be measured by convictions, but when the results are just, thus requiring the highest standards of conduct of any professional advocate.[577]

William Lee Hon, who is a prosecutor in the United States of America, also points out that besides pressure emanating from law enforcement officials and/or victims or their families who may have strong opinions or feelings about how a case should turn out, it is not infrequent to find pressure emanating from public opinion as expressed in the media which may be very much in favour of a particular outcome.[578] Hon notes that public sentiment in the media may often unfortunately be based on inadequate or unreliable facts, and that due to ethical constraints, there is not much that prosecutors can do to change or counter such public opinion.[579] Hon explains that '[a]s long as the prosecutor and public are on the same page and the prosecutor has the wind at his back, there's not much of a problem here - but what happens when the prosecutor's obligation to see that justice is done conflicts with the prevailing public sentiment?'[580] Hon refers to a prime example in the United States

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[572] *Ibid* 37.
[573] Wallace (2004-2005) *Delaware Lawyer* 21.
[574] *Ibid* 21.
[575] *Ibid* 22.
[576] *Ibid* 22.
[577] *Ibid* 21.
[578] WL Hon *Prosecuting under pressure* (2012) <http://www.tdcaa.com/journal/prosecuting-under-pressure> (accessed 06-06-2017).
[579] *Ibid*.
[580] *Ibid*.

of America where a prosecutor apparently allowed himself to make decisions based upon the intensity of media attention surrounding a pending rape case rather than on an overriding sense of fairness or objectivity where there was no case; the charges were later dropped by the Attorney-General. As another writer notes, the media initially depicted the case as a sordid tale of spoilt, white student-athletes from an elite university who took advantage of an impoverished and troubled black woman, and that in essence the prosecutor positioned himself in the media as the knight in shining armour determined to ride roughshod over the accused in order to right a grievous injustice.[581] The prosecutor made several improper public statements to the media during the pre-trial phase where he cast the prospective accused in a poor light. The prosecutor moreover went so far as to fail to disclose exculpatory DNA evidence to the defence and he made other mistakes regarding the discovery process.[582] What ultimately emerged from that situation is that the prosecutor concerned was removed from office and disbarred.[583]

Hon correctly comments that '[a]t the end of the day, the prosecutor has to be able to step back from the spotlight and cameras and make very important decisions based upon credible evidence and not what people who have less than the entire picture expect. Never has that old adage "to thine own self be true" been more meaningful than for the prosecutor who has to handle a high-profile, high-publicity case.'[584]

As may happen in the case of investigating officers being under pressure from various quarters, including the media and victims or their families, to effect arrests and solve crimes, prosecutors must be careful not to adopt so-called 'tunnel vision' on account of pressure or influence from any political grouping, the police, media or victims as to a particular outcome,[585] but keep an open mind, that is to say, they must retain their independence and objectivity and recognise the rights of the accused[586] and prevent innocent suspects from being charged with crimes.

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[581] DS Medwed 'Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution' (2010) 31 *Cardozo Law Review* 2187 2193.
[582] *Ibid* 2193-2195.
[583] Hon *Prosecuting under pressure*.
[584] *Ibid*.
[585] Medwed (2010) *Cardozo Law Review* 2201-2206.
[586] *S v Masoka and Another* 2015 2 SACR 268 (ECP) para 13; *S v Tshotshoza and Others* 2010 2 SACR 274 (GNP) para 18; Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-29; De Villiers (2010) *THRHR* 129: 'The prosecutor must reconcile this responsibility to protect the general public and at the same time to protect the rights of the accused.'

Prosecutors who view their role as embracing a duty to truth 'are less responsive to community pressures or the influence of crime victims', but rather approach the evidence critically, testing and retesting the validity of the hypothesis of guilt, carefully sifting and evaluating evidence and having the moral courage to refuse to prosecute a case in which they lack personal confidence of the accused's guilt.[587] These prosecutors are also 'animated by a credo that to be a good prosecutor "requires commitment to absolute integrity and fair play; to candor and fairness in dealing with adversaries and the courts; to careful preparation, not making any assumption or leaving anything to chance; and to never proceeding in any case until convinced of the guilt of the accused or the correctness of one's position."'[588] It is trite that the prosecutor must ensure that all reasonable lines of enquiry are made about evidence as part of the prosecutor's duty to prosecute without fear, favour or prejudice, irrespective of whether such enquiries are to the advantage or disadvantage of the alleged offender.[589] The prosecutor's duty is not simply to rubber-stamp a police official's recommendation which has no foundation in fact or law, but to apply an independent and objective mind to the facts of the case; the prosecutor must not act in 'robotic mode'.[590]

It has been noted above that the concept of prosecutorial impartiality does not mean not acting adversarially, but acting fairly, ie avoiding discrimination.[591] The duty to act impartially is therefore part of the more general duty to act without fear, favour or prejudice.[592] Prosecutors are to carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.[593] Prosecutors are also required to protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.[594] However, the impartiality that is required of prosecutors is not the same as that required of the presiding judicial

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[587] Gershman (2001) *Georgetown Journal of Legal Ethics* 353.
[588] *Ibid* 353.
[589] See Paragraph C(*g*) of the *Code of Conduct for Members of the National Prosecuting Authority*.
[590] See Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-40B. See also *Lapane v Minister of Police and Another* 2015 2 SACR 138 (LT) paras 49, 54.
[591] *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 9.
[592] *Ibid* para 9.
[593] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 12, with reference to the *United Nations Guidelines on the Role of Prosecutors*.
[594] *Ibid* para 12.

officer.[595] Presiding officers are held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system.[596] The presiding officer must keep an open mind throughout the proceedings until judgment; he or she is not permitted to form an early opinion as to the guilt or innocence of the accused.[597] The presiding officer is the arbiter of the guilt or innocence of the accused and is the ultimate repository of the fairness of the trial.[598] It is inevitable that the prosecutor, on the other hand, will form an early opinion as to the guilt of the accused to found the institution of criminal proceedings and thus entertain a natural bias or predisposition towards the guilt of the accused.[599] In an adversarial trial, the prosecutor, in conducting the prosecution on behalf of the State, will be partisan, and thus he or she will inevitably be perceived as biased.[600] It is virtually inconceivable that an accused in a criminal case would ever hold the view that a prosecutor is objective, given that it is the prosecutor who reads the case docket, compiles the charge sheet and ultimately prosecutes the accused.[601] Whilst the prosecutor must not conduct him- or herself so as, in the eyes of the accused, to project a malign character, the prosecutor is nevertheless, under the adversarial system, not required to impress him- or herself upon an accused as a 'benign influence.'[602] The notion of a 'neutral prosecutor' at trial is a fiction.[603] In *Marshall v Jerrico Inc*, the United States Supreme Court held that '[p]rosecutors need not be entirely "neutral and detached,"… In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law.'[604] A prosecutor 'cannot realistically remain a neutral agent of justice above the adversary fray'.[605] Once a decision has been made to prosecute and the case proceeds to

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[595] *Ibid* paras 11, 13; *R v Sole* 2001 12 BCLR 1305 (Les) 1330H-J.
[596] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 11.
[597] *R v Sole* 2001 12 BCLR 1305 (Les) 1330I-J.
[598] *Ibid* 1342B-C.
[599] *Ibid* 1330H-1331D. See also Zupančič (1982) *Journal of Contemporary Law* 68-69.
[600] *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.
[601] *S v Du Toit en Andere (2)* 2004 1 SACR 47 (T) 60*d-g*, 61*c*, 65*a-b*, as referred to with approval in *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 13.
[602] *R v Sole* 2001 12 BCLR 1305 (Les) 1332G-H.
[603] GC Harris 'The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused' (1995) 74 *Nebraska Law Review* 804 816.
[604] 446 US 238 248 (1980), as endorsed in *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA) para 15.
[605] Harris (1995) *Nebraska Law Review* 816.

trial, the prosecutor 'necessarily and inevitably makes the transition to a litigant in an adversary system. Any decision in the litigation process will be made with a mind to gaining maximum advantage, within the rules, for a successful prosecution.'[606] At this stage of the process, an analysis of any issue by the prosecutor will be shaped, consciously or unconsciously, by the prosecutor's genuine belief that the accused is guilty.[607] By the time a criminal case reaches trial, the prosecutor would have 'adopted a partisan advocate's posture.'[608] It is to be noted that '[d]espite the prosecutor's duty to seek justice, the prosecutor is still an advocate in an adversary system.'[609] The prosecutor is not the sole repository of justice, and accordingly the prosecutor's 'quasi-judicial' role should not be overplayed.[610] In the circumstances, any additional knowledge and understanding of the facts of a case which a prosecutor may derive from pre-trial publicity or judicial pronouncements on the facts contained in earlier civil judgments, cannot amount to prosecutorial bias of a kind that may result in trial prejudice.[611] After all, 'unfairness for trial purposes cannot be inferred from the mere fact that the prosecutor is partisan and holds a strong view that the accused is guilty.'[612] Rather, what one would look for, as borne out by the case-law, to establish prejudicial bias on the part of the prosecutor is, for example, where he or she wages a personal vendetta, impairs the conduct of the proceedings and the dignity of the court, or uses the same office as the trial judge's assessors,[613] or where he or she launches a prosecution upon patently insufficient evidence or seeks to foist his or her opinion in the matter upon the trial court.[614]

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606 *Ibid* 816.

607 *Ibid* 816. This of course 'does not assume any unethical motive or conduct on the part of the prosecutor.' (*Ibid* 816 n 49).

608 BA Green & FC Zacharias 'Prosecutorial Neutrality' (2004) *Wisconsin Law Review* 837 898-899.

609 CKY Lee 'Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines' (1994) 42 *UCLA Law Review* 105 171. The writer asserts that it is easier before a case has begun for a prosecutor to remain 'impartial, objective, and detached.' (*Ibid* 171).

610 Uviller (1973) *Michigan Law Review* 1159.

611 See the apposite findings in *S v Shaik and Others* 2008 1 SACR 1 (CC) paras 65-68, in the context of additional knowledge of the case which the prosecutor obtained in an investigatory position, that is, information which would not otherwise have been available to the prosecutor by virtue of his capacity as prosecutor to whom in the normal course the police would have made available the evidence of the case in the case docket. See also *Director of Public Prosecutions, Western Cape v Killian* 2008 1 SACR 247 (SCA); *R v Sole* 2001 12 BCLR 1305 (Les).

612 Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-64C, with reference to *Porritt and Another v National Director of Public Prosecutions and Others* 2015 1 SACR 533 (SCA).

613 See *S v Shaik and Others* 2008 1 SACR 1 (CC) para 66; *Director of Public Prosecutions, Western Cape v Killian* 2008 1 SACR 247 (SCA) para 25.

614 *R v Sole* 2001 12 BCLR 1305 (Les) 1331C-D.

It can be seen, in light of the above considerations, that a prosecutor confronted with pre-trial publicity in relation to a case he or she is seized with, must firstly, in the exercise of the discretion to prosecute, devote his or her attention, as in the normal course, to a critical, fair and objective examination of the witness statements, documentary evidence and other evidence contained in the police case docket, directing the police to conduct further investigations where necessary.[615] The decision to prosecute must be based on credible and reliable evidence and not on media reports. In performing their duties without fear, favour or prejudice, prosecutors should 'remain unaffected by individual or sectional interests and public or media pressures'.[616] When criminal proceedings are instituted, the prosecutor is not to secure a conviction at all costs, but must present all the facts in an objective and fair manner so as to place the court in a position to arrive at the truth.[617] After all, 'the judiciary can only fulfil its role effectively when it is assisted by independent, fair-minded prosecutors, and an independent bar.'[618] It is axiomatic that '[a]n impartial, informed, and wise decision presupposes that the person deciding a case has been given the truth. To furnish him with a lie is to mock impartiality, to mislead rather than to inform, and to stultify the decisional process rather than to make it an exploration leading to mature judgment.'[619] Prosecutors in general fulfil these vital duties as gatekeepers of the criminal justice system and as an integral part of the accusatory process.[620] The prosecutor must moreover purposefully take all reasonable steps to ensure maximum compliance with his or her constitutional obligations, even under difficult circumstances.[621] Of course, prosecutors in South Africa, as in comparable jurisdictions, would also be required to respect the *sub judice* rule and 'refrain from making inappropriate media statements and other public communications or comments about criminal cases which are still pending'.[622]

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615 Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-40B.
616 Paragraph 3(*b*) of the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, as quoted in *R v Sole* 2001 12 BCLR 1305 (Les) 1325G-1326E.
617 *S v Macrae and Another* 2014 2 SACR 215 (SCA) para 28.
618 DC Prefontaine & J Lee 'The Rule of Law and the Independence of the Judiciary' (1998) 11 *Revue québécoise de droit international* 163 166-167 (footnote omitted).
619 Noonan Jr (1966) *Michigan Law Review* 1488.
620 See *S v Rozani; Rozani v Director of Public Prosecutions, Western Cape and Others* 2009 1 SACR 540 (C) 549*h*-550*a*.
621 *S v Jaipal* 2005 1 SACR 215 (CC) para 56. See also Van der Merwe 'Prosecuting Authority' in *Commentary on the Criminal Procedure Act* 1-29.
622 See Paragraph D2(*b*) of the *Code of Conduct for Members of the National Prosecuting Authority*. See too Part 6 of the *Prosecution Policy* of the NPA; *R v Sole* 2001 12 BCLR 1305 (Les) 1339-1340.

4.5 The vital importance of competent defence counsel in an accusatorial trial and the need for judicial assistance to the undefended accused

Nico Steytler observes that '[t]he foundational assumption of the adversarial system is a scepticism about trusting the state to produce the truth and protect the interests of the accused… Those goals are best secured by the parties themselves. However, for the system to work, there should be equality of arms between the parties.'[623] Since the accusatorial or adversarial mode of trial is 'based on the premise that truth-finding is enhanced if the prosecution and defence are responsible for presenting their respective cases', it is vital that both the prosecution and defence should have equal opportunities to adduce evidence, challenge or test the opponent's evidence and make submissions to the court, and properly or competently so.[624] It is in this context that the so-called 'equality of arms' principle has developed.[625] Indeed, a fair trial 'envisages an "equality of arms"'; '[t]he right to equality before the law must also extend to equality in criminal trials. A fair trial embraces equality before the law between litigants in a criminal trial. Although inequalities between accused persons are inherent in any criminal justice system… inequalities between opposing litigants in a criminal trial is contrary to the principle of a fair trial.'[626] The adversarial system that prevails in our country 'assumes a forensic contest that is more or less evenly matched.'[627] However, the sad reality is that all too frequently such a contest is not so evenly matched; '[a]n unrepresented accused is usually disadvantaged, first, by a lack of legal knowledge and skill, and, second, because he or she suffers the disability of not being able to dispassionately assess and present his or her case as well as trained counsel for the State can.'[628] 'It cannot therefore be doubted that a criminal trial is most fairly conducted when both prosecution and defence are represented by competent counsel.'[629] It has been held that '[a] criminal trial is an exceedingly serious matter for an accused and he must be given every reasonable opportunity of having his case presented to best

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[623] Steytler (2001) *Law, Democracy & Development* 3.
[624] See Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 335-336; *S v Sebofi* 2015 2 SACR 179 (GJ) para 65.
[625] Van der Merwe supra 335. See also *S v Mofokeng* 2004 1 SACR 349 (W) para 20.
[626] *S v Lavhengwa* 1996 2 SACR 453 (W) 477*j*-478*b*.
[627] *Legal Aid Board v The State and Others* 2011 1 SACR 166 (SCA) para 1.
[628] *Ibid* para 1.
[629] *Ibid* para 2. See also the comments in Steytler (2001) *Law, Democracy & Development* 3-6, 20; Steytler *The Undefended Accused on Trial* 10; Devlin *The Judge* 67.

advantage.'[630] For this reason, legal representation for an accused under our accusatorial system either privately or at State expense (ie through legal aid) is, as one commentator notes, 'regarded as a necessity, not a luxury.'[631] Or as was argued in the Appellate Division decision of *S v Rudman and Another; S v Mthwana*, in South Africa's adversarial system of criminal procedure 'legal representation for the accused becomes indispensable.'[632] It has also been argued that 'implicit in a fair hearing under the adversarial process is the ability of the accused to present his/her case in a legally effective manner. Where the accused lacks that ability, legal representation is essential, otherwise the trial will not be fair.'[633] The Supreme Court of Appeal has observed that '[t]he entitlement of a person charged to be represented, if necessary, by a legal practitioner at public expense is *an important safeguard of fairness* in the administration of criminal justice', and that '[a]n entitlement to legal aid is a measure which reduces the possibility of an injustice and enhances the prospects of a fair trial.'[634]

Steytler argues that '[i]n the context of an adversarial system of criminal justice there should be equality of arms; an accused should have a fair opportunity to defend him or herself when pitted against the resources of the state. The lack of equality of arms is most obvious when an accused is unrepresented.'[635] For Steytler, equality of the parties is a 'precondition' for the pursuit of a fair trial in the adversary system.[636] After all, the fundamental basis of the adversary system '"is that each side is accorded a participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments."'[637] 'Although the right to participate in decision-making is also an essential ingredient of inquisitorial systems, the central difference in the adversary system is that the court's decision rests primarily on the evidence and argument advanced by the participating parties. The court is not required to participate actively in the process since the adversary system is predicated on the assumption that each party to the dispute will

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[630] *S v Mpetha and Others (1)* 1983 1 SA 492 (C) 495H.
[631] Bekker (2004) *CILSA* 176.
[632] 1992 1 SA 343 (A) 348D.
[633] Bekker (2004) *CILSA* 177, stating also (*ibid*) that 'American decisions have recognised both the practical and logical *nexus* between legal representation and a fair trial.' See also *S v Rudman and Another; S v Mthwana* 1992 1 SA 343 (A) 346H-I.
[634] *Legal Aid Board v The State and Others* 2011 1 SACR 166 (SCA) para 2 (my emphasis).
[635] Steytler *Constitutional Criminal Procedure* 216 (footnotes omitted).
[636] Steytler *The Undefended Accused on Trial* 2.
[637] *Ibid* 6, quoting Fuller 'The Adversary System' in *Talks on American Law* 41.

protect its own interests. It is expected that all persons, motivated by enlightened self-interest, would participate vigorously in the dispute resolution and that as a result of the accused and prosecutor strongly promoting and protecting their own interests, a just decision will eventually emerge.'[638] The principle feature of the accusatorial system 'is that the two litigants, the State and the accused, are responsible to ensure that justice is done.'[639] And '[o]ne of the fundamental principles of a fair trial is that the accused should be afforded the opportunity to participate in the decision-making processes which may affect his interests.'[640] In the circumstances, for the accused to receive a fair trial is largely dependent upon his or her desire and ability to protect and promote his or her own interests, and to assert the rights that would guarantee him or her a fair trial.[641] It is here that able or competent legal representation for an accused is necessary in order that the opportunity to participate in the decision that is ultimately reached by the trial court is 'afforded and utilized fully.'[642] As was, for example, held in this regard in *S v Nqula*: 'It is to my mind a matter of considerable importance in the interests of justice and the administration of justice that every accused person should be accorded every opportunity of putting his or her case clearly or succinctly to the court and this can only be properly done when it is put by a person who is trained in the law. Such a person must obviously be in a much better position to put the case of an accused person much better and much more clearly than that person could fairly do himself.'[643]

Steytler argues further that where in adversarial proceedings the 'parties are permitted to draw the parameters of the dispute and the court is called upon for a decision on the evidence produced by them', the 'party-orientation of the evidence may lead to the suppression and distortion of evidence, for the "truth" that a party may present is "an account edited with vested interests in mind". In the end the court cannot establish the material truth, but merely decides which party has adduced the more credible evidence.'[644] Steytler opines that '[i]f the truth may be distorted by two equal and combative parties, it seems highly improbable that the

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[638] Steytler *The Undefended Accused on Trial* 6.
[639] *Ibid* 8.
[640] *Ibid* 63.
[641] *Ibid* 8, 9.
[642] *Ibid* 63. See also *S v Mafu and Others* 2008 2 SACR 653 (W) para 24.
[643] 1974 1 SA 801 (E) 804E-F.
[644] Steytler *The Undefended Accused on Trial* 9 (footnotes omitted).

truth will emerge where one of the parties is undefended, poorly defended, or does not have the same resources to gather or present evidence. The parameters of the dispute will in such a case be drawn by the prosecution', with the result that 'only one comprehensive and coherent presentation of evidence will be advanced to the court, and this must inevitably prevail.'[645] Such a system therefore underscores the need for competent or effective legal representation for the accused, particularly in adhering to the principle of equality.[646] Indeed, the party-orientation of the proceedings and the largely passive stance of the presiding officer 'means that in the adversary system there can be little chance of procedural justice without legal representation for both parties to the dispute.'[647] Steytler suggests that the adversary system breaks down in practice when there is no legal representation.[648]

Steytler sums up the matter well with regard to the purpose or rationale of the accused's constitutional right to legal representation, as follows:[649]

> The right to a lawyer is an essential feature of the right to a fair trial as lawyers play a critical role in ensuring that the accusatorial system, the foundation of a fair trial in the common-law tradition, produces a just result. In an adversary system a court's decision rests primarily on the evidence and argument advanced by the parties and the system is predicated on the assumption that parties will protect their own interests through their vigorous participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision. Because effective participation requires legal knowledge and courtroom skills, accused need the assistance of lawyers who have such knowledge and skills. With the constitutionalisation of criminal procedure, the need for legal assistance is even greater; not only is a fair trial likely to emerge through skilled participation, but other constitutional rights, such as privacy, can also be vindicated through the criminal process.[650]

The conduct expected of a judicial officer under our predominantly accusatorial system, especially in relation to the principle of 'equality of arms', was crisply enunciated by the Court in *S v Maasdorp* to be as follows:[651]

> This case, in my view, is a classical example of how a presiding officer should not behave, particularly in a criminal trial with our predominantly adversarial system. It is a trite principle of our criminal justice system, which is deeply ensconced in our Constitution, that every

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[645] *Ibid* 9.
[646] *Ibid* 10.
[647] *Ibid* 10.
[648] *Ibid* 10. See also Steytler (2001) *Law, Democracy & Development* 3-6, on poor representation.
[649] Steytler *Constitutional Criminal Procedure* 302 (footnotes omitted).
[650] Cited with approval in *S v Lusu* 2005 2 SACR 538 (E) para 12.
[651] 2008 2 SACR 296 (NC) para 15.

> accused person is entitled to a fair trial. Amongst others, this requires that presiding officers should not only be fair and impartial but must assiduously ensure that they are in fact seen to be impartial. Our criminal justice system operates from a basic premise of 'equality of arms'. This suggests that, where both the State and the accused are legally represented, the presiding officer should try by all means to restrain himself, exercise self-control and give the parties the freedom and latitude to present their cases as best they can and without any undue interference. This is so because the assumption is that, both of them being legally trained and qualified, have prepared their cases properly and know what evidence they wish to present and how they wish to conduct their trial. It does not augur well for any presiding officer to become so involved in the case for one party to an extent where a perception is created that he/she has become partisan and partial.

Where the accused is unrepresented, it is settled law that he or she should be assisted by the trial court and informed of his or her rights.[652] Indeed, '[a] heavier burden rests on the prosecutor and the court to ensure that such a trial is fair in all respects.'[653] In *S v Simxadi and Others* it was held that as part of the accused's constitutional right to a fair trial 'the presiding officer should explain to the undefended accused the essential allegations against him or her and the nature of the evidence that will be required in order to refute those allegations. When an undefended accused experiences difficulty during cross-examination, the presiding officer must help the accused in clarifying the issues, formulating the questions, and putting his or her defence properly to the witnesses. Similarly, where an undefended accused through incompetence or ignorance fails to cross-examine a witness on a material issue, the presiding officer should question the witness in order to reduce the risk of the failure of justice.'[654] The presiding officer is moreover required to assist the accused in eliciting his or her version, either during his or her evidence-in-chief or after cross-examination by the prosecutor.[655] The Court in *Simxadi*[656] observed that for the right to a fair trial to have any meaning where the accused is unrepresented, it must include the obligation described in *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO and Another*, as follows:[657]

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[652] See, for example, Bekker (2004) *CILSA* 181.
[653] *Ibid* 181, with reference to, for example, *S v Mofokeng* 1992 2 SACR 261 (O) 264*c*. The writer also cites *S v Simxadi and Others* 1997 1 SACR 169 (C) 171*a-d*, where it was pointed out that an accused's constitutional right to a fair trial includes assistance by the court to the undefended accused.
[654] 1997 1 SACR 169 (C) 171*c-d*.
[655] *Ibid* 171*g*.
[656] *Ibid* 171*b*.
[657] 1989 3 SA 368 (E) 378A-379A.

> At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights - the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence - and in comprehensible language to explain to him the purpose and significance of his rights… During the State case a presiding judicial officer is at times 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… Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question - not cross-examine - the witness on the issue so as to reduce the risk of a possible failure of justice… If, at the close of the State case, an undefended accused is not discharged, the presiding judicial officer is obliged to inform him of his rights and in clear and unequivocal terms explain the courses open to him… The judicial 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.[658]

In *Rudman*, the Court added that '[f]rom this brief review of the rules of practice which have been evolved by the South African judiciary it is apparent that the presiding judicial officer in the trial of an undefended accused is required to take a more active part than a judicial officer is permitted in the orthodox accusatorial system, thereby, in some measure, redressing the disadvantage the undefended accused may suffer from the lack of legal representation. The value to an undefended accused of, and the benefit he derives from, judicial assistance emphasises the importance of an unfaltering judicial observance of the rules of practice intended for the protection of the undefended accused'.[659] Of course, it must be borne in mind that 'the duty of the presiding officer is not to descend into the arena as if a legal representative of the accused. He must tread a very fine balance between remaining the objective presiding officer and an "*assistant*" or "*guide*" to an unrepresented accused.'[660] The Appellate Division expressed itself thus on the aspect in *S v Sigwahla*:[661]

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[658] See also, for example, *S v Balatseng* 2005 2 SACR 28 (B) para 14.

[659] 1989 3 SA 368 (E) 379A-C. See also Steytler *The Undefended Accused on Trial* 221-225, 230, where the writer discusses what is required of an 'activist' judicial officer when the accused is undefended, broadly being (*a*) a duty to facilitate the accused's participation in the proceedings as an adversary by advising him or her of his or her rights and duties and assisting him or her in their exercise; (*b*) a duty to control the prosecutor in the exercise of his or her powers; and (*c*) a duty to establish a reliable factual basis before arriving at a decision.

[660] *S v Tshidiso* 2002 1 SACR 207 (W) 213*f* (Court's italics).

[661] 1967 4 SA 566 (A) 568G-H.

> A judicial officer should ever bear in mind that he is holding a balance between the parties, and that fairness to both sides should be his guiding star, and that his impartiality must be seen to exist. There are occasions, particularly where a party is unrepresented, when the judicial officer will properly take some part in the examination of witnesses; but in the main, and as far as is reasonably possible, he will usually tend to leave the dispute to the contestants, interrupting only when it is necessary to clarify some point in the interests of justice. Thereby he is better able to form objective appraisals of the witnesses who appear before him, and he also avoids creating wrong impressions in the minds of those present.

It is submitted that competent and effective legal representation for an accused, as with the prosecution, in a high-profile case which generates media attention would also be necessary to steer the trial court's mind away from pre-trial publicity and to ensure that the court remains focused on the evidence presented at trial. Where the accused is unrepresented, there may be an added duty on the prosecutor to focus the court's mind in these circumstances solely on the evidence produced at trial. The prosecutor could effectively do this in the opening address by indicating what evidence he or she will seek to adduce in proving the State's case against the accused beyond a reasonable doubt, and in the closing submissions after all the evidence has been presented.[662]

4.6 A public trial (judicial proceedings a public event)

In terms of section 35(3)(*c*) of the Constitution, an accused's right to a fair trial includes the right 'to a public trial before an ordinary court'. Section 152 of the Criminal Procedure Act also provides that criminal proceedings generally or ordinarily shall take place in open court. This right stems from the fundamental principle of open justice which is often expressed by the maxim that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[663] The principle of open justice is multifaceted and 'insists that trial proceedings be conducted publicly in open court and ordinarily, that is how trials in our criminal justice system are held.'[664] Moreover, '[t]he principle of open justice is one which strikes at the very heart of what South Africa has been, and is still, trying to achieve in the post-apartheid era.'[665] The principle of open justice 'is one of the most

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[662] These facets of the trial are dealt with more fully below.
[663] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 11.
[664] *Ibid* para 11.
[665] *Ibid* para 11.

pervasive axioms of the administration of common-law systems.'[666] The tradition of open justice has its origins in England before the Norman Conquest, when freemen in the community participated in the public dispensing of justice. The tradition has spread from England, particularly to those parts of the world which have adopted and retained that common-law heritage, but is also observed and respected in civil-law societies.[667] 'Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see.'[668] In South Africa, the principle of open courtrooms is also not new.[669] Not only is it firmly part of our common law,[670] but according to Justice Dikgang Moseneke in an extra-curial address:[671]

> In traditional African culture, the shade of a tree was the place where disputes of society were mediated and resolved. It was on this soil that the community would meet for a "lekgotla". There was room for all to have their say. Everybody was an active participant of the process. This is how justice was done. It is the age-old concept of justice under a tree.

The principle of open justice has evolved and is now constitutionally entrenched.[672] It provides to all criminal accused the right to a fair and public trial.[673] The Constitutional Court has appositely held that '[a]t the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done.'[674] Melunsky J in *K v The Regional Court Magistrate NO, and Others* found that 'the requirement that the [accused's] trial must be public amounts to the constitutionalisation of a long-recognised principle of transparency in criminal proceedings',[675] and that 'it is of the essence of a democratic society that the criminal

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[666] *Cape Town City v South African National Roads Authority and Others* 2015 3 SA 386 (SCA) para 13, with reference to JJ Spigelman 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 *University of New South Wales Law Journal* 147 150.

[667] *Cape Town City v South African National Roads Authority and Others* 2015 3 SA 386 (SCA) para 13.

[668] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 29.

[669] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 15.

[670] *S v Geiges and Others (M & G Media Ltd and others intervening)* 2007 2 SACR 507 (T) para 47; *S v Leepile and Others (4)* 1986 3 SA 661 (W) 664F; *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 11; Brand *Media Law in South Africa* 81 (para 193), noting that the open court principle was established in South African law before the advent of the constitutional era.

[671] Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 4.

[672] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 15. See also, for example, *S v Geiges and Others (M & G Media Ltd and others intervening)* 2007 2 SACR 507 (T) para 49.

[673] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 15.

[674] *S v Dzukuda and Others; S v Tshilo* 2000 2 SACR 443 (CC) para 11.

[675] 1996 1 SACR 434 (E) 447*b*.

law should be administered publicly and openly.'[676] The Constitutional Court has also pointed out that 'as a matter of general policy judicial proceedings of any significance are conducted in open court, to which everybody has free access and can assess the merits of the dispute and can witness the process of its resolution.'[677] The public has a 'fundamental, natural yearning to see justice done'.[678] The public 'has a legitimate interest in all criminal trials and are entitled to be kept informed in that regard.'[679] What is more, the public interest in knowing what transpires during the trial in a high-profile or shocking or notorious matter, such as a murder case involving the killing of a controversial figure who was the leader of a political organisation, may be especially 'acute'; it would not be surprising to find a heightened sense of curiosity on the part of the public to know what the trial would reveal.[680] Such was also overwhelmingly demonstrated in the Oscar Pistorius trial involving the Paralympic champion who murdered his glamour model girlfriend, and will be the case in the impending trial of former State president Jacob Zuma, involving serious charges of racketeering, money laundering, fraud and corruption.

The general principle that all court proceedings in South Africa should be conducted in public means that any member of the public, including journalists, should be able to attend court proceedings, subject to certain exceptions.[681] A trial is public 'when members of the public, including the media, have access to the courtroom and may report on the proceedings.'[682] An extension of the principle of open courts is that journalists or the media should be able to report on court proceedings as it is in the public interest for court proceedings to be disseminated.[683] Indeed, it is 'essential to a democracy and crucial to the rule of law that the courts are seen to function openly.'[684] 'The media act as interlocutors for the public, the vast majority of whom are unable to attend court cases and see justice being

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[676] *Ibid* 447*d*.
[677] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 18.
[678] *Richmond Newspapers, Inc. v Virginia* 448 US 555 571 (1980).
[679] *S v Geiges and Others (M & G Media Ltd and Others intervening)* 2007 2 SACR 507 (T) para 52.
[680] See *Media 24 Ltd and Others v National Prosecuting Authority and Others (Media Monitoring Africa as Amicus Curiae): In re S v Mahlangu and Another* 2011 2 SACR 321 (GNP) paras 17, 24. See also *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 56.
[681] Brand *Media Law in South Africa* 81 (para 193). See also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) paras 31, 50.
[682] Steytler *Constitutional Criminal Procedure* 251. See too PJ Schwikkard 'Arrested, Detained and Accused Persons' in I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 744 795 (para 32.7(*a*)).
[683] Brand *Media Law in South Africa* 81 (para 194).
[684] *Edmonton Journal v Alberta (Attorney General)* (1990) 45 CRR 1 13 (Westlaw para 84).

administered.'[685] The press and other media may be described as the 'eyes and ears' of society in reporting on court proceedings.[686] The media 'are agents of the public. There exists a tacit contract between the public and the media, that the media are the ears of the public.'[687] The media 'are the messengers'.[688] The media should be allowed to carry out its mandate on behalf of the public.[689] The United States Supreme Court observed as follows on the aspect in *Richmond Newspapers, Inc. v Virginia*:[690]

> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public.[691]

The media 'must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.'[692] Indeed, the constitutional right to freedom of expression, incorporating freedom of the press and other media and freedom to receive or impart information or ideas, recognises and protects a broader element of the principle of open justice which focuses, not on the accused's right to a fair trial, but on the public's right to be informed of the conduct of all criminal proceedings and the importance for the administration of justice that they be so informed.[693] In *Van Breda v Media 24 Ltd and Others*, the Supreme Court of Appeal held that: 'Freedom of the press and the principle of open justice are closely interrelated. The media, reporting accurately and fairly on legal proceedings and judgments, make an invaluable contribution to public confidence in the judiciary and, thus, to the rule of law itself.'[694] The principle of open justice can in the circumstances be said to be based on two main

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[685] Brand *Media Law in South Africa* 81 (para 194). See also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 101.

[686] Smith (1999) *Current Legal Problems* 130, 140.

See also *Attorney-General v Guardian Newspapers Ltd (No 3)* (1992) 1 WLR 874 at 886H, where the status of the news media was recognised 'as the trustees of the general public, whose eyes and ears they are'.

[687] *Media 24 Ltd and Others v National Prosecuting Authority and Others (Media Monitoring Africa as Amicus Curiae): In re S v Mahlangu and Another* 2011 2 SACR 321 (GNP) para 17.

[688] *Ibid* para 17.

[689] *Ibid* para 17.

[690] 448 US 555 572-573 (1980).

[691] Cited with approval by Ackermann J (as he then was) in *S v Leepile and Others (4)* 1986 3 SA 661 (W) 664C-D, 666A, in underscoring the need for the public to be fully informed, as far as was possible, of the evidence adduced in the trial, 'so that it [could] be able properly to evaluate any judgment given by the Court.' (*Ibid* 665J).

[692] *Edmonton Journal v Alberta (Attorney General)* (1990) 45 CRR 1 13 (Westlaw para 84).

[693] *S v Geiges and Others (M & G Media Ltd and Others intervening)* 2007 2 SACR 507 (T) para 52.

[694] 2017 2 SACR 491 (SCA) para 16.

considerations: 'The first is the fair-trial consideration because open justice is regarded as an important component of a fair trial. The second is the publicity consideration because members of society are entitled to be informed of the conduct of criminal proceedings and the administration of justice benefits from the publicity given to them.'[695] It is clear that '[f]ree speech goes hand in hand with open justice.'[696] In the *Van Breda* case, the Court observed that '[t]he media plays a vital watchdog role in respect of the court process. One of the aspirational goals of the media is to make governmental conduct in all of its many facets (including courts) transparent.'[697]

As evidenced for the first time in South Africa's legal history in the Oscar Pistorius trial, the principle of open justice now allows the televising or live public broadcasting of a criminal trial.[698] With the Pistorius case, 'the Rubicon had been crossed. The *Pistorius* trial, or more accurately the outcome of the pre-trial application to broadcast the proceedings, changed irreversibly the manner in which the media and the justice system of our country converge.'[699] The case 'ushered in a new era in the intersection between justice and the media.'[700] Mlambo JP, who presided over the pre-trial application, 'did what no South African court had before dared to do: media organisations were given permission to broadcast, live and in full Technicolor, a criminal trial.'[701] In *Van Breda*, the Supreme Court of Appeal pointed out that 'giving effect to the principle of open justice and its underlying aims now means more than merely keeping the courtroom doors open. It means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings. Broadcasting of court proceedings enables this to occur. Television presents the complete picture instantaneously. Television cameras do so by creating a comprehensive and instantaneous feedback loop between the trial participants and the television audience. In contrast, the print media simply does not operate with the

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[695] *S v Geiges and Others (M & G Media Ltd and Others intervening)* 2007 2 SACR 507 (T) para 53.
[696] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 11.
[697] *Ibid* para 47.
[698] See *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In re S v Pistorius; Media 24 Ltd and Others v Director of Public Prosecutions, North Gauteng and Others* 2014 1 SACR 589 (GP). See also *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 44.
[699] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 41.
[700] Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 2.
[701] *Ibid* 9. For a further discussion of this case, see Burns *Communications Law* 292-293.

same kind of interactive speed or attract so wide and responsive an audience.'[702] The Court added that televised proceedings 'aid in the public oversight of the judiciary.'[703] Moreover, the Court recognised that:

- In the light of the fact that members of the public acquire most of their news through the electronic media, it has to be somewhat counter-intuitive that they are not able to 'utilize the principle of open justice to their advantage to the same extent as the print media'.[704]
- Television allows viewers to feel that they are present in the courtroom.[705]
- Arguably, complete broadcast coverage of the trial is important to achieve the valuable ends served by increasing public access to judicial proceedings. In that regard, 'gavel to gavel' coverage, as it has sometimes been described, may be preferable to no (or limited) coverage. The way in which stories that have been told in court and retold by the media, may make a difference as to how the law is appreciated and the functioning of the court understood. With gavel to gavel coverage the role of the media more closely approximates that of a conduit rather than a processor and interpreter of court proceedings. By keeping cameras out of the courtroom, court reporters continue to be relegated to conveying information about judicial proceedings from the steps of the courtroom (as has traditionally been the case), despite the fact that the 'aural and visual nature of broadcasting would give the public a more direct sense of what has transpired than a verbal report in a highly summarised form'.[706]

The Court in *Van Breda* also alluded to the fact that a televised or live audio broadcast of a trial may be preferable to a dissemination of information relating to the trial proceedings on the internet or social media platforms such as Twitter (which many are increasingly turning to), where accuracy and fairness of reporting may be casualties – what would be the consequences for public understanding of the administration of justice and confidence in the judiciary in a medium such as Twitter where a message is limited to 140 characters or less?[707]

The Constitution (i) 'requires courts to observe the principle of open justice in the conduct of their proceedings', (ii) 'recognises the central role of the media, in particular, in ensuring open justice', and (iii) 'permits only the narrowest demonstrably justifiable infringement of the right of access to open court proceedings.'[708] After all, 'a judicial proceeding is a public event and information on

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[702] 2017 2 SACR 491 (SCA) para 46 (footnote omitted).
[703] *Ibid* para 47.
[704] *Ibid* para 47.
[705] *Ibid* para 49.
[706] *Ibid* para 51 (footnote omitted).
[707] *Ibid* para 64.
[708] *S v Geiges and Others (M & G Media Ltd and Others intervening)* 2007 2 SACR 507 (T) para 61.

the public record may be broadcast despite its highly sensitive nature.'[709] In *S v Geiges and Others (M & G Media Ltd and Others intervening)*, it was held that '[t]he open justice principle is a fundamental principle of our law. The starting point should therefore be that trial proceedings should be held in open court unless there are compelling reasons to close the doors of the court to the media and/or the public. If it then transpires that in the interests of the State, or of good order, or of the administration of justice, that such proceedings be held behind closed doors the court may make an appropriate order in the exercise of its discretion.'[710] There are a number of statutory exceptions to the open court or open justice principle which require justification in terms of the limitation clause.[711] Trials (or parts of trials) may be, and often are, held behind closed doors or *in camera*, amongst others, to protect the privacy or security of witnesses.[712] In many instances the requisite justifications overriding the open justice rule 'are obvious, for example, the need to protect vulnerable participants in the criminal justice system such as children and victims of sexual abuse – however, in other instances they will and do fail to pass constitutional scrutiny.'[713] Even in the case of a minor accused, the trial court may allow the media and the public to sit in a closed-circuit TV room, from where they could view the trial, instead of sitting in open court, having regard to the competing rights of the child accused.[714] Moreover, it was underlined in the *Van Breda* case that:[715]

> It is important to emphasise that whilst greater access by the public to the court system by means of televised proceedings would result in - (i) demystification of the judicial process; (ii) greater informed deliberation and critical assessment of the judiciary based on the public's ability to readily observe judicial proceedings; (iii) increased understanding of and respect for

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[709] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 57.
[710] 2007 2 SACR 507 (T) para 80.
[711] See sections 153 and 154 of the Criminal Procedure Act. See also Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 795 (para 32.7(*a*)).
[712] *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 15.
[713] Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 795 (para 32.7(*a*)) (footnote omitted). See also Brand *Media Law in South Africa* 83-84 (paras 201-202, 205-208); Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-42L-22-42V; Kruger *Hiemstra's Criminal Procedure* 22-16-22-25; Burns *Communications Law* 285-286, 295-297; *Nel v Le Roux NO and Others* 1996 1 SACR 572 (CC) para 17; *Centre for Child Law & others v Media 24 Limited & others* (871/17) 2018 ZASCA 140 (28 September 2018); Steytler *Constitutional Criminal Procedure* 251-254. Steytler also observes that under international law, five broad areas of *in camera* proceedings in criminal trials are recognised: morals, public order, national security, juveniles and a broad category of 'the interests of justice'. (*Ibid* 247). In Kruger *Hiemstra's Criminal Procedure* 22-18, it is opined that section 153 of the Criminal Procedure Act 'on the whole appears to comply with those norms.'
[714] *Media 24 Ltd and Others v National Prosecuting Authority and Others (Media Monitoring Africa as Amicus Curiae): In re S v Mahlangu and Another* 2011 2 SACR 321 (GNP) para 27.
[715] 2017 2 SACR 491 (SCA) para 58 (footnote omitted).

> the judiciary based on the public's increased ability to observe the daily working of the courts; (iv) improved journalistic standards relative to court reporting resulting from greater coverage of court proceedings and the development of court reporters specialising in judicial matters; and (v) heightened public awareness of deep-seated societal problems, the right to a public hearing does not automatically mean that trials must necessarily be broadcast live in all circumstances.

It would always remain open to a trial court to exercise its discretion under section 173 of the Constitution in directing that some or all of the proceedings before it may not be broadcast at all or may only be broadcast in (for example) audio form.[716] The court in this regard would need to balance the competing interests of freedom of the media and open justice, on the one hand, and the interests of the participants in the trial process and a fair trial or fair administration of justice, on the other.[717] It would remain the duty of the court to 'exercise a proper discretion in such cases by balancing the degree of risk involved in allowing the cameras into the courtroom against the degree of risk that a fair trial might not ensue.'[718] There could be no coverage of: *(a)* communications between counsel and client or co-counsel; *(b)* bench discussions; and *(c)* in camera hearings.[719] If a witness raised a valid objection to his or her evidence being televised, 'alternatives to regular photographic or television coverage could be explored that might assuage the witness's fears. For example, television journalists are often able to disguise the identity of a person being interviewed by means of special lighting techniques and electronic voice alteration, or merely by shielding the witness from the camera. In other instances, broadcast of testimony of an objecting witness could be delayed until after the trial is over. If such techniques were used in covering trials, the public would have more complete access to the testimony via television, and yet the witness could maintain some degree of privacy and security.'[720] The Court in *Van Breda* held further that '[w]henever an accused person in a criminal trial objects to the presence of cameras in the courtroom, the objection should be carefully considered. If the court determines that the accused's objection to cameras is valid, that may require that cameras be excluded. By framing the inquiry in these terms, courts will be better able to strike a constitutionally appropriate balance between policies favouring public

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[716] *Ibid* para 70.
[717] *Ibid* para 69.
[718] *Ibid* para 71.
[719] *Ibid* para 71.
[720] *Ibid* para 73.

access to legal proceedings and the accused's right to a fair trial. The court would accordingly have regard to all the relevant circumstances in identifying whether the right to a fair trial in a particular case is likely to be prejudiced.'[721] The Court in *Van Breda* proceeded to point out that the same considerations that come into play on the question of a pre-trial publication ban relating to pending court proceedings, as enunciated in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* (considered in chapter two),[722] apply on the question of a televised broadcast of trial proceedings; 'namely that courts will not restrict the nature and scope of the broadcast unless the prejudice is demonstrable and there is a real risk that such prejudice will occur. Mere conjecture or speculation that prejudice might occur ought not to be enough.'[723] It should not be forgotten that, as Justice Dikgang Moseneke observes:[724]

> The principle of open justice is, after all, a core part of the notion of participatory democracy, particularly one whose Constitution begins with the very words "democratic and *open* society". It is not a principle that should be defined in haste. The public is entitled to have access to courts, and to obtain information about them. Besides the obvious space limitation of there not being enough room in a courtroom to always fit everyone, and the distance limitation of court proceedings taking place in all four corners of our country, there is also the realistic point that not everyone wants to come to court to find out what is happening. Instead, they rely on the media to tell them. And we do not want a system in which the judicial system is "shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone". We want a system in which the public trusts that the judiciary is acting according to the "time-honoured standards of independence, integrity, impartiality and fairness." For that to happen, we must, as far as reasonably practicable, create means for the media to access, observe and report on the administration of justice.

For present purposes, the vital importance of open trials needs to be emphasised. The manifold salient objectives or purposes or benefits of open justice have been widely stated and affirmed by courts and writers alike to be as follows:

- The accused is afforded the right to a public trial in order that justice may be seen to be done.[725] But not only the accused possesses this right; the victims or survivors of crime and the broader community also have the

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[721] *Ibid* para 74. See also *ibid* para 62.
[722] 2007 2 SACR 493 (SCA).
[723] 2017 2 SACR 491 (SCA) para 75.
[724] Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' (15 May 2015) 8 (footnotes omitted) (author's emphasis).
[725] Snyckers & Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in *CLOSA* 51-120. See also *S v Muller and Others* 2005 2 SACR 451 (C) para 15.

right to see that justice is done in criminal matters.[726] 'The purpose of insisting on a public trial is to enable the public to be fully informed of the evidence, as far as it is possible to do so, so that it may properly be able to evaluate any judgment'.[727]

- 'Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process.'[728]
- 'The enshrinement of the right to a public trial ensures that secret trials employed by totalitarian states will not be tolerated under the Constitution'.[729] '"In the darkness of secrecy, sinister interest, and evil in every shape have full swing. *Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate*. *Where there is no publicity there is no justice*. Publicity is the very soul of justice. *It is the keenest spur to exertion and surest of all guards against improbity*. *It keeps the judge himself while trying under trial*."'[730] Secrecy has been described as '"tyranny's strongest shield"';[731] it encourages both the abuse of power and the suspicion that justice has not been done.[732] Denise Meyerson[733] comments that these points go a long way towards explaining why judges should discharge their duties in public and should publish the reasons for their decisions: 'publicity provides *an important safeguard against arbitrary and partial judicial decisions*.'[734] Justice is not a

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[726] *Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and Others* 2007 2 SACR 28 (CC) para 26.

[727] *K v The Regional Court Magistrate NO, and Others* 1996 1 SACR 434 (E) 447*b*. See also *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 29.

[728] *Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and Others* 2007 2 SACR 28 (CC) para 26. See also *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) paras 18-19; *Vancouver Sun, Re* (2004) 184 CCC (3d) 515 (SCC) para 25 (Westlaw); Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 795 (para 32.7(*a*)).

[729] *K v The Regional Court Magistrate NO, and Others* 1996 1 SACR 434 (E) 447*b-c*.

[730] *MacIntyre v Nova Scotia (Attorney General)* (1982) 65 CCC (2d) 129 (SCC) para 53 (Westlaw), quoting Jeremy Bentham (J Bentham *The Works of Jeremy Bentham* (Edited by John Bowring) (1838-1843)) (my emphasis). See also *Vancouver Sun, Re* (2004) 184 CCC (3d) 515 (SCC) para 24 (Westlaw); *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 99.

[731] Meyerson (2015) *Criminal Justice Ethics* 67.

[732] *Ibid* 68. Open justice thus makes an important contribution to the appearance of justice. (*Ibid* 68).

[733] At the time of writing, Meyerson was Professor of Law, Macquarie Law School, Macquarie University and Honorary Research Associate, Law Faculty, University of Cape Town.

[734] Meyerson (2015) *Criminal Justice Ethics* 67 (my emphasis).

cloistered value.[735] A public trial or open justice 'guards against the iniquities of secret trials'.[736] 'In any constitutional climate, the administration of justice thrives on exposure to light - and withers under a cloud of secrecy.'[737] The Constitutional Court has appositely held that:[738]

> Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based… Were criminal appeals to be dealt with behind closed doors, faith in the criminal-justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.

- An accused is to be 'tried publicly so that the trial *can be seen to satisfy the substantive requirements of a fair trial*.'[739]
- 'Access to the public ensures the legitimacy of the criminal justice system and acts as *an important safeguard of impartiality*.'[740] Self-evidently, informed and vocal public scrutiny, or free and frank debate in public about judicial proceedings, '*promotes impartiality, accessibility and effectiveness*, three of the important aspirational attributes prescribed for the Judiciary by the Constitution.'[741] 'The public is entitled to know exactly how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.'[742] The public nature of court proceedings '*enables the public to know that justice is being administered impartially*.'[743] In *Scott v Scott*, Lord Atkinson said:[744]

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a

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[735] *Vancouver Sun, Re* (2004) 184 CCC (3d) 515 (SCC) para 24 (Westlaw).
[736] Schwikkard 'Arrested, Detained and Accused Persons' in *The Bill of Rights Handbook* 795 (para 32.7(*a*)).
[737] *Toronto Star Newspapers Ltd. v Ontario* (2005) 197 CCC (3d) 1 (SCC) para 1 (Westlaw).
[738] *Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and Others* 2007 2 SACR 28 (CC) paras 25-26.
[739] *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) para 23 (my emphasis).
[740] Snyckers & Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in *CLOSA* 51-120-51-121 (my emphasis).
[741] *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 29 (my emphasis).
[742] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 32.
[743] *R v Legal Aid Board, ex parte Kaim Todner (a firm)* (1998) 3 All ER 541 (CA) 550*a*, cited in *Cape Town City v South African National Roads Authority and Others* 2015 3 SA 386 (SCA) para 13 (my emphasis).
[744] (1913) AC 417 463, endorsed in *Cape Town City v South African National Roads Authority and Others* 2015 3 SA 386 (SCA) para 13 (my emphasis).

> criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, *the best security for the pure, impartial, and efficient administration of justice*, the best means for winning for it public confidence and respect.[745]

Nico Steytler indicates that '[p]ublic trials mean public scrutiny; *the public may see whether judicial officers are independent and impartial, whether their decisions are rational and not arbitrary*'.[746] Similarly, the Supreme Court of Canada held in *Vancouver Sun, Re*:[747]

> Public access to the courts *guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law"… Openness is necessary to maintain the independence and impartiality of courts*.

And in *Richmond Newspapers, Inc. v Virginia*, Justice Brennan found:[748]

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. *Open trials assure the public that procedural rights are respected, and that justice is afforded equally*. *Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law*. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.[749]

- The principle of open justice promotes or enhances 'the *accountability* of courts and the administration of justice.'[750] The Constitutional Court has observed that '[o]pen courtrooms *foster judicial excellence*, *thus rendering courts accountable and legitimate*',[751] and that:[752]

> The principle of open justice is an incident of the values of openness, accountability and the rule of law, as well as a core part of the notion of a participatory democracy. All these are foundational values entrenched in the Constitution. Its preamble

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[745] See also *Khuja v Times Newspapers Limited and others* (2017) UKSC 49 para 12, where Lord Sumption reaffirmed this finding in *Scott* supra.
[746] Steytler *Constitutional Criminal Procedure* 250 (my emphasis).
[747] (2004) 184 CCC (3d) 515 (SCC) para 25 (Westlaw) (my emphasis).
[748] 448 US 555 595 (1980) (my emphasis).
[749] Quoted with approval in *K v The Regional Court Magistrate NO, and Others* 1996 1 SACR 434 (E) 447*e-f*.
[750] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 50 (my emphasis). See also *Van Breda v Media 24 Ltd and Others* 2017 2 SACR 491 (SCA) para 48; *Khuja v Times Newspapers Limited and others* (2017) UKSC 49 para 13; E Cameron 'Judicial accountability in South Africa' (1990) 6 *South African Journal on Human Rights* 251 253 (noting *inter alia* in this respect that '[i]f judges in a modern state… wish to avoid the taint of autocracy they have to be subject to public scrutiny of their functions').
[751] *Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and Others* 2007 2 SACR 28 (CC) para 26 (my emphasis).
[752] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SACR 408 (CC) para 97.

> contemplates "a democratic and open society in which government is based on the will of the people", whereas s 1(*d*) requires that our democracy shall ensure accountability, responsiveness and openness.[753]

Public scrutiny of judicial proceedings is '*a guarantor of the quality of justice*.'[754]

- The openness of court proceedings, also being one of the requirements of the rule of law, acts as a '*check*' on the judiciary.[755] In *S v Mamabolo (E TV and Others intervening)*, the Constitutional Court stated in this respect that public scrutiny of court proceedings performs an important constitutional function of constituting 'a democratic check on the Judiciary. The Judiciary exercises public power and it is right that there be an appropriate check on such power.'[756]
- A public hearing is necessary 'because the public nature of proceedings *deters inappropriate behaviour on the part of the court*.'[757] In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*, the Constitutional Court pertinently held:[758]

  > Open courtrooms *are likely to limit high-handed behaviour by judicial officers and to prevent railroaded justice, to mention two of the risks of secret justice*… Far from being intrinsically inimical to a fair trial, open justice is an important part of that right and *serves as a great bulwark against abuse*.[759]

- A public trial may also serve to promote the quality of the prosecution and enable the public to see whether the truth is established at the trial.[760]
- In the circumstances, a public trial buttresses other fair trial rights and the overall fairness of the trial.[761]
- 'Openness has long been a feature of our system of criminal justice. Various justifications for the public nature of most criminal proceedings

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[753] See also *ibid* para 29: 'The fact that courts do their work in the public eye is a key mechanism for ensuring their accountability.' See too *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In re S v Pistorius; Media 24 Ltd and Others v Director of Public Prosecutions, North Gauteng and Others* 2014 1 SACR 589 (GP) para 23.

[754] *Khuja v Times Newspapers Limited and others* (2017) UKSC 49 para 13 (my emphasis).

[755] Beinart (1962) *Acta Juridica* 113 (my emphasis).

[756] 2001 1 SACR 686 (CC) para 30.

[757] *R v Legal Aid Board, ex parte Kaim Todner (a firm)* (1998) 3 All ER 541 (CA) 549*j*-550*a*, endorsed in *Cape Town City v South African National Roads Authority and Others* 2015 3 SA 386 (SCA) para 13 (my emphasis).

[758] 2007 1 SACR 408 (CC) para 30 (my emphasis).

[759] See also *Edmonton Journal v Alberta (Attorney General)* (1990) 45 CRR 1 31 (Westlaw para 22).

[760] Steytler *Constitutional Criminal Procedure* 250.

[761] *Ibid* 250.

have been put forward. Most relate in some way to the simple truth that *an individual is much less likely to be subject to unfair or oppressive treatment at the hands of the state if tried in open proceedings*. As well, the public is much more likely to have confidence in an open system.'[762]

- Open justice is a means of securing the demonstration to the accused and the public at large how and why a conviction and punishment is justified.[763]
- The glare of full contemporaneous publicity or reporting of criminal trials, which are public events, not only ensures that trials are properly conducted and serves as 'a valuable check on the criminal process'; it also 'promotes the values of the rule of law.'[764]
- Publicity of court proceedings is moreover identified in instrumental terms 'as a procedure for maximising the factual accuracy of adjudication.'[765] It is felt that publicity is an essential device for deterring untrustworthy and inaccurate or unreliable testimony – publicity, then, would be a means of potentially increasing the factual accuracy of adjudication and consequently the verdict's legitimacy which is to be found in a factually correct outcome.[766] This, however, is not demonstrated in the Oscar Pistorius case, where the trial court, despite the world watching the trial (the trial was subjected to intense worldwide scrutiny), based its material factual finding that Pistorius thought that there was an intruder inside the toilet, and not Reeva Steenkamp, on patently dishonest, unreliable and improbable testimony given by Pistorius (Pistorius was shown and found to be 'a very poor witness' who at trial gave materially contradictory evidence and a version that contained inherent improbabilities).[767]

It is clear nonetheless that the publicity of court proceedings is a cornerstone principle of the South African accusatorial system. In light of the above purposes and benefits of a public trial, it is submitted that open justice is an indispensable in-built procedural mechanism or procedural safeguard that would guarantee an

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[762] *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995) 98 CCC (3d) 20 (SCC) para 116 (Westlaw para 127) (my emphasis).
[763] I Dennis 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2010) *The Criminal Law Review* 255 262.
[764] *In re S (A Child) (Identification: Restrictions on Publication)* (2005) 1 AC 593 para 30.
[765] Dennis (2010) *The Criminal Law Review* 261.
[766] *Ibid* 261. See also L Ellison *The Adversarial Process and the Vulnerable Witness* (2001) 7.
[767] *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA) paras 17-18, 53.

accused being tried solely on the evidence before court, and not on any information received outside that context, such as pre-trial publicity. Open justice may promote the independence, impartiality, accountability and appropriate conduct of the trial court, as well as the competency and commitment of the prosecutor, in the midst of pre-trial publicity and publicity attendant of the trial. The open justice principle means that the presiding officer is publicly accountable for his or her decision,[768] which would generally encourage greater care being exercised by him or her in ensuring that the decision is based solely on legitimate intrinsic considerations, namely the evidence and submissions of counsel presented at trial, and not on any extraneous factors or extrinsic considerations such as pre-trial publicity or any biases, predilections, predispositions or preconceptions.

4.7 The primacy of orality

A fundamental tenet or hallmark of the South African accusatorial system is the principle of orality.[769] The search for truth takes place during the trial, which places reliance on orality.[770] The testimonies of all witnesses at a criminal trial must normally be given orally.[771] Deon Erasmus states in this regard that '[t]he emphasis is on fact-finding through the leading of evidence-in-chief and cross-examination of the witnesses. Less emphasis is accordingly placed on pre-trial procedures such as disclosure.'[772] SE van der Merwe points out that '[i]n order to ensure that the principle of orality – with its emphasis upon confrontation – is enforced in an orderly fashion, the questioning of each witness is in principle subjected to the following successive stages: examination-in-chief, cross-examination, re-examination.'[773] The author observes elsewhere that the emphasis upon witnesses giving their evidence

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[768] See, for example, LL Cavise 'The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why some Latin American Lawyers hesitate' (2007) 3 *Original Law Review* 1 23.

[769] In Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 338, it is noted, with reference to *S v Adendorff* 2004 2 SACR 185 (SCA) para 20, that '[i]n the course of the criminal trial the principle of orality must be observed'. See also section 161(1) of the Criminal Procedure Act, which provides that: 'A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.' In Steytler (2001) *Law, Democracy & Development* 3, it is observed that '[t]he key element of the [adversarial] trial is its orality - evidence is produced *viva voce,* with the written statements of witnesses given little value.'

[770] Erasmus (2015) *Stellenbosch Law Review* 664.

[771] *S v Van Zyl and Others* 2016 4 NR 1000 (HC) para 95.

[772] Erasmus (2015) *Stellenbosch Law Review* 664.

[773] Van der Merwe 'Trial principles and the course of the criminal trial' in *Criminal Procedure Handbook* 338.

orally at trial might be explained by the fact that the 'adversarial model proceeds from the premises that greater approximation of the truth is possible if litigants are allowed to present their own evidence in a process which guarantees not only cross-examination of an opponent who testifies but also all witnesses called by such opponent.'[774] In *S v Van Zyl and Others*, the Court affirmed that:[775]

> 'Our law displays a strong bias in favour of the principle of orality. The preference for viva voce evidence as opposed to preserved memory found in written form is a marked characteristic of the common-law evidentiary system, where great faith is placed in cross-examination as a means of exposing falsehood.'

Rowland Cole likewise notes as follows: 'As opposed to the inquisitorial system where a great deal of reliance is placed on documentary evidence, the emphasis [in the accusatorial system] is on orality. This naturally gives opposing sides the opportunity to attack the evidence of each other. Each party calls its witnesses and cross-examines the witnesses of the opposing side. Cross-examination is vital in the adversarial process as each party calls witnesses who testify in their favour.'[776]

The principle of orality and the right of an accused to a public trial are interrelated.[777] As a fundamental, general rule, it would be required that the accuser should come face-to-face with the accused in an open trial; witnesses should give their evidence in the presence of the accused and in public, and not behind closed doors.[778] 'There has to be a confrontation: the accused has to see the witnesses when they testify, and they have to speak in the presence of the accused.'[779] In *S v Muller and Others*, it was held in this respect:[780]

> The right to a public trial is not limited to access to criminal proceedings by the ordinary members of the public, as also the media. The accused is given the right to a public trial to

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[774] Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 11-12 (para 1 5 2).
[775] 2016 4 NR 1000 (HC) para 96.
[776] Cole (2010) *SACJ* 333 (footnote omitted). See also Ellison *The Adversarial Process and the Vulnerable Witness* 11.
[777] See, for example, Dennis (2010) *The Criminal Law Review* 260-262.
[778] *Ibid* 260, 263-264. See also, for instance, *S v Motlatla* 1975 1 SA 814 (T) 815D-F. However, a child witness may testify in a separate room through closed circuit television and with an intermediary, as it would ordinarily be untenable to expect such a witness to face an accused and testify in an open court, given the trauma and mental anguish or suffering that he or she would invariably experience if required to do so – see section 170A of the Criminal Procedure Act; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 2 SACR 130 (CC) paras 94-98.
[779] Kruger *Hiemstra's Criminal Procedure* 22-38. Both section 35(3)(*e*) of the Constitution and the common law insist that a criminal trial must take place in the presence of the accused (*ibid* 22-38). See also sections 158 and 159 of the Criminal Procedure Act.
[780] 2005 2 SACR 451 (C) para 15.

> ensure that justice is seen to be done. The right to a public trial would include a right to participate fully in the proceedings, be it by way of adducing and challenging evidence, or by way of addressing court on the merits of the case after the conclusion of evidence. It would include a right to participate meaningfully in the conduct of the trial, from the pleading stage of the proceedings up to the pronouncement of the verdict. If the accused is represented by a legal practitioner, the right would include the cross-examination of witnesses and the challenging of evidence in the presence of the accused, unless lawfully removed from the proceedings by lawful order.

Similarly in *S v Nkabinde*, the Court observed that South Africa's '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.'[781] The Court went on to state in this regard that: 'Inherent in the adversarial procedure under which an accused is entitled to face his accusers in open court in order to test their allegations of misconduct against him, cross-examination provides, in usual circumstances, the only, but extremely effectual mechanism of testing the veracity of testimony.'[782]

All criminal accused have a constitutional right 'to adduce and challenge evidence', as part of the right to a fair trial.[783] The right to challenge evidence includes the right to cross-examine.[784] 'A prerequisite for cross-examination is that all evidence is produced in court and witnesses testify *viva voce*.'[785]

For present purposes, it is significant to note that 'the general insistence upon direct oral testimony in adversarial criminal proceedings is increasingly presented in modern debates as *an effective means of safeguarding the fair trial rights of criminal defendants*.'[786] IH Dennis points out that the principle of orality, where witnesses give oral testimony physically in court, 'helps to legitimise the adjudication' in that *inter alia* the principle 'reinforces the drama and solemnity of the [court] occasion, and *it allows for maximum participation in decision-making* in the sense that parties

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[781] 1998 8 BCLR 996 (N) 1001B-C.
[782] *Ibid* 1004F-G.
[783] Section 35(3)(*i*) of the Constitution.
[784] See Steytler *Constitutional Criminal Procedure* 347. See also, for example, *K v The Regional Court Magistrate NO, and Others* 1996 1 SACR 434 (E) 441*h-i*; *S v Manqaba* 2005 2 SACR 489 (W) paras 13-14; *S v Msimango and Another* 2010 1 SACR 544 (GSJ) paras 4, 24, affirming that there is 'authority for the proposition that in the South African context, the right of an accused person to adduce and challenge evidence as enshrined in s 35(3)(*i*) of the Constitution, also includes the right to cross-examine.'
[785] Steytler *Constitutional Criminal Procedure* 347.
[786] Ellison *The Adversarial Process and the Vulnerable Witness* 65 (my emphasis). See also C MacQueen 'Special Measures and the Principle of Orality in the Scots Criminal Trial: Ensuring Fairness to the Accused' (2017) 3 *Edinburgh Student Law Review* 3 6.

can confront their accusers and challenge the evidence against them in the most direct way possible by cross-examination.'[787] Oral adversarial process 'provides for *judicial transparency* and ensures that no salient fact is overlooked, toward the end that justice is done.'[788] PJ Zwier[789] and A Barney[790] explain:[791]

> *An oral adversarial system is structured to try to "unbias" the court by requiring two zealous presentations of the facts*. In addition, *it seeks to prohibit biasing evidence from being presented before a judicial proceeding, which could cause the judge to make up his or her mind before the hearing even starts*. *Evidence presented out of the presence of the defendant, without confrontation, objection, or challenge to its relevance and reliability is now thought to be partly to blame for the failing of a written system* [present in inquisitorial systems]. A "written" system, where evidence comes to the court in a file ahead of the hearing, *does not allow for transparent testing of the evidence to determine if the court has decided the case on the law, or on political, economic, or even corrupt bases*.

The writers further explain that the adversarial system assumes that 'good decisions depend on a zealous presentation by opposing sides. *Advocates not only test the evidence presented by the opposing party, but challenge the court to better see how its institutional perspectives can blind it to vital facts necessary to reach fair and just results*.'[792] The writers refer to the lack of transparency and accountability '*inherent*' in the dossier or case docket and 'written' system that features in inquisitorial jurisdictions,[793] particularly in Mexico's legal system.[794] The writers argue that an oral adversarial system 'puts its faith instead in the ability of judges to discern facts based on evidence presented by live witnesses and tested by cross-examination and

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[787] IH Dennis *The Law of Evidence* 5 ed (2013) 15 (para 1-015) (my emphasis).

[788] PJ Zwier & A Barney 'Moving to an Oral Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications' (2012) 26 *Emory International Law Review* 189 206 (my emphasis). The writers add, however, that such a system 'cannot ultimately guard against the human non-rational nature of fact-finding. Fact-finding in court will often be based on the judge's own perspectives and limited by time and resources to what evidence can be found and presented.' (*Ibid* 206-207). This much is clear from the notable example of the Oscar Pistorius trial – see *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA) para 57.

[789] At the time of writing, Zwier was Professor of Law, Director of International Advocacy and Dispute Resolution, and Director of the Advocacy Skills Program at Emory University School of Law.

[790] At the time of writing, Barney was First fellow with Emory Law School's Center for Advocacy and Dispute Resolution, and practising labour law at The Karmel Law Firm in Chicago.

[791] *Ibid* 208-209 (footnote omitted) (my emphasis).

[792] *Ibid* 224 (my emphasis).

[793] See Jörg, Field & Brants 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe* 50, explaining the pivotal role of the dossier at trial in the inquisitorial system. See also, for example, in this respect, Goldstein (1974) *Stanford Law Review* 1018-1019, pointing out that the inquisitorial trial 'places little emphasis on oral presentation of evidence or on cross-examination by counsel' – the trial in such a system is 'mainly a public recapitulation of written materials included in a dossier compiled earlier by an investigating magistrate.' The dossier is, however, the product of a pre-trial process that is much more formal than the Anglo-American process. (*Ibid* 1019).

[794] Zwier & Barney (2012) *Emory International Law Review* 224 (my emphasis).

argument.'[795] The writers moreover suggest that transparency and due process at trial may require an adversarial mode of process, consisting of opening statements, direct and cross-examinations, impeachment of the credibility and reliability of witnesses, admission of exhibits, and closing arguments (oral persuasion).[796]

Given, then, the degree of judicial transparency and accountability in adjudication which the principle of orality brings to a trial, and how such principle aids the parties to have maximum participation in the decision-making process, it is submitted that this principle is a further in-built procedural mechanism designed to protect the fairness of the trial. Such orality should also involve a contest between the parties. Although the assumption that truth emerges indirectly from a dialectic clash of two opposing evidentiary cases ('*choc des opinions*') is questionable,[797] each party should have an immediate opportunity to challenge or test, through cross-examination, the sources of information presented by the opponent, given party bias and the potential for misleading evidence.[798] After all, '"cross-examination has the inestimable advantage of being able to extract from the mouth of the untruthful, the mistaken or the forgetful a correction of their own assertions, to test the means of knowledge and memory, to expose bias, to turn a new angle upon one-sided impressions, to emphasise inconsistencies and expose contradictions, to sift where too much has been said, to expand where too little, to supply omissions, to search out what is concealed and to focus the fierce beams of truth into every dark corner."'[799] Moreover, as was considered in the previous chapter, an adversarial contest enhances the prospects of judicial impartiality with its continual point-counterpoint method of proceeding and gives the trial court little opportunity to pursue its own agenda, being reliant primarily on, and indeed having to accept, the information provided by the parties on which the decision is to be based.

4.8 The opening address

A much neglected process by prosecutors in the South African accusatory trial is the opening address which a prosecutor may give, before any evidence is adduced.

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[795] *Ibid* 203.
[796] *Ibid* 202-203.
[797] Jörg, Field & Brants 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe* 51-53 (an aspect that has been considered more fully in the previous chapter).
[798] Damaška *Evidence Law Adrift* 79.
[799] *S v Manqaba* 2005 2 SACR 489 (W) para 15.

This is in terms of section 150(1) of the Criminal Procedure Act, which provides as follows:

> The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he intends adducing in support of the charge.

Prosecutors are perhaps reluctant to use this procedure to explain the charge and indicate what evidence he or she intends adducing to prove the State's case, because a prosecutor is bound by any deliberate statement which he or she makes in defining the ambit of the case against the accused (whereby the prosecutor in effect gives particulars of his or her indictment); this is so 'as effectually as if its contents had been embodied in a formal set of further particulars to the indictment.'[800] In *S v Mbata en Andere*, it was pointed out that where a prosecutor for instance furnishes information to the court in an opening address as to what a witness will say, the court may allow the defence to cross-examine the witness on a discrepancy between his or her evidence and what the prosecutor intimated in his or her outline.[801] In *S v V*, it was held by Moseneke AJ (as he then was) that a court may compare any statement made by a prosecutor in terms of section 150 of the Act with the evidence actually tendered by the State, and that a credibility inference can be made from such a comparison depending on the circumstances of each case.[802]

It is submitted nevertheless that an opening address by the prosecutor would be based on the contents of the case docket. In light of the fact that disclosure generally now takes place to the defence of all witness statements and other evidence contained in the docket, any discrepancies that may arise between a witness' *viva voce* evidence and prior police statement would ordinarily be brought to light during cross-examination of the witness, in any event. Similarly, as was observed earlier in this chapter, where an accused is unrepresented, there is a duty on the prosecutor to disclose to the trial court any discrepancy between a witness' police statement and testimony in court.

One commentator remarks that notwithstanding the reluctance that may be felt by a prosecutor to deliver an opening address in light of the above potential

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[800] *S v Davidson* 1964 1 SA 192 (T) 194F-H.

[801] 1977 1 SA 379 (O) 380D.

[802] 1995 1 SACR 173 (T) 179*c-f*. See also Kruger *Hiemstra's Criminal Procedure* 22-2(2), where it is said: 'Despite the provisions of section 150(1) the opportunity to deliver an opening address is seldom used – possibly because it may provide material which can be used to test the credibility of state witnesses in cross-examination'.

drawbacks, the prosecutor ought to follow such a procedure 'especially when the case is long and complex': '*it provides the court and the defence with a perspective on the evidence presented*, helps prevent misplaced questions and allows appropriate admissions to be made. Furthermore, it is a useful exercise for the prosecutor, even before the case commences, to be compelled to form an overview of the state's case.'[803] Such a procedure was fruitfully used by the prosecution with a PowerPoint presentation in the highly complex *Krion* commercial crime case.[804] It enabled the trial court and the defence to get an overview of the ambit of the State's case – a framework within which to understand the evidence that would be adduced better. The prosecution, however, did not go into *detail* as to what evidence would be presented and in terms of section 150, did not comment on the evidence either.

An opening statement by the prosecutor can be used to provide 'a *preview* of the evidence that will be presented',[805] and indeed to indicate what the evidence will *show*.[806] It provides the court with a factual theory of the case.[807] An opening statement may influence the construct of a framework in the mind of the court for receiving and interpreting the evidence to follow.[808] After all, a trial narrative provides a systematic means of storing, organising, testing, analysing and interpreting vast amounts of information which the parties present in reconstructing a reality in the courtroom.[809] A trial is largely a battle for the imagination of the trial court, and because of the interpretive nature of reasoning at trial, the initial attraction of an opening statement is important.[810] The opening statement would create a picture of what the trial court should expect to see after it has received all the pieces of evidence and knitted them together in a unified fabric.[811] An opening statement will inform the judge about the issues, the evidence and the connection between the two.[812] It is submitted that, as such, an opening address delivered by the prosecutor, in conjunction with a summary of substantial facts set out in the indictment, can

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[803] Kruger *Hiemstra's Criminal Procedure* 22-2(2)-22-3 (my emphasis).
[804] *S v Prinsloo and Others* 2016 2 SACR 25 (SCA).
[805] RP Burns 'The Distinctiveness of Trial Narrative' in A Duff, L Farmer, S Marshall & V Tadros (eds) *The Trial on Trial: Volume 1: Truth and Due Process* (2004) 157 170 (my emphasis).
[806] *Ibid* 161.
[807] *Ibid* 171.
[808] See KJ Melilli 'Succeeding in the Opening Statement' (2006) 29 *American Journal of Trial Advocacy* 525 527.
[809] Burns 'The Distinctiveness of Trial Narrative' in *The Trial on Trial* 169-170.
[810] *Ibid* 172.
[811] Melilli (2006) *American Journal of Trial Advocacy* 528.
[812] *Ibid* 530.

immediately at the inception of the trial draw the court's attention away from possible adverse pre-trial publicity, or even reported pronouncements of guilt by other courts in earlier related civil judgments, to an indication of the *evidence* which the State will seek to produce at trial in proving its case against the accused beyond a reasonable doubt. In other words, the prosecutor can immediately focus the court's mind on what the criminal case is actually about – to get a helpful and accurate overview of the case, rather than what has hitherto been reported on the case in the media and possibly inaccurately so. This may conceivably at the commencement of the trial remove any preconceived ideas which the court may have regarding the case as a result of pre-trial publicity, which self-evidently is critical when it is considered that once a belief is formed a court may be inclined to overvalue confirming evidence and undervalue or even ignore conflicting evidence.[813] Thus, the procedure allowed in section 150(1) of the Act may serve as another in-built procedural mechanism designed to protect the fairness of the accused's trial in the face of pre-trial publicity.

4.9 The closing address

In terms of section 175 of the Criminal Procedure Act, both the prosecutor and the accused may address the trial court before judgment on the merits of the case, once all the evidence has been adduced. Nico Steytler observes in this regard that '[e]vidence is usually not self-evident and… in most cases there are aspects which present themselves for analysis, assessment and argument.'[814] In *S v Adams* it was pointed out that a 'court is duty-bound to invite the parties to address it on the merits by affording them an opportunity to do so. The address by each party on the merits *is and remains an important final act of participation on its part towards the determination of the accused person's culpability. It is an opportunity afforded as of right to the parties to influence the trial court's decision. The parties have a right to persuade the court*.'[815] The Court found *in casu* that 'the delivery of judgment and the subsequent conviction of the accused person without affording both his attorney and the prosecution the opportunity to address the court most certainly compromised the fairness of the trial to the detriment of the accused person. A judgment founded on a substantially unfair procedure must surely be void. Such a judgment is no

[813] *Ibid* 527.
[814] Steytler *Constitutional Criminal Procedure* 358.
[815] 2009 1 SACR 394 (C) para 7 (my emphasis). See also *S v Tshabalala* 2002 JDR 0828 (T) para 7.

judgment at all and it is without legal efficacy.'[816] The Court noted that '[i]t is an accepted and established fact that fair trial proceedings "guarantee that issues are well and fully argued by the parties who have a stake in its outcome".'[817] The Court affirmed that it 'remains one of the most fundamental rights of the accused person to be heard before any decision affecting him or her is taken by the court', and that not only is it an expression of the *audi alteram partem* rule, 'but it is also an integral component of the right to adduce and challenge evidence embodied in s 35(3)(*i*) [of the Constitution], which presents itself for argument meriting consideration, analysis and assessment by the judicial officer.'[818]

It is submitted that affording the prosecution and the accused the right to address the trial court on the merits, would be an important means of focusing the court's mind on the evidence adduced at trial, which the decision must be based on, rather than any media publicity which a case may generate before and/or during the trial. After all, '[c]losing arguments are important opportunities to *review the evidence* each side has presented and argue the fair inferences that can be drawn from the evidence.'[819] In this process:[820]

> [t]he advocate should show the court the match between the law and the evidence, or lack of evidence. The court should also be shown the reliability or unreliability of the evidence presented using (1) evidence law, (2) points of impeachment, (3) burden of proof requirements, and (4) arguments about the credibility, bias, or unreliability of the witnesses' testimony or the documents presented. Where the court has received documents, the court will be greatly aided by arguments that draw the court to specific facts contained in these documents and how they relate to proof or lack of proof.

The closing arguments of counsel recapitulate the respective cases of each party and attempt to justify the inferences and conclusions that each party feels should be drawn from the evidence.[821] With its axiomatic focus, then, on the evidence adduced at trial and its purpose of finally influencing the court's decision, the closing address similarly to the opening address may serve as a procedural safeguard of the fairness of the accused's trial when there is surrounding adverse pre-trial publicity.

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[816] *S v Adams* 2009 1 SACR 394 (C) para 8.
[817] *Ibid* para 6, quoting with approval *Borowski v Canada (Attorney General)* (1989) 47 CCC (3d) 1 (SCC) para 31 (Westlaw), where it was observed that 'a court's competence to resolve legal disputes is rooted in the adversary system', and that such a system 'helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.'
[818] *S v Adams* 2009 1 SACR 394 (C) para 6.
[819] Zwier & Barney (2012) *Emory International Law Review* 222 (my emphasis).
[820] *Ibid* 222-223.
[821] AG Amsterdam & R Hertz *Trial Manual 6 for the Defense of Criminal Cases: Volume 2* (2017) 997.

4.10 A trial by judge alone and a reasoned verdict

One may say, without calling into question the integrity of professional judges, that it is perhaps a fallacy to assume that trial judges cannot be affected by media coverage or outside information of a prejudicial nature relating to an impending criminal trial; judges are mortal too with human frailties.[822] Judicial officers are not automatons or perfect decision-makers.[823] There is also some debate as to whether professional adjudicators are better equipped than lay adjudicators to ignore or disabuse their minds of unduly prejudicial information which they are not entitled to consider.[824] Mirjan Damaška opines that '[o]ne cannot unbite the apple of knowledge'.[825] This, he argues, is so for lay and professional arbiters.[826] It is submitted, however, that judges would be less vulnerable to the influence of virulent publicity hostile to an accused than members of a jury, by reason of their training, experience and oath of office.[827] There is a firm belief that judicial officers in these circumstances would be better able than members of a jury to keep an open mind and to focus on the facts proven at trial, instead of basing a decision on emotions and prejudices.[828] This explains why in certain jurisdictions it may be considered pertinent or preferable to have a trial by judge alone than a jury trial, where the defence believes that it would be impossible for the accused to get a fair trial before a jury on account of heightened adverse media attention that may result in jurors forming preconceived ideas as to the accused's guilt prior to the trial.[829] Concern

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[822] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36D; Loucaides (2003) *Human Rights Law Review* 40. In Swanepoel (2006) *Ecquid Novi* 9, it is argued that 'the judiciary, being human, can be susceptible to media influence', the same applying to assessors.

[823] Waye (2003) *Melbourne University Law Review* 446.

[824] Schwikkard *Possibilities of convergence* 27. For a contrary view, see Cleaver (1993) *SALJ* 533.

[825] Damaška 'Atomistic and Holistic Evaluation of Evidence' in *Comparative and Private International Law* 96.

[826] Damaška *Evidence Law Adrift* 50; M Damaška 'Free Proof and its Detractors' (1995) 43 *The American Journal of Comparative Law* 343 352.

It may be said, however, that judicial officers are often exposed to prejudicial information or evidence during trials, such as confessions which are later ruled to be inadmissible. Yet, they would generally still be able to decide a case on the admissible evidence. They are required to disregard inadmissible evidence when reaching a decision.

[827] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36F-H; Loucaides (2003) *Human Rights Law Review* 40; Van Rooyen (2014) *HTS Teologiese Studies / Theological Studies* 9; Waye (2003) *Melbourne University Law Review* 427, 441; Hill (2001) *SAJHR* 566-567; Cleaver (1993) *SALJ* 533.

[828] P de Vos 'Oscar Pistorius: why media reporting is not infringing on sub judice rule' (18-02-2013) Constitutionally Speaking <https://constitutionallyspeaking.co.za/oscar-pistorius-why-media-reporting-is-not-infringing-on-sub-judice-rule/>; Hill (2001) *SAJHR* 566-567.

[829] De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 269-271; Waye (2003) *Melbourne University Law Review* 427; C Burgess 'Prejudicial Publicity: When Will it *Ever*

about the accused's ability to receive a fair trial following pre-trial publicity features prominently as a reason for a trial by judge alone.[830]

A further compelling reason why a trial by judge alone may be considered more suitable than a jury trial, is that in contrast to a jury a trial judge must give reasons for his or her decision.[831] It is so that biases or prejudices or improper reliance on extraneous material or information can be disguised in a judgment.[832] Gross miscarriages of justice also occur despite the furnishing of reasons for a verdict. Nevertheless, it is generally felt that the furnishing of reasons in a judgment brings a level of transparency to the decision-making process and assists appellate courts in detecting error.[833] The High Court of Australia has held in this respect:[834]

> But by an indirect route the duty to give reasons can operate to safeguard the interests of the accused and the public interest generally. That is because a move to trial by judge alone causes appeals to operate in a radically different way. It is much easier for an appellate court

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Result in a Permanent Stay of Proceedings?' (2009) 28 *The University of Tasmania Law Review* 63 72-73; *The State of Western Australia v Rayney* (2011) WASC 326.

[830] J O'Leary 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) 35 *Criminal Law Journal* 154-169 (Bond University ePublications@bond) <https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1406&context=law_pubs>.

[831] De Vos (2017) *Tydskrif vir die Suid-Afrikaanse Reg* (*Journal of South African Law*) 270. The writer also points out in this regard that:

> 'In essence the most compelling argument against the jury trial appears to be the absence of any reasons for the jury's verdict. It seems unfair to both the accused and the prosecution to be left in the dark regarding the reasons for the jury's verdict. The community also has an interest in knowing why an accused was convicted or acquitted in a particular case. As critics have argued, this mode of adjudication goes against the philosophy of transparency.' (*Ibid* 267).

In J Mullineux 'Some random and subversive thoughts on fact-finding, juries and unlawfulness' (1993) *De Rebus* 721 727, the writer opines that 'the most serious argument against the jury system is the absence of a requirement that the jurors should give reasons for their findings. Most, if not all, of the ills attributed to the jury system could be avoided if juries were required to give reasons for their findings, and if an appropriate right of appeal were granted to both sides in the case where the reasons are invalid or insufficient.' See also Bekker 'The American grand jury: judicial empowerment of the South African population in general?' in *Essays in honour of SA Strauss* 22, where this view is endorsed.

In Dugard (1972) *Crime, Punishment and Correction* 58, the writer is critical of the jury verdict which he describes as an 'unreasoned, erratic type of decision'. Former Justice of the Constitutional Court, John Didcott, in an extra-curial address was likewise critical of an unreasoned jury verdict, stating that:

> '"My major difficulty with the jury system... is this: a jury never gives reasons for its decision. And it is hard to see how that could ever alter. Yet to entrust anyone with the power to make a decision affecting someone else's liberty or livelihood or property, and then to allow him to give no reasons for his decision, is a highly dangerous thing to do. It is licence for a decision influenced by bias or prejudice that would never come to light."'

- see Kahn (1993) *SALJ* 330.

See also *S v Thebus and Another* 2003 2 SACR 319 (CC) para 71, noting the dangers of exposing jurors to prejudicial information, where they do not deliver an open and reasoned judgment.

[832] Jackson & Summers *The Internationalisation of Criminal Evidence* 73.

[833] O'Leary (2011) *Criminal Law Journal* 30-31 (Bond University ePublications@bond); *AK v The State of Western Australia* (2008) HCA 8 para 104.

[834] *AK v The State of Western Australia* (2008) HCA 8 para 104.

> to detect appellable error where reasons for the verdict at trial must be provided than it is when the appellate court is limited only to the record of the proceedings before a jury.

The necessity to give reasons is considered to be a means whereby any prejudice or other errors in applying evidence to the decision can be objectively determined following a judge alone trial.[835] The following objectives have been identified as underlying the duty to provide reasons for a decision, which ties in with the principle of judicial accountability:[836] '"First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Second, the general acceptability of judicial decisions is promoted by the obligation to explain them. Third, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions."'[837]

The giving of reasons for a decision 'encourages rational decision-making in both the traditional and more normative senses because it allows depth of review, recourse to decisional tools and other forms of reality testing'.[838] The requirement of a reasoned verdict helps to reduce the risk of 'irrelevant or otherwise inadmissible material being taken into account'.[839] Such requirement also acts as a constraint because the basis for all primary fact-finding has to be made transparent by clear reference to the evidence.[840] Moreover, the basis upon which evidence was found to be persuasive and accepted by the judge also has to be stated.[841] In turn, this reasoning has to be strongly related to the presumption of innocence and the discharge of the burden of proof.[842] The use of written reasons for a decision directs the judge to articulate and to examine critically the inferences underlying his or her conclusions of fact.[843]

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[835] O'Leary (2011) *Criminal Law Journal* 31 (Bond University ePublications@bond).
[836] M Gleeson 'Judicial Accountability' (1995) 2 *The Judicial Review* 117 122.
[837] *AK v The State of Western Australia* (2008) HCA 8 para 89, quoting Gleeson (1995) *The Judicial Review* 122.
[838] Waye (2003) *Melbourne University Law Review* 441.
[839] *Ibid* 441.
[840] *Ibid* 441.
[841] *Ibid* 441.
[842] *Ibid* 441.
[843] *Ibid* 447.

One court has observed that the process of having to state judicial reasoning in terms sufficiently clear, exact and convincing to pass muster in the eyes of an appellate court entails a need to be very precise in working that reasoning out. The discipline stems from the fact that the process of stating reasoning often reveals its fallacies: in the course of composing reasons for a judgment directed to supporting a conclusion which seemed clear, judges often find that the opinion 'won't write', and that a different conclusion develops. The duty of a presiding officer to give reasons, is thus a 'safeguard', indeed 'a vital technique for ensuring accurate fact finding, correct inferential reasoning and sound application of the law to the facts.'[844]

In *S v Chinamasa*, it was held that 'only the remotest possibility exists of a judge, imbued with basic impartiality, legal training and the capacity for objective and unemotional thought, being consciously or subconsciously influenced by extraneous matter.'[845] As was seen in chapter two, Graeme Hill comments that even though this statement perhaps overstates the position, 'the fact that (unlike juries) judges are required to give reasons for their decisions, at *least limits* the extent to which extraneous matters influence these decisions.'[846]

In South Africa, which does not have a jury system, all courts in criminal trials, as in civil matters, are required to give reasons for their verdicts.[847] This is a vital feature of the administration of justice in our legal system. In *S v Jaipal*, Van der Westhuizen J, writing for the Constitutional Court, pertinently held:[848]

> Of special importance is the fact that juries do not furnish reasons for their decisions. A reasoned decision allows for close scrutiny of the conclusions reached in view of the evidence presented and *the influence of irregularities on a decision are more likely to be detected than in the case of a finding reached in secrecy*.

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[844] *AK v The State of Western Australia* (2008) HCA 8 para 108.
[845] 2001 1 SACR 278 (ZS) 298E.
[846] Hill (2001) *SAJHR* 567 (my emphasis).
[847] See, for example, Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-134-22-136. See also section 146 of the Criminal Procedure Act; section 93*ter*(3)(*c*) and (*e*) of the Magistrates' Courts Act; *S v Maake* 2011 1 SACR 263 (SCA) paras 24-25; Van der Merwe 'An Introduction to the History and Theory of the Law of Evidence' in *Principles of Evidence* 16 (para 1 6); SE van der Merwe 'The Evaluation of Evidence' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) 565 566 (para 30 1), 599-600 (para 30 13); SE van der Merwe 'The verdict' in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 349 351-352; MM Corbett 'Writing a judgment' (1998) 115 *The South African Law Journal* 116 117; E Kahn 'Restore the jury? or "Reform? Reform? Aren't things bad enough already?" II' (1992) 109 *The South African Law Journal* 87 94, where it is observed that the judicial officer, sitting with or without assessors, and being the 'counterpart of the jury', should give reasons for his or her verdict. In civil cases, the giving of reasons for a decision is a rule of practice – see Van der Merwe 'The Evaluation of Evidence' in *Principles of Evidence* 566 n 2 (para 30 1).
[848] 2005 1 SACR 215 (CC) para 45 (my emphasis).

Justice John Didcott is quoted as having said extra-curially that it is important for the parties to a case and the public to understand the result of the case, noting that: '"But how does one understand that without any reasons having been given? The giving of reasons is both a safeguard against the wrong decision and the condition on which public confidence in the rightness of the decision rests."'[849] In *National Director of Public Prosecutions v Naidoo and Others*, the Supreme Court of Appeal similarly observed:[850]

> The importance of furnishing reasons for a judgment is a salutary practice. Judicial officers express the basis for their decisions through reasoned judgments. A statement of reasons gives assurance to the parties and to any other interested member of the public that the court gave due consideration to the matter, thereby ensuring public confidence in the administration of justice.

Nico Steytler points out that '[w]here the accused is undefended, it is important that the court should take particular care to explain the reasons for its judgment comprehensively and comprehensibly since the latter does not have the services of a lawyer to make the judgment intelligible to him. This would increase the accused's understanding of the trial's outcome and facilitate possible appeal and review proceedings.'[851]

It is elementary that litigants are entitled to reasons for a judicial decision following upon a hearing.[852] The delivery of reasons for a verdict enables the parties to the litigation and the public to see whether justice has been done, or at least whether an honest, careful and conscientious effort has been made to do justice.[853] This is of particular importance in a modern democracy where society is not prepared to accept a decision simply because it has been pronounced, but rather is inclined to question and criticise any exercise of authority, judicial or otherwise.[854] In an extra-curial paper, former Chief Justice of the Supreme Court of Appeal, MM Corbett, noted that 'it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case - and quite often they are - a statement of reasons gives some assurance that the court gave due

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[849] Kahn (1993) *SALJ* 330.
[850] 2011 1 SACR 336 (SCA) para 18.
[851] Steytler *The Undefended Accused on Trial* 182.
[852] See *Strategic Liquor Services v Mvumbi NO and Others* 2010 2 SA 92 (CC) para 15.
[853] See *Road Accident Fund v Marunga* 2003 5 SA 164 (SCA) para 32.
[854] *Ibid* para 32, citing with approval H Gibbs 'Judgment writing' (1993) 67 *The Australian Law Journal* 494 494. See also *S v Mokela* 2012 1 SACR 431 (SCA) para 13.

consideration to the matter and did not act arbitrarily.'[855] Similarly in *S v Mokela*, the Supreme Court of Appeal, per Bosielo JA, underlined the importance of courts furnishing reasons for their decisions, for a reasoned verdict is 'critical in engendering and maintaining the confidence of the public in the judicial system', and '[p]eople need to know that courts do not act arbitrarily, but base their decisions on rational grounds.'[856] Bosielo JA added that '[o]f even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person.'[857]

The Constitutional Court has observed that judicial officers 'ordinarily account for their decision by giving reasons - and the rule of law requires that they should not act arbitrarily and that they be accountable.'[858] Even though there is no express constitutional provision which requires judicial officers to furnish reasons for their decisions, the rule of law, in terms of section 1 of the Constitution, is one of the founding values of South Africa's democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judicial officers not to act arbitrarily and to be accountable.[859] 'The manner in which they ordinarily account for their decisions is by furnishing reasons.'[860]

The Constitutional Court has expressed the purposes that are served by the furnishing of reasons for a decision, as follows:[861]

> It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may

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[855] Corbett (1998) *SALJ* 117, as quoted with approval in *Road Accident Fund v Marunga* 2003 5 SA 164 (SCA) para 31. See also *S v Maake* 2011 1 SACR 263 (SCA) para 20, where these remarks by Corbett were reaffirmed.
[856] 2012 1 SACR 431 (SCA) para 12.
[857] *Ibid* para 12.
[858] *Strategic Liquor Services v Mvumbi NO and Others* 2010 2 SA 92 (CC) para 17.
[859] *Mphahlele v First National Bank of SA Ltd* 1999 2 SA 667 (CC) para 12.
[860] *Ibid* para 12. See also J Soeharno *The Integrity of the Judge: A Philosophical Inquiry* (2009) 124-126, noting that stating the grounds on which a decision is based bridges the gap between deliberation and judicial accountability in decision-making. See too *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 4 SA 551 (SCA) para 30, where it was affirmed that 'the rule of law obliges judges not to act arbitrarily and to be accountable, which they ordinarily do by giving reasons for their decisions'.
[861] *Mphahlele v First National Bank of SA Ltd* 1999 2 SA 667 (CC) para 12.

> well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.[862]

From a reasoned judgment, it may be determined whether any impermissible or external factors or information, prejudicial to an accused, had a bearing on or unduly influenced the court's decision.[863] It is submitted that reasons for a decision may moreover enable one to establish whether the trial court had any undue regard to pre-trial publicity in reaching its decision.[864] After all, as pointed out above, the basis for the court's decision is expressed through a reasoned judgment.[865] Furnishing reasons in a judgment explains to the parties and to the public 'why a case is decided as it is.'[866]

The 'best indication that a court has applied its mind in the proper manner' in evaluating the evidence adduced at trial and reaching a conclusion on the guilt or innocence of the accused, 'is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'[867] The 'surest way of determining whether there was a proper assessment of the evidence, is to look at all the evidence *and* the reasons advanced by the court for making the factual findings which it did.'[868] The furnishing of reasons for a decision is necessary in enhancing the fact-finding process.[869] 'It is only by articulating reasons to justify a factual finding, that the proper assessment of evidence can be achieved and arbitrariness avoided.'[870] MM Corbett remarks that it is only through the discipline of writing (or giving orally) the reasons for a judgment 'that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn from the evidence are properly drawn; whether the relevant principles of law are

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[862] See also *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 4 SA 551 (SCA) paras 29-30; Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-135.

[863] Compare *S v Maputle* 2002 1 SACR 550 (W) 554*g-h*. See also Schwikkard *Possibilities of convergence* 27; *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 11.

[864] See *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38I.

[865] *National Director of Public Prosecutions v Naidoo and Others* 2011 1 SACR 336 (SCA) para 18.

[866] *Mphahlele v First National Bank of SA Ltd* 1999 2 SA 667 (CC) para 12.

[867] *S v Singh* 1975 1 SA 227 (N) 228G-H.

[868] Van der Merwe 'The Evaluation of Evidence' in *Principles of Evidence* 599 (para 30 13) (author's emphasis).

[869] However, gross miscarriages of justice on factual and credibility issues frequently occur in court judgments despite the process of rational decision-making that the giving of reasons is said to promote. It self-evident that the furnishing of reasons does not automatically lead to a proper assessment of the evidence and sound inferential reasoning. Deliberation can lead to error.

[870] Van der Merwe 'The Evaluation of Evidence' in *Principles of Evidence* 600 (para 30 13).

what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.'[871] It has been held that proper reasons in a judgment require 'an intelligent analysis of the evidence and an extraction of the material points'.[872]

The requirement that a court must give reasons for its decision also 'acts as *a safeguard against departures from impartiality*.'[873] It can help to prevent a decision from being unduly influenced by any possible bias or prejudice that would not otherwise come to light.[874] It is inherent in the notion of a competent, independent and impartial court that it must give reasons for its decisions.[875] The giving of reasons by a court for how it decides a case, is seen as 'the *ultimate safeguard against abuse*' by the court, and helps to ensure that the judicial officer's decision-making is conducted in accordance with the Constitution and the rule of law.[876] The principle that courts should publish the reasons for their decisions also gives effect to the maxim that justice should be seen to be done.[877] The obligation on a trial court to publish reasons for its decision is an important manifestation of the principle of open justice and is also the foundation of judicial accountability.[878] The public character of judicial proceedings in South Africa and the requirement that reasons should be furnished for a judgment help the public understand that the decision of the court is not given without due consideration of the relevant law and facts.[879]

In the circumstances, the duty of the presiding officer to give reasons for his or her decision may serve as a vital safeguard of the fairness of an accused's trial in

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[871] Corbett (1998) *SALJ* 118.
[872] *S v Bhengu* 1998 2 SACR 231 (N) 234*h*.
[873] Schwikkard *Possibilities of convergence* 27 (my emphasis).
[874] See Kahn (1993) *SALJ* 330.
[875] Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association *Professional Training Series No. 9: Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) 134.
[876] E Cameron *Justice: A Personal Account* (2014) 185 (my emphasis), adding that any betrayal of constitutional values and ideals by the court would be apparent from a reasoned judgment.
[877] See Meyerson (2015) *Criminal Justice Ethics* 67; O'Leary (2011) *Criminal Law Journal* 31 (Bond University ePublications@bond); Gibbs (1993) *The Australian Law Journal* 494; HL Ho 'The judicial duty to give reasons' (2000) 20 *Legal Studies* 42 50; *R v Sheppard* (2002) 162 CCC (3d) 298 (SCC) para 15 (Westlaw): 'Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be *seen* to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.' (Court's emphasis).
[878] Spigelman (2006) *University of New South Wales Law Journal* 154.
[879] Hahlo & Kahn *The South African Legal System and its Background* 38-39.

the face of surrounding pre-trial publicity by helping to prevent a trial court from improperly basing its decision on such extraneous matter.[880]

An accused's right to a fair trial may be compromised resulting in an irregularity which vitiates the proceedings, if the trial court fails to take into account all of the evidence in its judgment and fails to provide reasons for its verdict and the sentence imposed.[881]

[880] *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38I.

[881] *S v Xaba* 2015 JDR 0851 (WCC). See also Paizes 'Conduct of Proceedings' in *Commentary on the Criminal Procedure Act* 22-136.