THE UNDEFENDED ACCUSED ON TRIAL:

JUSTICE IN THE LOWER COURTS

BY

NICOLAAS CHRISTIAAN STEYTLER

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ABSTRACT

Due to the party-orientation and professional nature of the adversary mode of criminal procedure, the principles of a fair trial are best observed where the accused is represented by a lawyer. Given the advantages to be gained from legal representation, the principle of equal justice requires that all accused should have access to legal assistance and thus that legal aid should be provided for indigent accused. The South African legal aid scheme cannot yet provide assistance to all indigent accused because of the large number of these accused, the shortage of manpower and the lack of funds. There are, however, few legislative provisions to safeguard the rights of the vast majority of accused, arraigned in the lower courts, who remain undefended. The Supreme Court, in order to ensure that these accused are fairly tried, has imposed the following types of duties on judicial officers: (a) a duty to facilitate the accused's participation in the proceedings by advising him of his rights and duties and assisting him in their exercise; (b) a duty to control the prosecutor in the exercise of his powers; and (c) a duty to conduct an enquiry before arriving at administrative-type decisions. These duties are, however, inadequate to achieve the Court's objective because, firstly, not all rights are made accessible to the accused, and secondly, the duties are inadequate to ensure that the accused's guilt is reliably established. The failure of the legislature and the Supreme

Court to incorporate the principle of equal justice into the legal process, has resulted in court proceedings that are characterized by unjust practices and outcomes. To ensure the more equitable prosecution of undefended accused it is suggested that an activist judicial officer should be responsible for the enforcement of all the principles of a fair trial (which would be concretized in clear legal rules) in an impartial manner, with his decisionmaking routinely supervised by the Supreme Court.

PREFACE

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NC STEYTLER

Newark, Delaware 1986

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SECTION A INTRODUCTION

RESEARCH OUTLINE

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 determination, if necessary, of an appropriate penalty, in a manner which is fair to all parties involved. The values and principles according to which liability and penalties are determined are shared by most Western legal systems, and are called the principles of a fair trial, or in American jurisprudence, the principles of due process. These principles are expressed in constitutions, bills of rights, the common law and in international documents.

The procedures by means of which these common principles may be pursued, varies according to jurisdiction. In the Anglo-American common law jurisdictions the mode of procedure is adversarial, while on the European continent it is inquisitorial.

South Africa has inherited from England the adversary mode of procedure. The English legal profession, its rules and traditions, have also been replicated. Because of the party-centred nature of the adversary system, lawyers for both the State and the defence play a prominent, if not dominant role in the pursuit of procedural justice. Yet legal representation is available at a price and this has meant that it has remained the privilege of few due to the

indigence of most accused. As a result, the majority of accused in South Africa face a trial within the adversary system without a defence lawyer.

In a system predicated upon full participation by the parties in the pursuit of justice, the undefended accused will be severely handicapped should he lack legal knowledge and expertise. His difficulties may be exacerbated by problems such as illiteracy, language difficulties, and class or cultural differences. The problem to be confronted, then, is how a fair trial is to be achieved in the South African criminal justice system for those accused who cannot afford legal representation.

The accepted solution in Anglo-American jurisdictions has been the provision of State-funded legal aid. This, when fully implemented, would ensure equality of the parties, which is a precondition for the pursuit of a fair trial in the adversary system. It will be shown, however, that this option will not meet the needs of the majority of indigent accused in South Africa in the foreseeable future, due to the large number of potential candidates for legal aid, the shortage of lawyers and the lack of State-funding.

This necessitates the investigation of other potential solutions. One possibility is the simplification of proceedings; this would minimize the accused's need for legal knowledge and skills. The alternative remedy involves the development of an activist judicial officer. This may

require either assistance to the accused designed to make him an effective adversary, or inquisitorial-type intervention by the court, on behalf of the undefended accused, in order to ensure that justice is attained. The former would involve the maintenance of the adversarial party orientation while the latter would entail introducing a strong inquisitorial element to a predominantly adversary system.

It is proposed to examine the development of legislative and judicial rules relating to the criminal process in order to determine:

(a) whether the problems facing the undefended accused in the adversary system have been recognized; and

(b) whether the abovementioned solutions have been, firstly, considered and secondly, implemented.

Subsequently, lower court proceedings will be studied in order to assess:

(a) the extent of the difficulties confronting the undefended accused;

(b) whether and to what extent legislative and judicial provisions are implemented in practice; and

(c) the adequacy of such provisions to address the problem of the undefended accused.

Before embarking upon these enquiries, it is important to clarify and elaborate upon some of the concepts mentioned thus far. Chapter One, then, will comprise of a discussion of the principles of a fair trial, the nature of the

adversary system and the implementation of the principles in that system, particularly with reference to the undefended accused. Chapter Two will consider these aspects in relation to the South African criminal justice system.

CHAPTER ONE PROCEDURAL JUSTICE AND THE ADVERSARY TRIAL

1. THE PRINCIPLES OF A FAIR TRIAL

A concise definition of procedural justice is difficult, if not impossible. The broad notion of "fair trial" or "due process" encompasses, however, certain legal principles protective of the individual, which are common to the legal systems of the Western world, irrespective of whether the mode of procedure is adversary or inquisitorial, as both modes have been influenced by the same liberal ideology of the European Enlightenment.[1] The principles have been incorporated in international documents which are applicable to adversary and inquisitorial systems alike,[2] and in municipal law are to be found in Bills of Rights,[3] or the common law[4] or both.[5]

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1. See A Esmein A History of Continental Criminal Procedure (1913 reproduced 1968) 428; M Damaska "Structures of Authority and Comparative Criminal Procedure" (1975) 84 Yale LJ 480 532; J Hermann "Various Models of Procedures" (1978) 2 SACC 3 14.
2. See eg Universal Declaration of Human Rights UN doc A/811 adopted 20 December 1948; Geneva Convention relative to the Treatment of Prisoners of War signed 12 August 1949; European Convention on Human Rights signed in Rome 4 November 1950.
3. See eg United States Constitution, and further, Yale Kamisar, Wayne R LaFave & Jerold H Israel Modern Criminal Procedure (1980); JG Cook Constitutional Rights of the Accused: vol I Pretrial Rights, vol II Trial Rights, vol III Post Conviction Rights (1979). Canadian Bill of Rights, see further, SA Cohen Due Process of Law (1977).
4. For United Kingdom, see Walker & Walker The English Legal System 5th ed by RJ Walker (1980); C Hampton Criminal Procedure (1982); S Mitchell (ed) Archbold's Pleadings, Evidence & Practice in Criminal Cases 14th ed (1979).
5. TM Franck Human Rights in Third World Perspective Vol I, II, III (1982).

Broadly, these principles give expression to the liberal ideology that accords primacy to the individual when in conflict with the State. This is achieved through the protection of certain rights regarded as fundamental to the individual's well-being and thus entail limitations being placed on State power.[1] Since the loss of liberty and social stigma flowing from a conviction and sentence, are among the gravest inroads on the individual's freedom which can be perpetrated by the State, the principles of a fair trial constitute an attempt to protect the individual against unwarranted infringements of his rights by limiting the use of the criminal sanction by the State.

In any criminal dispute between the State and an individual, the protection of the individual is effected firstly through the presumption of his innocence.[2] The State must show cause for any interference with an individual's rights. From this principle flow the rules in respect of bail, a preliminary hearing before an accused is put on trial, the onus of proof, the accused's right to remain silent, and a discharge at the end of the State case if insufficient evidence has been presented against the accused. The dispute between the State and the individual should be concluded expeditiously in

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1. Herbert L Packer The Limits of the Criminal Sanction (1969) 165.
2. In chapters 4 to 10 the basis of these principles will be set out.

order not to exhaust and harass the latter unnecessarily. The forum which is called upon to settle the dispute should be impartial to give satisfaction to both parties. Furthermore, it should be competent to hear disputes of great importance and to impose sentences which severely affect the individual's rights. Factual disputes should be settled on the truth and punishment imposed should not be excessive in relation to the harm done. The individual whose rights are in jeopardy should have a full opportunity to participate in the decisions which may affect those rights. Prerequisites for such participation are the physical and mental presence of the accused and his ability to understand the language spoken in court. In order to participate, the accused also requires notification and specification of charges and the opportunity to prepare for such participation. Once the dispute has been concluded by a judicial decision, the State should not persecute an individual by interfering with his rights in respect of the same dispute. Finally, any judicial decision which affects an accused's rights should be open to review by a superior court.

How are these principles to be realized in legal systems where the mode of procedure is adversary? The examination of this question will be preceded by an outline of the nature of the adversary process.

2. THE NATURE OF THE ADVERSARY MODE OF PROCEDURE

The nature of the adversary system is best illustrated by comparing it with the inquisitorial mode of procedure. The essential characteristic of the adversary mode is that the onus is on the litigants to advance their cases for a decision to be made by a judicial officer, who remains passive throughout the proceedings.[1] In contrast, in the inquisitorial system, the judicial officer plays the most active role by conducting the proceedings to their conclusion.[2]

In the adversary system the two parties, the State and the accused, are responsible for the collection and presentation of evidence. The evidence gathered by each party is privileged and the other party has no access to it, either before or during the trial. The parties may delineate the area of contest through plea bargaining and admissions. They determine what evidence should be produced and in what order. Strict rules as to the admissibility of evidence are

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1. See W Zeidel "Evaluation of the Adversary System: A Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 Australian LJ 390 391.
2. For the description of the two modes the following sources were used: J Hermann "Various Models of Criminal Proceedings" (1978) 2 SACC 3 5; AV Sheenan Criminal Procedure in Scotland and France (1975); CR Snyman "The Accusatorial and Inquisitorial Approaches to Criminal Procedure: Some Points of Comparison between the South African and Continental System" (1975) 8 CILSA 100 103; M Damaska "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1972-73) 121 Univ of Pennsylvania LR 506; LH Leigh "Liberty and Efficiency in the Criminal Process - The Significance of Models" (1977) 26 Int & Comp LQ 516 530; GEP Brouwer "Inquisitorial and Adversary Procedures - A Comparative Analysis" (1981) 55 Australian LJ 207.

followed. Questions of admissibility are to be raised by the parties and decided upon by the judicial officer. The accused is not a compellable witness, but may choose to testify. Testing the veracity of the evidence is the responsibility of the parties.

Although the accused and the prosecution 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. He must accordingly place all relevant evidence before the court. The defence, meanwhile, may act in a partisan manner short of misleading the court. In order to obtain a conviction, the prosecutor must prove the guilt of the accused beyond reasonable doubt, while the accused need only raise a reasonable doubt to obtain an acquittal.

The role of the court is on the whole passive: the judicial officer listens to the evidence and arguments presented by the parties, and makes decisions when called upon to do so. He does, however, have a subsidiary duty to control the admission of evidence and the conduct of the parties. He may put questions to witnesses in order to clarify aspects of evidence and may even call witnesses mero motu. In the main, though, 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.[1]

In an inquisitorial system, the court plays an active role in the proceedings. The police file is an open document and lays the foundation for the trial. The court decides which witnesses to call and conducts their examination personally in an attempt to establish the truth. To that end the accused may also be questioned. The prosecutor and defence may, after the examination of a witness, suggest further questions and may themselves ask supplementary questions. They may also suggest the taking of further evidence. There is essentially a free system of evidence. As there is a duty on the court to establish the truth, there is no onus on either party to prove the guilt or innocence of the accused. Since the evidence is not party-orientated, the evidence on which the court makes its decision has been called the 'material truth'.[2] The adversary system is therefore party-based while the inquisitorial method is centred on the judicial officer. In the inquisitorial mode it is primarily the judicial officer's duty to realize the the principles of a fair trial while in the adversary mode it is the responsibility of the litigants.

3. THE PRINCIPLES OF A FAIR TRIAL AND THE ADVERSARY SYSTEM

The essence of a "fair trial" lies, as set out by Fuller,[3] not in the correctness of the decision made, but in the

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1. See Snyman op cit 108.
2. Snyman op cit 109.
3. Lon L Fuller "Collective Bargaining and the Arbitrator" (1963) 3 Wisconsin LR 18.

procedures by which the correctness of the decision is guaranteed. The basis of the adversary system, he points out, "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".[1] Due process under this system thus requires that persons to be affected by a decision should have some formally guaranteed opportunity to influence that decision.[2]

Although the right to participate in decisionmaking 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 emerge.[3]

By challenging the State's decision to prosecute him, the

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1. Lon L Fuller "The Adversary System" in H Berman (ed) Talks on American Law (1961) 41.
2. Fuller (1963) 3 Wisconsin LR 19.
3. See MM Feeley The Punishment is the Process (1979) 18; MM Feeley Court Reform on Trial (1983) 10; N Kittrie "Symbolic Justice: The Trial of Criminal Cases" in C H Foust & D R Webster (eds) An Anatomy of Criminal Justice (1980) 121; H Jacob Urban Justice (1973) 99.

accused not only protects his own interests, but also serves a wider function of controlling governmental action in general. It has been said that

> "The adversary system is the institution devised by our legal order for the proper reconciliation of public and private interests in the crucial areas of penal regulation. As such, it makes essential and invaluable contributions to the maintenance of the free society. The essence of the adversary system is challenge. The survival of our system of criminal justice depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defence function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions".[1]

The adversary process is designed to be self-regulatory as the responsibility for achieving a fair result is placed upon the parties. Feeley compares the adversary court to a market place; it is an open system, reliant upon the bartering of the contestants to give form and direction to the proceedings.[2] The role of the judge is thus to see that the adversaries barter "according to the rules of the game".[3] The adversary system, as a result, is characterized by the absence of rules and structures designed to ensure that the correct results are achieved, even where the parties involved fail to protect their own interests.[4]

The inquisitorial system is much more bureaucratic. Rules

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1. Report of the Attorney-General's Committee on Poverty and the Administration of Criminal Justice under the chairmanship of Francis A Allen (1963) 10-11.
2. The Punishment is the Process 18.
3. Feeley Court Reform on Trial 12.
4. Feeley op cit 18.

designed to achieve a just result apply to all cases, irrespective of the activities of the parties. The court assumes a more active role in searching for a just result and is thus less reliant on the activities of the parties. Damaska[1] has taken this analysis further. He identifies as the basic difference between the adversary and the inquisitorial systems, the structure and form of judicial decisionmaking. The inquisitorial mode involves a predominantly hierarchical structure of decisionmaking. Its central features are the centralization of authority and the fact that decisions are made in accordance with bureaucratic principles which give direction and specify rules of conduct. Rules are precise, prolific and comparatively inflexible.[2] A court acting in a bureaucratic tradition is the dominant party in the decisionmaking process and uses a factual basis established by its own endeavours for its decisions.

There is no such bureaucratic enforcement of rules in the Anglo-American adversary system. In the words of Feeley:

> "Bureaucracy implies rational organization, hierarchical control, common purpose and central administration. None of these accurately characterizes the courts. Their fragmented organization reinforces the diversity of values and interests within them. No single co-ordinator, no single authority exists to resolve disagreements or to enforce compliance with goals".[3]

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1. M Damaska "Structures of Authority and Comparative Criminal Procedure" (1975) 84 Yale LJ 480.
2. Damaska op cit 505.
3. Court Reform on Trial 17-18.

Although the courts are organized in a hierarchical structure with the appellate court controlling the lower courts, the process of control is passive and expensive. Whether the supervisory function of the higher court is to be invoked depends not on the supervisory court, but on the accused, whose choice may be determined by his financial position.[1] With the lack of strict and routine hierarchical control, the courts are fairly autonomous; they attempt to reach the decision most appropriate to the circumstances of each case [2] and display a flexible attitude towards rules.[3] The absence of bureaucratic rules involves a limited role for the judicial officer, who is consequently reduced to a passive arbiter. The parties to the dispute are given supremacy in the conduct of the dispute. Damaska attributes the basis of this approach to classic English liberalism which advocated unencumbered individual freedom and a limitation on governmental powers to encroach on such freedoms.[4]

The principal feature of the adversary model, then, 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. Consequently there are obvious limitations to the adversary system.

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1. Feeley Court Reform on Trial 14.
2. Damaska op cit 509.
3. Op cit 517.
4. Op cit 532.

4. THE ADVERSARY SYSTEM AND THE UNDEFENDED ACCUSED

For the adversary system to achieve substantial or procedural justice, it is essential that the parties should be highly combative, effective, and evenly matched adversaries.[1] 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.[2]

In addition to the obstacles presented by the structure of decisionmaking under the adversary system, the accused faces also the criminal justice system's emphasis upon crime-control. The achievement of this goal requires an efficient process, based on speed, certainty and finality of disposition.[3] The occasions for challenges of the decisions of the administrators of the process, the police and prosecutors, should be minimized. Reliance is placed on the accuracy of the fact-finding of the police, and the ability of the prosecution to screen out innocents. The formal adversary adjudicative process is de-emphasized and

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1. D Danet & B Bogoch "Fixed Fight or Free-for-all? An Empirical Study of Combativeness in the Adversary System of Justice" (1980) 7 British J of Law & Society 36 58; AS Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure" (1959-60) 69 Yale LJ 1149 1192; Justice The Unrepresented Defendent in the Magistrates' Court (1972) 4.
2. Brouwer op cit 208.
3. See Packer's description of the crime control model, op cit 159.

cases are best disposed of by a plea of guilty.[1] Rights that would slow down the process, eg bail, legal representation, and sound proof of guilt in court, are not accorded much attention.

To counteract the steady march towards conviction, the accused must positively assert the rights which would guarantee him a fair trial,[2] for the onus rests generally upon the accused to invoke the protection of his rights.[3] Whether or not the interests of the State prevail, depends therefore upon the accused's desire, knowledge, ability, and resources to counteract them.

This reality is well illustrated by the adversarial search for the truth. 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.[4] The party-orientation of the evidence may lead to the suppression and distortion of evidence,[5] for the 'truth' that a party may present is "an account edited with vested interests in mind".[6] In the end the court cannot establish the material

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1. Packer op cit 161.
2. Brouwer op cit 208.
3. Cf Feeley Court Reform on Trial 14.
4. Zeidler op cit 395.
5. Brouwer op cit 208.
6. McBarnet 17. See also LL Weinreb Denial of Justice (1977) 102; Danet & Bogoch (1980) Br J of Law & Society 36 40; B Wootton Crime and Penal Policy (1978) 19-20. See also Wootton Crime and the Criminal Law (1963) 33 for her comment on the unscientific method of extracting the truth from opposite distortions. McBarnet (1981) 81 calls it "conflicting caricatures". Hermann op cit 6 describes it as a stereoscopic view of the offence. (Continued on the next page)

truth, but merely decides which party has adduced the more credible evidence.[1]

If 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.

A non-bureaucratic system of procedure 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.[2] The party-orientation of the proceedings and the 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.

More favourable is Certoma, who argues that the truth will emerge as a product of the collaboration between the parties, C Certoma "The Accusatorial System v the Inquisitorial System: Procedural Truth v Fact?" (1982) 56 Australian LJ 288 291.

1. Zeidler op cit 395.
2. Cf Packer op cit 157.

As Lord Devlin remarks:

> "Indeed, where there is no legal representation and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down".[1]

Since a necessary precondition for a fair trial, according to Packer, is the adherence to the principle of equality,[2] legal assistance should thus be provided for the accused who cannot afford it.

5. LEGAL REPRESENTATION AND THE RATIONALE FOR THE PROVISION OF LEGAL AID TO THE INDIGENT ACCUSED

The accused's right to legal representation has been called the "most pervasive right" of an accused,[3] and of "fundamental character".[4] In the context of adversary procedure it has been shown that legal representation is essential to the attainment of a fair trial. Legal services, controlled by an independent legal profession, have traditionally been a commodity available only at a price. However, once the assistance of a defence lawyer is recognized as an essential requirement for a fair trial, the doctrine of equality before the law, the cornerstone of legal systems in the Western liberal tradition, demands that all accused persons should have access to the services of a lawyer.[5]

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1. Lord Patrick Devlin The Judge (1979) 67.
2. Op cit 168.
3. See Yale Kamisar "The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused" (1962) 30 Univ of Chicago LR 1.
4. Powell v Alabama 287 US 45, 68 (1932).
5. See AJ Reiss "Citizen Access to Criminal Justice" (1974) 1 British J of Law & Society 50 69; PA Sallman & J Willis Criminal Justice in Australia (1984) 144.

The response in the Anglo-American jurisdictions to the indigent, and hence undefended accused, has been the provision of free legal assistance to certain classes of accused to ensure, by placing the accused on an equal footing with the prosecution, a fair trial. It is useful to consider the rationale given for the provision of legal aid to indigent accused by the United States Supreme Court.

The United States Supreme Court in Gideon v Wainwright 372 US 335 (1963) finally established that "in [their] adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him".[344] The appointment of counsel for indigent accused was justified by Black J as follows:

> "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."[344]

Court-appointed counsel for indigent accused was thus justified in order, firstly, to equalize the standing of the accused vís a vís the prosecutor, and secondly, to equalize the accused vís a vís other accused who have the money to brief counsel. These justifications are the foundations of

the principles of due process and equal protection respectively, as enshrined in the American Constitution.[1] Rehnquist J in Ross v Moffitt 417 US 600 (1974) distinguished these two principles as follows:

> "'Due process' emphasizes fairness between the State and the individual dealing with the state, regardless of how other individuals in the same situation are treated. 'Equal protection', on the other hand, emphasizes disparity in treatment between classes of individuals who are arguably indistinguishable".[2]

The appointment of counsel for indigent accused can be justified on both grounds. It has been stated that equal protection and due process emphasize the central aim of the judicial system that "all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court"".[3] In Gideon v Wainwright the Court, by recognising legal representation as an essential part of due process, extended the entitlement to counsel of the Sixth Amendment, applicable only to federal courts, through the due process clause of the Fourteenth Amendment, to the state level.

The principle in Gideon formed the basis of the rule pronounced in Argersinger v Hamlin 407 US 25 (1972) that no person, in the absence of a knowing and intelligent waiver, may be imprisoned for any offence without the

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1. V & XIV Amendments.
2. 609. See, however, the more general interpretation of "due process" by Powell J in Argersinger v Hamlin 407 US 25 49 (1972): "Due process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial".
3. Griffin v Illinois 351 US 12, 17 (1956).

assistance of counsel.[1] Powell J, in a separate opinion in Argersinger, was convinced that the principle could be extended also to petty cases whenever assistance of counsel was necessary to assure a fair trial in a particular case.

The doctrine of equal protection has also been utilized to make post-conviction remedies available to indigent convicted persons. In striking down a provision that a fee must be paid before an appeal may be lodged, Black J in Griffin v Illinois 351 US 12, 19 (1956) said:

> "In criminal trials a state can no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial...There can be no equal justice where the kind of trial a man gets depends on the amount of money he has".

Following on Griffin, the principle was succinctly stated in Mayer v Chicago 404 US 189 (1971) as follows: "[The] principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way".[196-7]

Furthermore, the fact that a conviction was for a misdemeanor should not deprive the indigent accused of obtaining a copy of the record free of charge for the purposes of appeal.[2]

Although equality has been pursued in various aspects of criminal procedure, it has often been asserted that

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1. See also Scott v Illinois 440 US 367 (1979).
2. Mayer v Chicago 404 US 189 (1971).

"absolute equality is not required",[1] and that legal assistance is not always an essential requirement.[2] In each instance it must be determined whether "an unconstitutional line has been drawn between rich and poor".[3] Although the State is not required to relieve the accused of his poverty, it should not take advantage of indigence in the administration of justice.[4] The test remains whether the accused has had an adequate opportunity to present his claim fairly.[5] Fundamental fairness is the general test, and the State's responsibility is to do all that is reasonably required to ensure basic compliance with the requirements of a fair trial.[6] The inclusion of other forms of assistance, such as investigators, experts etc, under the equal protection clause has not been settled, but the Supreme Court at present seems reluctant to grant a substantial equalization of resources.[7]

Polyviou concludes that the Supreme Court has

> "brought into existence a new and distinct principle of equality which is primarily if not exclusively applicable to the problems of the indigent criminal defendant. This new principle derives support from both the Equal Protection and the Due Process clauses, and it is a matter of some doubt whether either clause by itself provides an entirely satisfactory basis for the results reached in the cases considered above...".[532]

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1. Douglas v California 372 US 383 (1963); Ross v Moffitt 417 US 600 (1974); United States v MacCollom 426 US 317 (1976).
2. See dissenting judgment of Clark J in Douglas v California 272 US 353 (1963).
3. Per Douglas J in Douglas 387.
4. Miranda v Arizona 384 US 436 (1966) 472 per Warren CJ.
5. Ross v Moffitt supra per Rehnquist J. Also in United States v MacCollom 426 US 317, 326:"The basic question is one of adequacy of the respondent's access to procedures for review of his conviction".
6. PG Polyviou The Equal Protection of the Laws (1980) 535.
7. Polyviou op cit 509.

Central to the argument is the principle of equal justice, between the accused and the prosecution, and between accused inter se. The moral strength and legitimacy of the legal system are much dependent on the achievement of equality between litigants, particularly where there is manifest social inequality with regard to their positions of power and status.

In most developed liberal legal jurisdictions equality before the law is pursued by the provision of legal aid for indigent accused.

6. THE PROVISION OF LEGAL AID TO INDIGENT ACCUSED

The provision of legal assistance to those who cannot afford it, is a very costly social service. Because the majority of persons accused of crime are, for a number of reasons, from the lower economic strata of society, paid legal services are usually beyond their means. To provide legal assistance to a large group of accused requires firstly, legal resources to provide the service, and secondly, financial resources to sustain such a service. Legal resources include, on the one hand, defence lawyers, and on the other, court personnel and facilities to deal with the increased court time which frequently results from the presence of lawyers; all this involves the expenditure of large sums of money.

The implications of providing legal aid to indigent accused are therefore far reaching. In examining these implications

attention will be focused on legal aid in England and Wales. The reasons for this choice are threefold. Firstly, South Africa has adopted a legal aid scheme based on the English system whereby legal services are rendered by private practitioners. Secondly, the number of persons accused of serious offences is approximately the same as in South Africa. Thirdly, most of the accused referred to above are indigent and qualify for legal aid. Examining the costs involved in the operation of the English system will provide some insight into the implications of pursuing equal justice through the provision of free professional legal services.

Although legal aid was initially provided in England and Wales through the court practice of appointing pro Deo counsel and the so-called 'dock brief',[1] the accused's legal entitlement to such assistance came through legislative intervention. The Poor Prisoners' Defence Act of 1903, empowered courts to grant legal aid for the trial on indictment of an indigent prisoner where a defence was put up at committal proceedings.[2] Although the Poor Prisoners' Act of 1930 removed this requirement, legal assistance was reserved for cases where it was in the interests of justice "by reason of the gravity

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1. M Zander "Legal Aid in a Democratic Society" in University of Natal Legal Aid in South Africa (1973) 12 14; E Moeran Practical Legal Aid (1982) 133.
2. H Levenson The Price of Justice (1981) 15.

of the charge or exceptional circumstances".[1] A comprehensive legal aid scheme was introduced in 1949 by the Legal Aid and Advice Act of that year. The granting of legal aid in criminal cases was placed in the discretion of the court, which was to be exercised when desirable "in the interests of justice" and in accordance with a means test.[2] Where doubt existed as to whether the accused qualified for legal aid in terms of the means test or the interests of justice, he was to be given the benefit of the doubt.[S 18]

The Widgery Committee Report on legal aid in criminal proceedings[3] recommended that legal aid should as a practice be given at trial and committal proceedings in respect of indictable offences. In summary trials, it should be in the discretion of the courts to grant legal aid.

The courts were also liberal in their extension of legal aid to accused in serious cases.[4] In Howes [1964] 2 QB 459 the Court of Appeal held that it would be rare for justice not to demand that legal aid be granted to an accused facing a serious charge. Where a court considered the imposition of a heavy sentence of imprisonment, it should offer legal aid to the accused where he failed to apply for it himself.[5]

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1. Moeran op cit 134.
2. S 18(2). See Moeran op cit 135.
3. Report of Departmental Committee on Legal Aid in Criminal Proceedings under Chairmanship of Mr Justice Widgery, Cmnd 2934 1966.
4. Hampton op cit 442; Moeran op cit 139.
5. Serghiou [1966] 1 WLR 1611; O'Donnell (1967) 111 SJ 809; Green [1968] 1 WLR 673.

The Criminal Justice Act of 1967 gave effect to most of the Widgery Committee's recommendations.[1] The scope of assistance was further widened by the Legal Advice and Assistance Act of 1972, which provided for legal assistance short of representation and permitted the setting up of duty-solicitor schemes in the lower courts.[2] The Criminal Justice Act of 1972 provided that nobody, with certain limited exceptions, could be sent to prison without being offered legal representation.[3]

In terms of the Legal Aid Act of 1974, which replaced the 1967 Criminal Justice Act, criminal legal aid is still to be administered by the courts. If a person wishes to obtain legal aid, he has to apply to court,[S 28] which may assign him any barrister or solicitor in private practice. Legal aid may be granted to accused appearing in various trial courts, at committal proceedings, and also for the purposes of appeal.[S 28] The Act states that a legal aid order shall be made where it appears to the court that it is desirable in the interests of justice,[S 29(1)] and the accused's means are such that he requires assistance in meeting the costs which he may incur.[S 29(2)] Where doubt arises whether a legal aid order should be made, the doubt should be resolved in the accused's favour.[S 29(6)] The court is also empowered to order the accused to make a monetary contribution at the conclusion of the case if it appears

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1. Moeran op cit 140.
2. See below.
3. S 37. See Moeran op cit 163; PH Gross Legal Aid and its Management (1976) 157.

that he has the means to do so.[S 32(1)]

The Legal Aid Act of 1982 further extended the powers of the courts to grant legal aid orders, for example, for proceedings following a partly suspended sentence.[S 4] Provision was also made for appeal against the refusal of legal aid.[S 6]

In England and Wales in 1983 prosecutions were instituted against 2 300 000 persons.[1] Of these accused, 23% were charged with indictable offences (530 000), a further 23% with summary offences excluding motoring offences (521 000), and the rest (1 252 000), with motoring offences.[2] In the superior court the vast majority of the accused and appellants received legal aid: 95% of the 88 800 accused who were put on trial at the Crown Court;[3] 99% of the 10 300 accused who appeared at the Crown Court for sentence following a conviction in the magistrates' court; and 60% of the 18 115 appellants.[3] In these cases applications for legal aid for proceedings in the superior courts were invariably granted.[4]

In the magistrates' court legal aid cases did not constitute such a high proportion of all the cases heard, but constituted more than three quarters of all the legal aid orders made. Eighty percent of 351 000 accused charged with

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1. Home Office Criminal Statistics England and Wales 1983 (1984) Cmnd 9349, hereinafter referred to as Criminal Statistics 1983.
2. Table 6.1.
3. Tables 6.7, 6.8 & 9.4.
4. Table 9.3.

an indictable offence applied for legal aid,[1] and 89% of these were successful,[2] resulting in 71% (249 210) of all the accused in this category enjoying legal aid.[3] Of 1 773 000 arraigned for summary, or non-indictable offences, of which 70% were minor motoring offences, only 3% (60 000 persons), applied for legal aid; 62% of those were successful, resulting in only 2% of these accused receiving legal aid.[4] Of 94 000 accused against whom committal proceedings were instituted in the magistrates' court for trial at the Crown Court, 53 000 applied for legal aid and of these 99% were successful.[5] Finally, in 105 000 proceedings at juvenile courts, 42% of the juveniles requested legal assistance, most of them being successful (92%).[6] In all there were 545 000 applications, of which 495 000 were successful.[7]

The cost of 495 000 legal aid orders amounted to £121 million. The number of contribution orders made totalled 18 000, but these produced a mere £1,32 million or one percent of the total cost.[8] The number of criminal legal aid orders more than doubled in ten years from 244 000 orders made at a cost of £16 million.[9]

The vast majority of accused charged with indictable offences, whether in the higher or lower courts, qualified

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1. Tables 9.1 & 9.2.
2. Table 9.3.
3. Table 9.4.
4. Tables 9.1, 9.2, 9.3 & 9.4.
5. Ibid.
6. Ibid.
7. Table 9.1 & 9.5.
8. Table 9.5.
9. Ibid.

for legal aid, and were in effect granted such assistance. In the lower courts, in respect of summary offences, few accused applied for legal assistance and even less were granted legal aid. The court practice in this regard has been described as varying from "the humane to a Victorian indifference to the poor".[1]

The picture in England is not complete without reference to the operation of the duty-solicitor schemes. Solicitors, on a voluntary basis, provide at the lower courts legal advice and temporary assistance to accused persons.[2] A scheme is constituted and administered by the local law society which, on a rotation basis, allots days upon which its members will be on duty at the local criminal court or prison. The duty solicitor will then be present at court to advise or act for any person who appears without a lawyer. He will conduct bail applications, advise on the entering of pleas, make representations regarding sentence and advise on legal aid applications. These services complement the formal legal aid scheme at the initial, yet very important, stages of the criminal trial.

England and Wales thus have a fairly comprehensive provision of legal aid involving most accused charged with serious offences, a large number of lawyers,[3] and vasts sums of

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1. Moeran op cit 142.
2. See generally M King The Effects of a Duty Solicitor Scheme: An Assessment of the Impact upon a Magistrates' Court (1976); Zander op cit 17.
3. 5 000 barristers and 45 000 solicitors, Guardian 21 January 1986.

money.

For legal assistance needs to be satisfied by a legal aid scheme, Reyntjens[1] argues, five conditions must be present:

(a) a relatively small number of indigent persons to be provided for;

(b) a highly productive economy resulting in a high income to finance legal aid for the small number of indigents;

(c) a well-organized legal profession with a large number of members who have a considerable impact on policy-making;

(d) a well established tradition of a constitutionally strong judiciary - independent, respected by the executive, and bound by the due process of the law; and

(e) a tradition of social welfare and justice as a public service.

The last four conditions are met in England and Wales, but half a million offenders charged with indictable offences and qualifying for legal assistance place considerable demands on a country's financial resources and the manpower of the legal profession. Whether this answer to factual inequality before the law - the provision of professional legal assistance, particularly through the English referral system - is at all tenable in a Third World country where none of Reyntjens' conditions are met, is doubtful.

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1. "Legal Aid in Africa - South of the Sahara" in FH Zeemans (ed) Perspectives on Legal Aid (1979) 12 31.

South Africa straddles the First and Third Worlds and it is necessary to consider how the Republic has responded to the challenge of equality before the law and the question of legal aid.

CHAPTER TWO SOUTH AFRICA: EQUAL JUSTICE AND INDIGENOUS PROBLEMS

In South Africa the principles of a fair trial are pursued in the context of an adversary mode of procedure. Thus each party is responsible for promoting and protecting its own interests and for that purpose may employ legal practitioners. Since legal services are a commodity to be secured by the payment of a sum of money, the financial status of the parties determines whether they will enjoy legal representation. The State has at its disposal the financial resources to employ as prosecutors persons trained in law.[1] Accused persons with financial means secure the services of lawyers, but the vast majority of persons arraigned before court are indigent and hence undefended. The questions to be asked are, firstly, whether equal justice is part of our legal tradition, and secondly, how its demands have been confronted.

1. THE COMMITMENT TO EQUAL JUSTICE

The concepts of "due process" and "equal protection" have not been widely used in South African law or legal writing.[2] The traditional approach has been to regard them

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1. Cf Report of the Commission to Inquire into the Structure and Functioning of the Courts of Law in South Africa RP 78/1983 under chairmanship of Mr Justice GG Hoexter, part VIII par 2(g) (hereinafter referred to as the Hoexter Commission) which recommended an increase in the expenditure on salaries of prosecutors to attract and retain qualified and experienced personnel for this task.
2. Under the influence of American jurisprudence, writers like JD van der Vyfer, Die Beskerming van Menseregte in Suid-Afrika (1975), and J Dugard, Human Rights and the South African Legal Order (1978), have given these concepts greater currency.

as being incorporated in the Rule of Law concept.[1] The principle of equality before the law is regarded as part of our common law tradition. Although the Roman-Dutch authorities did not spell out the doctrine unequivocally, Voet declared that law preserves equality and binds the citizens equally.[2] As a general overriding principle in our legal system, however, it has had a checkered career both in the legislatures and in the courts.

The idea of equality before the law became an accepted principle during the course of the 19th century in the Cape colony.[3] To the north of the Cape, the 1854 constitution of the new republic of the Orange Free State included the guarantee that "De wet is voor allen gelijk; met dien verstande dat de rechter alle wetten met onpartijdigheid zal uitoefen, sonder aanzien van personen".[Art 58] In contrast, the Transvaal constitution of 1858 expressly stated that "Het volk wil geene gelijkstelling van gekleurden met blank gezeten toestaan, noch in Kerk noch in Staat".[4]

No references to equal justice are to be found in the 1910 Union and 1961 Republican constitutions of South Africa. In

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1. See eg HR Hahlo & E Kahn South Africa: The Development of its Laws and Constitution (1960) 133-135; AS Mathews Law, Order and Liberty in South Africa (1971) 14-16.
2. Voet Commentarius ad Pandectus 1.3.5. See generally HR Hahlo & I Maisels "The Rule of Law in South Africa" (1966) 52 Virginia LR 1; V d S Centlivres "The South African Constitution and the Rule of Law" 1956 Butterworths South African LR 2 10-12.
3. TRH Davenport "Civil Rights in South Africa 1910-1960" 1960 Acta Juridica 11 13.
4. Grondwet art 9.

the Constitution Act 110 of 1983, however, the preamble includes as one of the "national goals", "To uphold the independence of the judiciary and the equality of all under the law". The same constitution provides, nevertheless, for a tri-cameral parliament and executive founded firmly upon racial differentiation between Coloureds, Indians and Whites, with all Blacks excluded from participation.[1]

The South African courts have recognised the principle of equality before the law as a fundamental principle of the common law and in the words of Lord de Villiers,

> "It is the primary aim of the court to protect the rights of individuals which may be infringed and it makes no difference whether the individual occupies a palace or a hut".[2]

In an earlier dictum Kotze CJ declared in In re Marechane (1882) 1 SAR 27 31: "The court is bound to do equal justice to every individual within the jurisdiction, without regard to colour or degree". With equal force Leon ADJP said in Hurley and another v Minister of Law and Order 1985 (4) SA 709 (D) more than a hundred years later that

> "it is perhaps necessary to remind oneself, from time to time, that the first and most sacred duty of the Court, where it is possible to do so, is to administer justice to those who seek it, high and low, rich and poor, Black and White; to attempt to do justice between man and man and man and State".[3]

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1. See generally LJ Boulle South Africa and the Consociational Option (1984).
2. Zgili v McCleod (1904) 21 SC 150 152.
3. 715G. See, however, how the principle has not been applied in the testing of subordinate legislation, Dugard Human Rights 304ff; Minister of Interior v Lockhat 1961 (2) SA 587 (A); Adams, Werner 1981 (1) SA 198 (A).

In the field of criminal procedure, direct references to the principle of "equal justice" are found in various criminal codes of the pre-Union colonies. In the preamble of a Cape proclamation of 1813, the establishment of the principle of open court was justified on the ground, inter alia, that it would imprint "on the minds of the inhabitants of this colony the confidence 'that equal justice is administered to all'...".[1] In the Cape criminal code of 1819[2] the principle of equality before the law was again mentioned in a few sections.[3] The same code, however, authorized discrimination by excluding the necessity for court authority to arrest a person "beneath the rank of Burghers or Christian Inhabitants".[S 27] In the Transvaal, despite the express provision for inequality in the Constitution of 1858,[4] the criminal code of 1864 contained the assurance that equal justice was to be done to all.[5]

While the South African social, political and economic structure is founded upon the racial inequality implicit in the apartheid system, the notion of equality in criminal trial proceedings has remained to a certain extent intact. The rules of procedure, formulated in general terms, have not discriminated overtly against accused persons on the

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1. Proclamation of 25 September 1813, in Theal vol IX 239. My italics.
2. "Crown Trial: or a Mode of Proceedings in Criminal Cases at the Cape of Good Hope" enacted by the Chief Justice, in Theal vol XXV 90.
3. See s 37, 77 & 145.
4. See above.
5. Ord 4 of 1864 s 27.

basis of race, religion, or class.[1] The major departure from the principle of non-discriminatory rules has been the establishment of separate courts for the prosecution of Blacks for certain specified offences.[2]

The absence of discriminatory rules does not, however, ensure effective equality between the prosecution and the accused, or amongst various accused, if the implementation of the principles of a fair trial is dependent upon the presence of a defence lawyer.

2. THE NEED FOR LEGAL ASSISTANCE

The vast majority of accused persons in South Africa would not be able to participate effectively in court proceedings without legal assistance. They are illiterate or undereducated, inexperienced, and unfamiliar with the official languages of the court. Yet these accused are also indigent and therefore routinely confront the criminal justice process without representation. Those facing the most serious charges in the regional courts are the least defended. With the increase in the substantive and sentencing jurisdiction of the regional courts to include offences such as rape, and sentences of up to 10 years imprisonment,[3] many cases which were previously tried in the Supreme Court with the assistance of pro Deo counsel, are now heard in the regional courts with the accused

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1. See ch 3 below.
2. See ch 3 below.
3. Lower Courts Amendment Act 91 of 1977 s 9.

undefended.[1] The exclusion of candidate attorneys from appearing in the regional court[2] also limits the source of legal practitioners for accused arraigned in those courts. This reality was clearly demonstrated by the writer's survey in 1984 of the regional court sitting in Durban.[3] Only two of the 24 accused of rape, one of the 35 alleged housebreakers, one of the 21 charged with motorcar theft, and none of the 19 alleged robbers were defended. Only two of the 52 accused who received prison sentences were represented.

The absence of legal representation has not only made the legal process inaccessible to the majority of Black people, but has effectively undermined the legitimacy of the judicial system. While most accused are Black, the administrators of the criminal justice system are mostly White. As most of the Black accused are undefended, they are reliant, for procedural justice, on the predominantly White court personnel. Considering the wider political context, it is understandable that a Black accused, particularly when appearing without legal assistance, will be sceptical as to whether there is equal justice before the law. Years of exploitation and repression, primarily through the legal system, have led to the increased questioning of its legitimacy. The following remarks of the Human Sciences Research Council's Investigation into Intergroup Relations,

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1. The number of Supreme Court cases dropped from 3 700 in 1977 to 1 789 in 1979, see McQuoid-Mason (1982) 60.
2. Attorneys' Act 33 of 1979 s 8(1).
3. For details of the study, see section C par 2.1. below.

are apposite in this context:

> "The South African legal system is suspect among large parts of the population because, on the one hand, the administration of justice is controlled by whites and, on the other, because, as a result of various economic, language and other factors, legal processes and administrations, as well as penal and litigation procedures, have become inaccessible and incomprehensible to many".[1]

The provision of legal assistance will make the legal process more accessible to many Blacks and enhance the legitimacy of the judicial system to some degree.

One of the responses to the demands of the principle of equal justice has been the provision of legal aid to indigent accused through the appointment of pro Deo counsel in the Supreme Court, and a legal aid scheme for the lower courts.[2]

3. THE PROVISION OF LEGAL AID

3.1. PRO DEO COUNSEL

The provision of legal aid through the intervention of the courts has been limited to the appointment by the Supreme Court of pro Deo counsel in capital cases.[3] The Court never developed a legally enforceable rule that an indigent

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1. Main Committee: HSRC Investigation into Intergroup Relations The South African Society: Realities and Future Prospects (1985) 166.
2. The Legal Aid Board has decided in principle that the provision of legal services in the Supreme Court should also be brought under the control of the Board, but due to its financial implications this decision has not been implemented, Legal Aid Board Annual Report for Period ending 31 March 1984 8.
3. See chapter three below for development of this institution.

accused, even when facing a capital charge, is entitled as of right to free legal representation; the provision of legal assistance has remained merely a rule of practice.[1] The right to counsel, acknowledged in the Criminal Procedure Act,[S 73(2)] merely entails that the accused may not be deprived of the opportunity to engage the services of a lawyer.[2] Where an accused cannot afford the services of a lawyer, he has no right to demand that a lawyer should be appointed on his behalf.

Nevertheless the Court ensures that most accused arraigned before the Supreme Court are represented pro Deo,[3] mostly by junior members of the bar who are not usually assisted by an instructing attorney.[4]

3.2 LEGAL AID ACT 22 OF 1969

With the enactment of the Legal Aid Act 22 of 1969, the provision of legal aid was for the first time given a statutory footing. A body corporate, the Legal Aid Board, was established,[S 2] whose object is "to render or make available legal aid to indigent persons".[S 3] The Board, a semi-autonomous body, consists of eleven members; one nominated by the Bar Council, four by the Association of Law Societies, five civil servants and a judge who acts as chairman.[S 4] The Board has the power, inter alia, to

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1. Mati 1960(1) SA 304 (A) 306; Chaane 1978 (2) SA 891 (A).
2. See ch 4 par 1 below.
3. McQuoid-Mason (1982) 58ff.
4. Cf Gibson 1979 (4) SA 115 (D). See also DL Carey-Miller "Some Aspects of Legal Aid in Criminal Proceedings" (1972) 89 SALJ 71 72.

obtain the services of legal practitioners and to fix conditions subject to which legal aid is to be rendered.[S 3] Legal aid is not controlled or administered by the legal profession but by the Board's functionaries, called legal aid officers, who are all civil servants.

The legal aid scheme was implemented in South Africa on 29 March 1971.[1] The Board issued a Legal Aid Guide which gave direction and body to the scheme. The English legal aid scheme of referring cases to attorneys in private practice was adopted. A person may apply to a legal aid officer and, if he qualifies in terms of the means test which determines "indigence",[2] he can either be assisted by the legal aid officer or be referred to a private practioner [Par 20.1] who is prepared to act for him.[Par 27] Such practitioner is further required to certify that there is a reasonable prospect of success.[3] The Guide also lays down rules whereby, despite the accused's indigence, legal aid would not be granted or would be granted only with the approval of the director of the Board.[Par 12] Legal aid is excluded generally where, according to the legal aid officer, the applicant leads a criminal life or is unemployed for no good reason.[Par 10.1] In respect of criminal cases in particular, legal aid is excluded where pro Deo counsel is provided,[Par 12.1(a)] in respect of offences for which an admission of guilt has been determined or which can be

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1. McQuoid-Mason (1982) 27.
2. See Par 5.1 and Annexure E for the means test.
3. Legal Aid Board Annual Report 1984 3.

compounded,[Par 12.1(b)] where the commission of the offence is admitted, or where the defence is so simple that it can be advanced by the accused himself,[Par 12.1(c)] in respect of traffic offences or any other offence connected with the use of a motor vehicle, unless the director grants permission due to exceptional circumstances,[Par 12.1(d)] in a preparatory examination,[Par 12.1(e)] or to advance mitigating circumstances for the purposes of sentencing, unless it is a 'deserving' case.[Par 11.2]

From its inauspicious start in 1972-3, when 465 applications for legal aid in criminal proceedings were received and 251 were referred to attorneys,[1] these figures rose to 5 898 applications and 3 071 referrals for the year ending 31 March 1984.[2] Coloureds and Indians made most of the applications to the Board (2 494), followed by Blacks (1 961) and Whites (1 443). Criminal legal aid applications still form a fraction (11,5%) of all applications received.[3]

The availability of legal aid is broad and goes beyond the provision of legal representation for accused persons facing a possible sentence of imprisonment. But to provide legal aid to all accused persons, or even all those accused of serious offences, is not yet within South Africa's capabilities. The large number of indigent accused, a small legal profession,

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1. McQuoid-Mason (1982) table 37.
2. Legal Aid Board Annual Report 1984.
3. In 1983-84 5 898 of 51 305 applications. For a similar pattern in previous years, see McQuoid-Mason (1982) 84 table 24.

the lack of financial support, and an absence of interest in legal aid generally, are all daunting obstacles in the way of providing satisfactory legal assistance to indigent accused through the present legal aid scheme.

4. PROBLEMS IN THE PROVISION OF LEGAL AID

4.1 THE LARGE NUMBER OF INDIGENT AND UNDEFENDED ACCUSED IN COURT

Figures reveal the extensive use of the criminal courts in South Africa. In the year ending 30 June 1984, a total of 1 808 978 criminal cases were recorded in the various courts administered by the Department of Justice.[1] The Supreme Court dealt with 0,2% (2 450) of those cases, the regional court with 3,0% (54 633 cases) and the magistrates' courts with the remaining 96,8% (1 751 895 cases). In the commissioners' courts, administered by the Department of Co-operation and Development, more than 100 000 persons were prosecuted in 1983 for offences relating to pass books and influx control.[2]

The above statistics are misleading in two respects. First, the figures reflect only the number of cases recorded in the various courts; the actual number of accused persons appearing in court would be greater as in

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1. Report of the Department of Justice for the Period 1 July 1983 - 30 June 1984 40-46.
2. See DJ McQuoid-Mason "Problems Associated with the Legal Representation of Africans in the Urban Areas of South Africa" in Urban Black Law (1985) 181 187. These courts are about to be abolished, and their functions have since July 1985 been taken over by the magistrates' courts, Proc R131 of 10 August 1985.

many cases there were more than one accused. Secondly, 1 751 895 cases recorded in the magistrates' court do not represent the actual number of full trials. The Hoexter Commission estimated that in 1980 half of the cases recorded in the magistrates' court never came to trial.[1] A further 25,9% (372 415) were petty offences, including motoring offences, which were disposed of by guilty pleas. The remaining 24,0% of the cases (347 495) were either contested or a plea of guilty was entered after judicial questioning.[2] With the exclusion of the cases heard in the commissioners' courts and the petty offences in the magistrates' courts, 392 338 criminal trials were conducted, of which the Supreme Court heard 0,39%, the regional court 11,8%, and the magistrates' court 87,8%. Making allowances for a large number of accused jointly tried, this figure approximates the 486 236 persons prosecuted for serious offences as recorded by the Central Statistical Services for the statistical year 1981-82.[3] The number of persons charged with serious offences in South Africa are thus not significantly less than the 530 000 persons charged with indictable offences in England and Wales.[4]

The indigence of most accused can be deduced from their educational level, age, race, and whether they were in fact represented in court. Most of the accused were illiterate or

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1. 716 974 of 1 434 884 cases (49.9%), part VI par 2.2.1.2.
2. Part VI par 2.2.1.2.
3. Statistics of Offences 1981-82 table 2.
4. The offences regarded as "serious" correspond to the English classification of indictable offences. See Criminal Statistics England and Wales 1983 appendix 3 199ff.

undereducated. The Statistics of Offences of 1981-82 reveal that of the convicted persons 27,8% were illiterate, 48,7% had had some education up to and including standard 5, 22,7% had had some secondary education (up to and including standard 10), and only 0,6% had received post matric training.[1] Juveniles (between the ages of 7 -17) constituted 12% of all the convicted, and the 18-20 year old group a further 18%.[2] The low level of education and youthfulness of a substantial portion of the accused are indicators of low occupational status, which would place legal services beyond their means.

A further indicator of indigence in South Africa is the race of the accused, since Blacks constitute the poorer section of the community. Although official reports do not disclose the racial distribution of accused persons, it is apparent that most of them were Black. The statistics provided by the Commissioner of Prisons for the year 1983-4 show that of the 252 302 unsentenced and 266 829 sentenced prisoners received into prison, 79,7% were African, 17,0% Coloured, 0,6% Indian, and 2,7% White.[3] A conservative estimate would be that at least 90% of all accused in South Africa are Black.[4] In a study of bail in the Durban magistrates' court in 1981, only 5,3% of the sample of 486 accused were White, 79,9% were African, the rest being Indian or

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1. Table 8.
2. Table 3.
3. Report of the Department of Justice for the Period 1 July 1983 - 30 June 1984 section B table 9.
4. Statistics of Offences 1981-82 table 2.

Coloured.[1] In a survey conducted by the present writer in both the regional and magistrates' courts sitting in Durban in 1983-84, Whites comprised 8,2% of the sample of 580 accused and Africans 74,6%, while the rest were either Coloured or Indian. The courts thus dealt primarily with Black accused persons, the vast majority being African.[2]

The average monthly household income for the different race groups for 1984 has been calculated as follows: for Africans R273, Coloureds R624, Indians R1 072, and Whites R1 834.[3] The household subsistence levels as calculated for September 1984, were as follows: for an African family of six living in Johannesburg, R300, in Cape Town, R309, in Durban, R297, and in Bloemfontein, R298. For a Coloured family of five, the figures were: Johannesburg, R338, Cape Town, R321, Durban R323, and Bloemfontein, R309.[4] It is further important to note that the number of unemployed and underemployed in South Africa and the homelands were estimated at two million, or about 25% of the workforce.[5]

The level of representation in court not only reflects the relative need for representation, but is also a reliable indication of the ability of accused persons to secure legal

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1. NC Steytler "Deciding on Liberty - A Bail Study of the Durban Magistrates' Court" in Olmesdahl & Steytler 120 table 1.
2. The term Black will be used to indicate all "non-White" persons unless the contrary is apparent from the context.
3. Race Relations Survey 1984 (1985) 241 quoting Market Research Africa's figures.
4. Op cit 240-1.
5. Op cit 244.

representation. Independent research has shown that most of the accused arraigned in the Supreme Court were represented by counsel either on brief or acting pro Deo, the latter constituting about 90% of the cases.[1] The level of representation in the lower courts, on the other hand, is much lower. A survey of 425 cases heard in the Cape Town magistrates' court in 1980 showed that 84,5% of the Black, 79% of the Coloured and 42% of the White accused were unrepresented,[2] while in the regional court sitting at Retreat, of the 400 cases heard in 1979-1980, 99,9% of Black, 79% of Coloured and 71,5% of White accused were tried unassisted.[3] A survey of 500 cases heard in the juvenile court in Durban, also in 1980, revealed that a lawyer was present in only 2% of the cases.[4] It has been estimated that in 1982 only 33 of 56 000 blacks prosecuted in the Johannesburg commissioners' court had legal assistance.[5] This figure is supported by a survey conducted in the same courts in 1982 which found that in a sample of 365 cases, only 0,2% of the accused were represented.[6] In a survey conducted by the present writer in 1982 in the magistrates' courts in the greater Durban area, it was found that only

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1. McQuoid-Mason (1982) 59 table 4.
2. M Slabbert Justice for All (1981) 28.
3. Slabbert op cit 29.
4. D Hutchinson "Juvenile Justice" in Olmesdahl & Steytler 236 249.
5. R Monama "The Pass Courts Advice Office" in DJ McQuoid-Mason (ed) Legal Aid and Law Clinics in South Africa (1985) 113, quoting the Minister of Co-operation and Development, Dr P Koornhof MP.
6. R Monama Is this Justice? A Study of the Johannesburg Commissioners' Courts (1982) 29. See also McQuoid-Mason in Urban Black Law 187.

7,8% of the 276 accused enjoyed legal assistance.

In a follow-up survey conducted by the writer in 1984 of both the regional and district courts sitting in Durban, 11,2% of the 582 accused in the sample were assisted by lawyers. Legal representation according to the race of the accused was: Africans 6,2%; Coloureds 11,1%; Indians 32,8% and Whites 24,0%. The unemployed persons, constituting approximately a quarter of the accused, were, with the exception of two, without representation. Of the unskilled labourers, only 8,4% had assistance, while the percentage for the skilled workers was 42,9%, and for the white collar workers 72,5%. Representation was clearly linked to financial position.

The Legal Aid Board determines whether an applicant is indigent by reference to a means test.[1] In 1984 the means test was set at the following levels:[2] A single person or estranged spouse qualifies for assistance if his income is less than R400 per month (plus R100 for each dependent child), and R800 if married (plus R100 for each dependent child); for an African man married with a family of six, his monthly income must be less than R1400. If the means test is compared with the average income of Blacks, it is clear that most of the Black population could be classified as indigent and thus qualify for legal aid.[3]

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1. Legal Aid Guide par 5.1.
2. Legal Aid Board Annual Report 1984 3.
3. Cf McQuoid-Mason in Urban Black Law 190.

4.2. A SMALL LEGAL PROFESSION

In 1983 there were 5 654 attorneys and 696 advocates in South Africa, serving the needs of 26 million people.[1] It is estimated that 90% of their work consists of civil matters, with criminal defences receiving little attention.[2] On the assumption that 90% of all accused are indigent and would qualify for legal aid, a demand on these attorneys and advocates to provide assistance for an estimated 50 000 indigent accused prosecuted in the regional courts, or 260 000 accused sentenced to imprisonment, appears impossible.[3] It is clearly not feasible to implement with any measure of success, the referral system of England and Wales, where a population more than double that of South Africa, is served by 45 000 solicitors and 5 000 barristers.[4] It seems clear that, as McQuoid-Mason has pointed out,[5] the legal profession will not at present be able to deliver the necessary legal services should every accused entitled to legal aid, be offered such.

4.3. LACK OF FINANCES

The State financing of the legal aid scheme has grown from its initial R50 000 in 1969-70, to R2,9 million for the year ending 31 March 1984.[6] These funds finance both civil and

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1. McQuoid-Mason in Black Urban Law 183.
2. Ibid.
3. Op cit 193.
4. Guardian 21 January 1986.
5. In Urban Black Law 194.
6. Legal Aid Annual Report for Period ending 31 March 1984. For previous years, see McQuoid-Mason (1982) 70ff.

criminal legal aid. Of the 11 342 referrals to attorneys in 1983-4, criminal matters constituted only 3 071 (27%). On an average of R300 per case,[1] the amount spent on criminal legal aid is estimated at R921 300. The cost of providing pro Deo counsel for at least 2 000 cases in the Supreme Court, calculated at R500 per case,[2] could amount to R1 million. The total amount spent on criminal legal aid would then add up to R2 million. To provide legal representation to all the accused who qualify for legal aid, would require an expenditure many times higher than the present level.[3] The cost of providing attorneys for 50 000 cases tried in the regional courts would amount to R15 million (R300 per case) and for 168 000 persons sentenced in 1983/4 to imprisonment of longer than a month, R50 million (R300 per accused).[4]

Increases in expenditure on legal aid are voted for by Parliament. Dramatic increases in State-funding cannot be expected in the future since the budget of the Legal Aid Board for the 1984/5 financial year had to be cut by R2,2 million.[5] This led to a serious curtailment of its activities and a freeze on expansion. It suspended all legal aid for the institution of divorce proceedings and the prosecution of appeals in civil matters.[6] A further

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1. This is estimated on R3,4 million spent on legal fees for the 11 342 referrals, Annual Report 1984.
2. At present counsel earns R75 a day per accused, plus R25 for consultation.
3. Cf MK Robertson "Is Legal Aid the Solution" in DJ McQuoid-Mason (ed) Legal Aid and Law Clinics in South Africa (1985) 98 103; McQuoid-Mason in Urban Black Law 193-4.
4. See also McQuoid-Mason in Urban Black Law 194.
5. Legal Aid Board Annual Report 1984 4.
6. Ibid.

increase in the number of its sub-offices was abandoned as was the plan to substitute the pro Deo system with the normal legal aid scheme.[1] Despite the finding of the Human Sciences Research Council that the public is to a large extent uninformed about the existence of legal aid,[2] the advertising campaign has also been abandoned.[3]

Through the years, as will be illustrated in the next chapter, Parliament has shown little concern for the position of the indigent accused and has exhibited reluctance to extend legal aid to all accused persons. Concern for increased spending on legal aid, particularly in criminal matters, is not a politically popular cause and major increases in funding may not be forthcoming in the foreseeable future.

5. THE FUTURE DEVELOPMENT OF LEGAL AID

The difficulties outlined above are not insurmountable in the long term. At present there are 18 law schools in South Africa and the independent states within its borders, which are capable of training large numbers of lawyers. A gradual increase in the expenditure on legal aid and the utilization of other sources of finance,[4] are not improbable. Furthermore, the more efficient use of the

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1. Op cit 8.
2. Op cit 5. See also MK Robertson Preventive Law (1981) unpublished LLM thesis, University of Natal, Durban.
3. Op cit 7.
4. See eg the suggestion that the Attorneys' Fidelity Fund should contribute to its financing, Daily News 13 June 1985.

available manpower and finances, could also contribute to the extension of legal representation to many more accused. McQuoid-Mason has argued persuasively that the present referral system is more costly than one based on salaried lawyers,[1] and that where public defenders are employed, more effective use is made of their time and expertise.[123]

The introduction of student practice rules to grant senior law students the right of appearance under supervision, has been approved in principle by the Council of the Association of Law Societies and law students could become a valuable additional source of manpower.[2]

These developments will not, however, provide assistance to the majority of the accused in the foreseeable future. The lack of legal representation will remain acute and it will be most widespread amongst the accused whose need for such assistance is the greatest.

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1. McQuoid-Mason (1982) 122ff, 73. See also McQuoid-Mason "Discretion in the Provision of State-financed Legal Aid and Services to Indigent Criminal Accused in South Africa" in Olmesdahl & Steytler 103 111; McQuoid-Mason in Urban Black Law 194.
2. McQuoid-Mason "Student Practice Rules" in DJ McQuoid-Mason Legal Aid and Law Clinics in South Africa (1985) 137. For proposed rules see P Ellum Legal Aid Developments in South Africa: July 1973 to June 1975 (1975) 64; McQuoid-Mason (1982) 194ff. See also Hoexter Commission's approval of this development, part II par 6.4.4.10.

Alternative stategies and methods to alleviate the plight of the undefended accused in the pursuit of equal justice should therefore be investigated.

6. ALTERNATIVE STRATEGIES AND METHODS OF PURSUING PROCEDURAL JUSTICE

The following remarks of Reyntjens in respect of legal aid in Africa, are also applicable to South Africa.

> "It seems unrealistic to propose Western style legal aid provisions, which would only serve a tiny fraction of the hundreds of millions of needy. A far more interesting and efficient approach would be to examine how the need for legal resources can be minimized by making the legal system easier to use for those without professional representation".[1]

The need for professional legal assistance can be minimized by (a) simplifying the proceedings so as to enable the accused to participate without any assistance, or (b) placing a positive duty on the court to ensure that the accused is fairly tried, in an attempt to mitigate the consequences of his inability to participate effectively in the proceedings. The latter approach has important implications for the traditional adversary mode of procedure for it envisages a restructuring of the role of the court.

In South Africa few attempts have been made to simplify the procedure. More significant has been the selective use of customary rules of procedure to facilitate the participation of Black accused in the proceedings.[2]

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1. Op cit 31.
2. See ch 3 below.

The judicial officer, on the other hand, has been entrusted more and more with the responsibility to ensure that the undefended accused is fairly tried. It has even been argued that the provision of free legal aid to all accused, was unnecessary because

> "Our whole legal system is designed to prevent the conviction of an innocent person, whether he is defended or not, and that is the duty of the judicial officer and the prosecutors who are quite capable of doing so to ensure that no miscarriage of justice occurs".[1]

In the chapters which follow, the law and practice of criminal procedure in South Africa will be examined in order to determine whether the role of the judicial officer has been modified so as to ensure that the undefended accused is tried according to the principles of a fair trial. If the fairness of the trial is largely dependent on the judicial officer's active participation, then the successful performance of such a role will, in turn, depend on the impartiality with which he approaches this task. In examining the role of the judicial officer, particular attention will thus be paid to this aspect.

The next chapter will examine the development of the statutory basis of criminal procedure in South Africa as it relates to the undefended accused.

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1. Annual Report of the Department of Justice for 1958 4-5.

SECTION B: STATUTE LAW AND THE UNDEFENDED ACCUSED

CHAPTER THREE THE LEGISLATIVE DEVELOPMENT OF CRIMINAL PROCEDURE IN RESPECT OF THE UNDEFENDED ACCUSED

In South Africa statute law provides both the broad framework of criminal procedure and many of the detailed rules for the conduct of the proceedings. Only in the absence of specific rules have the courts been able to look to and develop the common law. Against the background of the general legislative development of criminal procedure, this chapter will focus on the statutory rules pertaining primarily to the position of the undefended accused. In examining this aspect of criminal procedure, the role that commissions of enquiry and parliamentary debates have played in its development, will also be investigated. Since the services of lawyers are secured only at a fee, the indigence of an accused will invariably result in him being undefended. As indigence and a lack of legal representation are so interrelated, this chapter will cover both indigent and undefended accused.

1. THE CAPE OF GOOD HOPE

1.1. 1806-1832: THE INTRODUCTION OF ENGLISH CRIMINAL PROCEDURE

This period saw the gradual displacement of the predominantly inquisitorial Dutch mode of procedure by the English adversary system of the 19th century. At the time of the second British occupation of the Cape of Good Hope in 1806, it was decreed that the criminal procedure then in

force was to remain the law of the land.[1] This procedure followed the law established by the Ordinance of 1570 of Philip II of Spain.[2] There were two modes of prosecution; the ordinary and the extraordinary process. The ordinary process was followed where the accused denied the crime and the evidence was doubtful. The accused was allowed counsel and could appeal against conviction. The extraordinary process applied where the accused confessed to the crime or where his guilt was 'apparent'. It was inquisitorial in form; the judge interrogated the accused, who was not allowed legal assistance, in order to obtain a confession. The usual mode of procedure was the extraordinary process and in neither mode of procedure did the public have access to the proceedings.

The judicial function was performed during the Batavian period (1803 -1806) by the Raad van Justitie.[3] The accused generally had no right to legal representation,[4] although under the ordinary procedure legal representation was permissible during the trial stage[5] and the Raad van Justitie could, in its discretion, appoint pro Deo counsel for a party appearing before it.[6] Two or more of the Raad's

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1. Cape Articles of Capitulation of 10 and 18 January 1806, Theal vol VI 125-126.
2. Art 7, 32 and 35 of Ord 1570, Theal vol VI 125-126.
3. CG Botha "Criminal Proceedings at the Cape during the 17th and 18th Centuries" (1915) 32 SALJ 319.
4. S Selikowitz "Defence by Counsel in Criminal Proceedings in South African Law" 1965-66 Acta Juridica 53 60.
5. Botha op cit 322.
6. Art 23 of "Provisioneele Instructie voor den Raad van Justitie aan de Kaap de Goede Hoop" quoted in GG Visagie Reg en Regspleging aan die Kaap van 1652-1806 (1969) 107.

members acted as commissioners to deal with minor disputes with the aim of solving these amicably.[1]

Soon after the British occupation in 1806, however, the English law of procedure and evidence began to infiltrate. Despite the legal provision that the criminal procedure then in force was to remain the law of the land, the arrival of British settlers proved to be the determining factor in the development of criminal procedure in the Cape.

The principle of equal and impartial justice, embodied in the English legal tradition, became a focus of concern for the future development of the law. A proclamation issued by the Governor Sir John Cradock on 25 September 1813, which opened the courts to the public, reflected the principle of equal justice. The preamble read as follows:

> "And whereas it has appeared to me to be of essential utility, as well for the dignity of the administration of justice, as towards imprinting on the minds of the inhabitants of this colony the confidence 'that equal justice is administered to all in the most certain, most speedy, and least burthensome manner,' - that all judicial proceedings should be carried on in open Court".[2]

This proclamation was of further significance as it introduced basic aspects of the English law of criminal procedure for the hearing of minor cases. The mode of procedure was adversary; the complainant and the accused were responsible for the production of evidence and only they had the right to cross-examine witnesses. The accused's

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1. Botha op cit 319.
2. Theal vol IX 239. My italics.

right to remain silent was recognised and the court played a relatively minor role, remaining on the whole passive. The prosecutor's role, however, was not that of an adversary, for he maintained an independent position in respect of the dispute; he was obliged to summon all witnesses and was not allowed to cross-examine the defence witnesses.[S 17]

In 1817 lower courts were introduced to the Cape. Limited criminal jurisdiction was conferred on the Board of Landdrost and Heemraden,[1] consisting of lay persons, which had, until then, been concerned only with the investigation and prosecution of crime.[2] The secretary of the Board was to perform the prosecuting function.[3] The accused was not allowed legal representation. The actual sentencing jurisdiction of the lower court was not clearly spelt out but, "in order to prevent any danger", if the sentence exceeded "domestic correction" or imprisonment of more than a month, the right of appeal existed and all such cases were automatically reviewed by the Governor.[4]

In 1819 a new mode of procedure was introduced by the publication of "Crown Trial: or a Mode of Proceedings in Criminal Cases at the Cape of Good Hope". The aim of this code was "to assimilate the criminal procedure as nearly as they [the drafters] considered practical to that of

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1. Proc 18 July 1817 in Theal vol XXV 27.
2. Theal vol XXXIII 47.
3. Theal vol XXV 26.
4. Theal vol XXV 25.

England", this being prompted by "the greater influx of British subjects into the colony".[1] The Code did away with the distinction between extraordinary and ordinary proceedings [S 136] and established two different procedures that had to followed depending on whether or not the offence was subject to public punishment.[2] In cases where public punishment could be imposed, whether in the lower or superior courts, the judicial officer was to follow an inquisitorial mode of procedure. The questioning of witnesses was done by the court which could "put such questions to the witnesses as [might] tend to discover or disclose the Truth".[S 52] There was automatic review by the Governor of all sentences involving public punishment.[S 62] In all other cases the adversary mode was to be used.[S 91] The prosecutor's role became more adversary as both he and the complainant could cross-examine the defence witnesses.[S 110]

The new procedures introduced a measure of professionalization to the criminal process for considerable attention was given to detailed rules, which depended for their enforcement on the skilled participation of the accused. At the outset of the court proceedings, for instance, objections as to the competence of the court or to the charge could be raised by the accused [S 42] and the ruling of the court in this regard was appealable.[S 43]

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1. Theal vol XXXIII 88.
3. Public punishment included transportation, banishment and imprisonment.

No legal representation was allowed in the lower courts, but if the accused was unable to defend himself due to old age or "other indisposition", the court could allow him the assistance of an attorney of whom it approved.[S 125] In the Court of Justice, while the accused was under preliminary examination no one had access to him without the consent of the court.[S 67] The accused became entitled to legal assistance after the indictment had been read and after he had answered all the questions put to him by the court.[S 65] An advocate could assist him to put questions to witnesses and to argue points of law.[S 65]

Some attempt was made to see that the right to legal representation applied equally to all. If the accused was "in a state of Insolvency, or if he [was] so circumstanced that his imprisonment put a stop to his means of subsistence, the Court, where practicable, [should] appoint the necessary Practitioner to assist him pro Deo".[S 86]

Care was taken to ensure that an accused's indigence caused him no further deprivation when orders regarding costs were made. By an order of 1820 prosecutors were prohibited from claiming costs against an accused who was granted pro Deo counsel or, if unrepresented, was indigent.[1] Orders as to costs were not usually exacted from Hottentots, Free Blacks or poor persons.[2] Witnesses were entitled to be

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1. General Table of Fees, Charges and Costs in Criminal and Civil Cases, Order by the Governor 7 April 1820 art 8 in Theal vol XXXIII 223.
2. Theal vol XXXIII 86.

compensated by the party who summoned them and in case of a party being unable to bear such cost, they would receive compensation from the Colonial or district treasury.[1]

When representation was not possible, provision was made for assistance to illiterate accused before the commencement of the trial, as follows:

> "In order to give equal facility to all and every accused person, the tenor of the said Act of Indictment shall be communicated to all persons in custody...; and consequently to all Hottentots, Free-Blacks, and Slaves, to whom, in case of their not being able to read, the same shall be read and explained."[S 37]

Due proof that this had been done was to be entered on the record, its absence making the indictment null and void.[S 37]

After the indictment was communicated to the prisoner, he was required to furnish the prosecutor with the names of his witnesses and the latter was charged with the duty of subpoenaing them.

The assistance provided for thus involved firstly, making allowances for the accused's indigence in providing some free legal assistance and limiting the operation of rules requiring the payment of money, and secondly, attempting to compensate for an accused's illiteracy or lack of legal knowledge by making the procedure more comprehensible.

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1. Theal vol XXXIII 76.

1.2 THE COLEBROOK AND BRIGGE COMMISSION

In 1826 the Colonial Secretary, Lord Bathurst, appointed a commission of inquiry, with Messrs Colebrook and Brigge as members, to investigate the administration of criminal justice in the Cape. The report of the Commission, submitted in 1827,[1] had a profound effect on the development in general of South Africa's criminal justice system. The Commission's analysis of the Cape criminal justice system and its recommendations were based on the principle of "equal and impartial justice" and thus had important implications for the indigent and undefended accused.

A fundamental requirement for equality before the law, it was declared, was the absence of procedural rules discriminating on the basis of class, race or religion. Although the Code of 1819 made a few references to the doctrine of equal and impartial justice,[2] the Commission pointed out that it also contained discriminatory rules. In the arrest of suspects, for example, the prosecutor did not require court authority to arrest a person "beneath the rank of Burghers or Christian Inhabitants",[S 27] a distinction which the Commission described as "a great departure from the principles of English jurisprudence, for which we do not admit that any necessity existed".[3]

Furthermore, equality before the law implied the equal

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1. Reproduced in Theal vol XXXIII 1-388.
2. See s 77, 145.
3. Theal vol XXXIII 89.

application of rules and enforcement of rights. The Commission noted that the limited protection afforded to non-Burghers in theory was not always enforced in practice. The requirement that after arrest non-Burghers had to be brought before court within 24 hours was not duly observed and the commissioners were "much impressed with a belief that great laxity [had] prevailed in the practice as respected this large class of the community".[72] They also found that great delays occurred in bringing slaves and Hottentots charged with petty thefts to trial and that the imprisonment before the trial was equal in some cases to the imprisonment ordered by the sentence.[55]

Where inequality existed in the wider society, the Commission's approach was that it should not intrude on the administration of justice. Particular attention was paid to securing equal and impartial justice for the "servile" classes, particularly in view of the limited legal representation they enjoyed.[77, 82] The commission recommended the appointment by the State, for trials in the superior court, of a "professional person for the defence of Hottentots and slaves, who ... comprised so large a portion of the delinquents".[128] This person, called the 'Guardian of Hottentots and slaves', would also be at the service of other indigent accused. If he was not available, the Commission suggested the introduction of the "dockbrief" - a prisoner could name any advocate in court to represent him, and the latter was then bound to act for him free of

charge.[128]

The Commission stressed the importance of review by the Governor for those who did not enjoy representation:

> "It should be observed that the prisoners tried and sentenced by the landdrost and heemraden and by the commissioned members of the court of circuit have not the benefit of legal advice or assistance during the trial or in preparing their appeals and are therefore entitled to every remedy which the best legal opinions may suggest to the Governor in the execution of his great power of confirming or mitigating their punishment."[31]

At the same time, however, the commissioners also questioned the efficacy of the protection that the governor's review of the proceedings of inferior courts afforded accused persons. The review was never conducted with the assistance of the assessors appointed for that purpose and the Governor never gave reasons for any decision.[31] That the scrupulous review of the proceedings of the lower courts was necessary, is apparent from the evidence of the fiscal of that time, who complained about the great disparities in sentences passed by different lower courts for the same type of crime, and the "occasionally observed great defects of form in criminal proceedings taking place before Landdrost and Heemraden".[236]

The second strand of "equal and impartial justice" was the requirement that the judiciary should be impartial - firstly, in deciding matters between the State and the individual, involving its independence of the Executive, and secondly, in ensuring the equal treatment of all accused

irrespective of class or race differences. Both these aspects had relevance for the undefended accused who was generally disadvantaged in his competition with the State and, at the same time, usually belonged to a class or group subjected to discrimination.

The Commission criticized the failure in the Cape to maintain a clear distinction between the adjudicatory and prosecution functions of court officials. The fiscal not only prosecuted in the Court of Justice but also acted as its vice-president and could, and did, perform both functions.[50, 63, 234] This was true also of the landdrosts who acted as prosecutors in the circuit court and presided over the board of the landdrost and heemraden in a judicial capacity. This meant that persons with too great an affiliation to the State judged issues between the State and the individual. The Commission thus recommended that the performance of adjudicatory and prosecutorial duties by the same officers of the court should cease.[115] The absence of jury trials - which embody the principle that the decision maker in respect of facts is totally autonomous from the State - was also questioned by the Commission.[89-90]

A serious problem in the endeavour to achieve impartiality was the fact that few of the judicial officers were professionally qualified for their task. The commissioners expressed this danger as follows:

> "The principle objection, however, to which we think the criminal process is liable, consists in the attribution of the whole of the judicial functions to a body of men

> not sufficiently instructed in the law to give weight and respectability to their decisions, yet too slightly distinguished or removed from the Ordinary class of the population to be exempt from the suspicion of local or popular influence."[89]

They concluded that the pronounced class antagonisms between the Burghers and the 'servile' classes also found expression in the practice of the courts.[9-10]

Impartial justice was to be pursued in the superior court through the introduction of the jury system. Although jury members were to be appointed "without distinction of colour", they had to be "respectable inhabitants of free condition over the age of twenty one years and householders or occupiers of houses or leases for terms not less than three years".[114] No person of the Christian faith should be tried by a jury whose members were not of the same religion.[113] The Commission was aware, however, that these jury trials were to be conducted in a society where class and racial differences and prejudices were rife. In order to avoid overt racial bias in jury decisions, they recommended that "'Bushmen', prize negroes during their term of indenture, individuals of the frontier tribes then under contracts of service, and slaves" were to be exempted from being tried by a jury because of "the peculiar relation in which all these classes [stood] towards the great body of inhabitants".[112] The Commission did not wish to exclude the Hottentots and "bastaard races" from the rights and benefits of the jury system, but in order to protect them "against prejudice and sometimes hostile feelings" of jury

members, who would mostly be Burghers, they were given the choice whether to opt for a trial by jury or by a judge alone, such choice to be exercised on their behalf by their official guardian.[113]

In respect of the lower courts the Commission recommended that the system of lay justice in the Board of Landdrost and Heemraden should be replaced by a system of trained magistrates.[115]

Prosecutors, too, came under criticism. The principle that the prosecutor's goal was the attainment of justice, making him an impartial "adversary", was not honoured in practice. While prosecutors had been instructed by the Batavian Government to "lay open to the court everything which could plead as well for, as against the accused, without keeping back or concealing anything relative thereto",[77] the history and practice of the office of the fiscal did not accord with this ideal. Under the regime of the Dutch East India Company the task of the fiscal was to protect the interests of the company vís a vís the inhabitants, and not to be an impartial investigator.[62] Furthermore, he had until 1825, a share equal to those of the colonial treasury and the customs house official or informer in the revenue produced by the penalties and forfeitures resulting from infringements of the Company's regulations.[1]

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1. 43. A practice prohibited by Ord of October 1825 clause 18, Theal vol XXXIII 86.

The commissioners pointed out the practical consequences of prosecutorial partiality:

> "The spirit of this injunction [to impartiality] is not always observed in the addresses of the Public Prosecutors, and perhaps is less necessary where the prisoners have a right to the assistance of an advocate pro Deo, but upon the Circuit where the Landdrost is the prosecutor whither the advocates have not hitherto proceeded, the prisoners are exposed to the full weight of local influence and to the effects of their own unassisted ignorance."[77]

Here is encapsulated the particular relevance of impartiality (judicial and prosecutorial) in respect of the undefended accused.

The Commission's analysis and recommendations thus articulated the basic principles of equal and impartial justice, which were to be pursued by the introduction of the English law of criminal procedure and evidence.[129] The principle of equality between accused of all classes and races, and between the accused and the State, was seen to be essential to the whole system of criminal procedure. Equality between accused persons meant, firstly, the absence of any discriminatory rules, and secondly, if inequality existed in the wider society, the presence of positive rules to remedy that inequality. Rights should thus extend to all accused persons alike, and where some were precluded from their benefits because of their 'servile' position in society, due to status, class or race differences, specific rules were required to make their rights a reality. In the Supreme Court where the right to legal representation was recognized, an accused's indigence would preclude him from

the benefit of a legal practitioner. The provision of legal aid to such an accused was thus required.

In the lower courts where legal representation was not allowed, the dispensing of justice would be wholly dependent upon the judicial officer. Of great importance then was the principle of impartial justice that the court should treat as equal all classes of accused, and the accused as against the State. Thus the judicial officer had to be independent of the Executive and sufficiently professionalized to be capable of escaping the influence of local prejudice. The interdependence of equal and impartial justice was clear. The extension of procedural rights to all accused would fail if judicial officers exhibited a pro prosecution bias. Moreover, because the majority of accused persons were not members of the dominant class, they were particularly vulnerable to partiality. Only through a professional and impartial judicial officer could equal justice be attained.

1.3 1828-1910

The Charter of Justice of 24 August 1827[1] implemented the principal recommendations of the Colebrook and Brigge Commission regarding the general structure of the courts and a uniform adversary mode of procedure. Provision was made for the establishment of a Supreme Court and the Governor was authorized to establish inferior courts with a limited

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1. Reproduced in Theal vol XXXII 274-292.

sentencing jurisdiction.[1] However, none of the recommendations aimed at the extension of rights to the 'servile' classes was accepted. In a letter from Viscount Goderick to Major-General Bourke explaining why not all the proposals of the Commission had been accepted, these recommendations were not even mentioned.[2] By ignoring the Commission's clear identification of inequality amongst accused and its proposals to prevent such from pervading the administration of justice, the governing regime displayed its unwillingness to pursue actively the ideal of equal justice.

Ordinance 40 of 1828 continued the anglicization of criminal procedure and established the adversary mode of procedure on which the South African criminal procedure is based.[3] Legal representation was allowed at trials in the Supreme Court, but a prisoner was not entitled to the assistance of a legal advisor during the preparatory examination;[4] nor was he allowed, as of right, access to his friends or legal advisors before his committal for trial in the Supreme Court, although the magistrate could authorize such access.[S 38] On the other hand, some limited safeguards for the accused were introduced. At the preparatory examination before a trial in the Supreme Court, the accused, when asked his

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1. Ordinance 33 of 1927 abolished the Board of Landdrost and Heemraden and established the court of the resident magistrate.
2. Letter dated 3 August 1827, Theal vol XXXIV 254.
3. SA Strauss "The Development of Law of Criminal Procedure since the Union" 1960 Acta Juridica 157; Dugard 26.
4. Ord 40 of 1828 s 39.

response to the charge, had to be warned that he was not required to make any statement that might incriminate him and that what he said could be used in evidence against him.[S 34] These provisions established two important principles: firstly, the accused's right to silence was extended to all aspects of the proceedings, and secondly, it was the court's duty to inform the accused of his legal rights.

An indirect but effective method of control over the detention of accused persons was the imposition of a duty on the keepers of gaols in the district of Cape Town to deliver to the Supreme Court at each session a list of all persons detained, specifying the date of commitment of each prisoner, the cause of imprisonment and the name of the committing magistrate.[S 56] In the other districts the lists were sent to the circuit court.[S 57] To ensure an expeditious trial, a prisoner who was not brought to trial at the second session of the Supreme Court held after the date of committal, was discharged from prison [S 58-59] and could not be recommitted to gaol either for examination or for trial for the same offence.[S 62] The importance of these controlling devices was that they functioned independently of the accused. Thus, where the accused was unrepresented, the right to a speedy trial was not dependent upon on his knowledge or skill to enforce it.

Ordinance 72 of 1830 further professionalized the criminal process by the introduction of the English law of evidence,

either by specific rules or by reference. The second Charter of Justice of 1832[1] reaffirmed the principles spelt out in the first Charter and firmly established the English law of procedure at the Cape.

The most important changes thereafter were the opening of the lower courts to legal practitioners and the institution of automatic review of the proceedings of these courts. In 1856 the right to legal representation was extended to the court of the resident magistrate, although there was still no provision for representation at the preparatory examination.[2] At the same time a system of automatic judicial review of certain lower court cases was introduced. In cases where sentences of more than a £5 fine or imprisonment exceeding one month or a whipping of more than 12 lashes were imposed,[3] the record of the case was to be submitted to a judge for review.[4] If it appeared to him that the proceedings were in accordance with "real and substantial justice", he endorsed a certificate to that effect.[S 47] If not, the judge had to lay the case before a full court of review which had the power to affirm, alter or reverse the conviction or sentence, or remit the case back to the magistrate with instructions on how to deal with the matter.[S 48] The court could also direct that a question of law or fact be argued by the Attorney-General and an

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1. Proclamation of 13 February 1834.
2. Ord 20 of 1856 s 45.
3. All sentences involving a whipping of an adult were made reviewable by Act 21 of 1876 s 5.
4. Judges of the Eastern Districts were given similar powers of review by Act 10 of 1865 s 2.

advocate appointed by the Court.[S 48] The Court could alter a sentence only if an irregularity was committed. Where the sentence appeared to have been "unusually or unnecessarily severe", the Court or the convicted person could make representation to the Governor for the mitigation of the sentence.[S 49]

The concurrence of legal representation being extended to the lower courts and the establishment of automatic review was not coincidental. The institution of review was not designed primarily for the protection of the undefended accused, as cases were reviewable irrespective of whether or not the accused was defended. The principal objective was instead the guidance and the control of the lower courts whose judicial officers, usually not legally qualified, were confronted for the first time with legal practitioners whose possibly unscrupulous use of superior knowledge could perhaps lead to miscarriages of justice. The impact of this procedure, however, lay in the creation of the opportunity for the Supreme Court to review on a regular basis the proceedings of the lower courts, and the undefended accused would undoubtedly have benefitted from this.

The rules of the magistrates' court of 1856[1] contained a few provisions of general application that could have assisted the undefended accused. In order to avoid unnecessary delays in the proceedings, the absence of the prosecutor on the day of the hearing led to the dismissal of

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1. Annexed to the Ordinance 20 of 1856 issued in terms of s 59.

the charge or complaint.[1] If an accused was unable to afford the costs for subpoenaing a defence witness, the clerk of the court would subpoena the witness free of charge if such witness was, in the opinion of the clerk, "material and necessary" to the defence of the accused.[Rule 69]

In 1886 the accused was declared a competent but not compellable witness.[2]

1.4. CRIMINAL PROCEDURE IN THE 'NATIVE TERRITORIES'

With the annexation and incorporation into the Cape of the Transkeian Territories in 1884,[3] the legal colonization of the territory followed swiftly. The Native Territories' Penal Code[4] contained both substantive and procedural English criminal law. In the absence of a superior court in the territory, a special court, consisting of the chief magistrate and two resident magistrates, was created with substantive and sentencing jurisdiction similar to that of the Cape Supreme Court.[S 251] The chief magistrate also performed the automatic review function of the Supreme Court.[5] The Governor could promulgate general rules of court,[S 257] and until this had been done the rules of the court of the resident magistrate

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1. Rule 74. It repealed Ord 8 of 1852 art 6 which attached no consequences to the non-appearance of the prosecutor.
2. Act 13 of 1886 s 6. Act 24 of 1886 s 263 incorporated the same rule for the Transkei.
3. EA Walker A History of South Africa (1968) 394.
4. Act 24 of 1886.
5. S 259. This function was abolished by Act 35 of 1901 s 9 and was assumed by the Eastern Districts Local Division.

were applicable "as far as the circumstances of the country [would] admit".[S 265] Hardly any attention was given, however, to accommodating local custom and procedures. The proceedings of the court were conducted in English with provision being made for interpretation into the local Black languages.[S 260] The most significant procedural innovation was the institution of "Native assessors". The resident magistrate had the discretion to call not more than five assessors, chosen from "the principal chiefs, councillors, headmen and others" who appeared on a list compiled by the magistrate, "to aid him in the hearing of any trial with a view to the advantages derivable from their observations, and particularly in the examination of witnesses".[S 262] Their role was merely advisory as the final decision vested in the magistrate, although their opinion, given separately, could be recorded and formed part of the proceedings to be forwarded for review.[S 262] The special court had similar powers to call upon local assessors.[S 262] There was thus no creation of separate courts with different procedures for the Black population; functioning within the equal justice doctrine, one uniform procedure was followed which made some allowances for cultural differences.

1.5. CONCLUSION

The introduction of a professionalized adversary procedure, coupled with the recognition of the right to legal representation, created two classes of accused, those who could afford legal assistance, and the indigent majority who

remained unrepresented. Equal justice before the law as between accused persons was, however, limited to the absence of discriminatory rules and the rights of accused were formulated in universal terms. Scant recognition was given to the existence of inequality amongst accused persons in the wider society which would render most of these rights inaccessible to the indigent and ignorant accused. That indigence could preclude equality before the law was recognized only so far as the subpoenaing of material and necessary defence witnesses was concerned.

Commissioners Colebrook and Brigge had espoused the principle that for rights to be equally extended to all accused, it was not sufficient to establish rights in universal and non-discriminatory terms. The possible grounds of inequality were to be recognized and rules had to be formulated specifically to prevent the intrusion of those grounds in the administration of justice. The Cape Legislature failed to implement this principle. Instead, the law was increasingly professionalized and the effects of inequality in resources and education amongst accused persons became even more pronounced, hindering the attainment of equal and impartial justice.

2. NATAL

The criminal procedure of Natal closely followed the law of the Cape. The most important innovation in Natal was the establishment of a separate court system for the prosecution of Black accused for certain offences.

2.1. ORDINARY COURTS

When Natal became an autonomous district of the Cape Colony in 1845,[1] a magistrate was appointed[2] and a superior court, called the District Court of Natal, was established in the same year.[3] The Cape law of criminal procedure was adopted.[4]

Various rules governed the issue of legal representation. The accused had no right of access to friends or legal advisers while in custody for a preparatory examination in the magistrates' court, although the magistrate had the power to allow such access.[5] Nor was a legal advisor allowed to assist the accused during the preparatory examination.[S 44] Access thereafter was subject to the discretion of the magistrate and such reasonable restrictions as he might impose.[6] In the District Court

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1. EH Brooks & C de B Webb A History of Natal (1965) 54.
2. Ord 12 of 1845 (C) s 2. This ordinance was complemented by Ord 16 of 1846 authorizing the appointment of resident magistrates, s 1.
3. Ord 14 of 1845 (C) s 1.
4. Ord 18 of 1845 (C) for the District Court and Ord 12 of 1845 (C) s 2 for the magistrates' court.
5. Ord 18 of 1845 (C) s 43.
6. Law 16 of 1861 s 4. Law 6 of 1870 s 11 allowed access to prisoners at all reasonable times as determined by the magistrate.

the accused had the right to representation at the trial but, as in the Cape, the right did not extend to preliminary proceedings.[S 44] The District Court rules,[1] which contained many complex provisions regarding technical objections to the charge,[Rule 30] challenges to the jury [Rule 9] and special pleas,[Rule 30] spelt out the role and duties of counsel during the trial.[2] Nowhere, however, was special consideration or attention given to the undefended accused and legal assistance for indigent accused was not mentioned. Although in forma pauperis proceedings were possible in civil matters,[3] no mention was made in the rules of the Supreme Court (as the District Court was reconstituted by Law 10 of 1857) of pro Deo counsel for indigent accused, and the Court did not, as a general rule, assign counsel to defend accused in forma pauperis.[4] The Court also did not have the power to assign an attorney to conduct a review in forma pauperis on behalf of an accused convicted and sentenced in a magistrates' court to a term of imprisonment.[5]

The rules of the Supreme Court of 1859, however, attempted to bring legal assistance within the reach of some Black accused by placing a limit on the legal fees they could be charged. No attorney could charge a Black accused in the

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1. Rules of the District Court, annexed to Ord 32 of 1846.
2. Cf rule 37.
3. See Rule of the Supreme Court Order 10 rule 1/4 in JJ Hillier Rules of the Supreme Court of the Colony of Natal (1906) 21.
4. Lutyityi (1880) 2 NLR 62.
5. Ex parte Malcolm (1893) 14 NLR 192.

Supreme Court more than three guineas without the approval of the Secretary of Native Affairs.[1] This amount was increased in 1906 to ten guineas.[2] In 1863 Chief Justice Harding suggested that a fund should be set up to cover legal costs of Black accused, but this suggestion never found favour with the Lt-Governor or with the British government.[3]

The only provision made for the indigent accused was the duty imposed upon the clerk of the court to subpoena material and necessary witnesses on his behalf.[4] Language and cultural differences between accused persons were recognized only in the requirement that the indictment had to be read to the accused by the registrar and explained "if need be by him or the court interpreter".[5] Since most undefended accused would also have been labouring under language differences, this would have assisted them.

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1. Rules of 30 November 1859, Cadiz Statutes of Natal (1874) vol II 1332.
2. Rules of the Supreme Court (1906) order 40 rule 1, Hillier op cit 105.
3. PR Spiller "Criminal Justice in the Early Supreme Court (1858-1874)" (1983) 7 SACC 125 137.
4. In the Supreme Court it also included the fees of such witnesses, Law 33 of 1865 s 3; Law 13 of 1888 s 3. In the lower courts, see rules of the court of the resident magistrate (1 September 1846) in WJD Moodie Ordinances, Proclamations relating to the Colony of Natal 1836 to 1855 Vol 2 (1856) 339, rule 8; rules of the court of the resident magistrate (1878) rule 8; rules and regulations of the inferior courts of justice of colony of Natal (6 December 1890) rule 6; rules of the court of the magistrate (5 June 1897) rule 10; rules of the magistrates' court (1 December 1906) rule 12.
5. Rules of the court of the resident magistrate (1 September 1846) rule 29.

Some of the rights of general application recognized in the District Court rules would also have benefitted the undefended accused. During the preparatory examination the magistrate had to warn the accused, who would always have been unrepresented at this stage, that he need not say anything to the charge, and that if he did, it could be used as evidence against him.[1] An accused had to be brought to trial within two sessions of the court from the date of his committal for trial.[2] If the State failed to proceed with the trial within that period, the accused was entitled to a discharge from imprisonment, although this was not regarded as an acquittal.[3]

The Cape institution of automatic review of some of the proceedings of the lower court was first introduced in Natal in 1887. All sentences of more than three months' imprisonment or 25 lashes were sent for review by a judge in chambers.[4] The system did not take root and was abolished in 1896,[5] not to be revived until 1917. This meant that for a substantial period of time there was no routine control over the proceedings in the lower courts.

From the first days of the colony, jury trials were a feature

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1. Act 14 of 1864 s 2.
2. S 65 and 69. See also AN Montgomery The Natal Magistrate (1878) 273.
3. See Trammer (1905) 26 NLR 318.
4. Law 27 of 1887 s 5. Further minor changes were effected by Law 22 of 1889.
5. Act 22 of 1896 s 3.

of the proceedings in the superior court.[1] The jury trial would have been of assistance to many accused since justice was dispensed by their peers and not by a State appointed judge. Although Blacks were not excluded from jury duty, "natives who [had] not obtained their exemption from the operation of the native law under Law 28 of 1865", were not eligible.[2] By 1874 there was still no record of any Black who was sufficiently qualified to be placed on a jury list.[3] As Spiller remarks: "Blacks were invariably tried by the racially different, dominant class of their neighbourhood".[4] The failure to ensure an impartial decisionmaker through this method was succinctly expressed by Connor J in 1872:

> "[The right] that a man shall be tried by his peers, i.e. by those whose habits and ideas are similar to his own, is not conceded to the kaffirs of this colony, and the result is, what might be anticipated, a complete failure to secure the good sought to be obtained by the establishment of the principle ..."[5]

In the ordinary courts the principle of equal and impartial justice was pursued through the enactment of formally non-discriminatory rules which were of universal application. Little cognizance was taken of the inequality which existed among accused. The indigent accused were not routinely provided with legal assistance and there were only a few attempts to make the process more accessible to Black accused, for whom the law, procedure and language were alien.

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1. Act 14 of 1864 s 2.
2. Law 10 of 1871 s 4.
3. Spiller op cit 137.
4. Ibid.
5. Natal Mercury 2 July 1872 as quoted by Spiller op cit 138.

2.2. THE 'NATIVE' COURTS

The most important feature of the Natal legislation was the creation of a separate court system for the Black population. Reacting to the application of Roman-Dutch law to all the inhabitants of Natal,[1] the British Government issued the following instructions to the Lt-Governor of the colony:

> "And whereas the said district of Natal is inhabited by numerous tribes...whose ignorance and habits unfit them for duties of civilized life and it is necessary to place them under special control, until, having duly been capacitated to understand such duties, they may reasonably be required to render ready obedience to the laws in force in the district...we have not interfered with, or abrogated, any law, custom, or usage prevailing among the inhabitants, except so far as the same may be repugnant to the general principles of humanity, recognized throughout the whole civilized world...but that in all crimes committed by any of them against the person or property of any of them, the said Natives are...to administer justice towards each other as they had been used in former times".[2]

The justification underlying this provision appears to be a recognition that the wholesale application of colonial law, with all its complexities, to the Black population would have created de facto inequality before the law as the protection offered by the legal process would have been inaccessible to an illiterate and culturally different population group. The prosecution of Blacks in separate courts applying customary law for intra-racial offences would not prejudice these accused as the procedure would be both simple and familiar.

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1. Ord 12 of 1845 (C).
2. See Ord 3 of 1849 preamble; also Proc 21 June 1849 in Cadiz op cit vol II 1488-9.

The application of colonial law to the indigenous Black population in respect of these disputes was thus revoked in 1849,[1] and the courts of the "administrators of native law", then established, had to administer justice according to "native law".[S 2] This principle was not, however, consistently applied and a Black could still be prosecuted, with the consent of the prosecutor, in the ordinary courts for crimes inter se which might be deemed "repugnant against the general principles of humanity, recognized throughout the civilized world".[S 7] A certain percentage of accused, then, were to face the complexities of the ordinary colonial procedure, as they did in any intergroup dispute.

In intergroup conflicts the customary law and procedure were soon to be used, not to the advantage of the Black accused, but to serve the interests of the White colonists.
In order "to more effectively check and punish the stealing of cattle" from the white settlers,[2] "native law" was used because it was "better adapted to check the offence of cattle stealing than the ordinary law of the district".[3] To effect this purpose, it was, however, "expedient to define, modify and consolidate native law on the subject ... and to extend its operation to the theft of cattle committed by natives under all circumstances",[4] by creating a separate court, redefining the offence and stipulating the penalties.

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1. Ord 3 of 1849 s 2.
2. Ord 1 of 1855 title. This ordinance was repealed and re-enacted again by Law 4 of 1868 and again by Law 10 of 1876.
3. Ord 1 of 1855 preamble.
4. Ibid. My italics.

A "combined court" was established, composed of a judicial assessor appointed by the Lt-Governor, the resident magistrate and the chief of the tribe to which the culprit belonged,[1] with a majority decision to be decisive.[S 9] Group liability could be imposed on a village or a tribe associated with the theft, along with a shifting of the burden of proof. In relation to stock theft offences, villagers had to exculpate themselves from the presence of stolen cattle; failing that, the resident magistrate could make compensatory orders against the whole village.[S 4-6] The procedure followed was similar to that of the ordinary magistrates' court,[2] but the sentencing jurisdiction was much more extensive than that of the latter; the court could imprison an accused for up to three years, order a public whipping on three different occasions and confiscate all his property.[S 1] There was no right of appeal, but administrative control was exercised by the Lt-Governor, who had to approve such sentences.[S 10] The court specifically created to prosecute Blacks, neither applied customary law, nor implemented the safeguards of the ordinary procedure. By applying discriminatory rules it was in conflict with the basic requirement of the principle of equal justice, namely that laws should apply equally to all.

In 1875 the Native High Court was established,[3] with

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1. S 8. If the accused had no chief, or the chief himself was a socius, the former two persons would constitute the court, s 8.
2. See rules of court, Moodie op cit 376.
3. Law 27 of 1875.

jurisdiction to try according to native law most offences committed by Blacks inter se. The dual system of justice, initiated by the creation of the courts of the administrators of native law,[1] was thus complete. The Court consisted of a (White) judge, who could be assisted by an administrator of native law or native chiefs or other native officers as assessors.[S 7] The rules of court were compiled by an all-White board consisting of the Chief Justice, the Attorney-General and the Secretary of Native Affairs, the judge of the Native High Court and three other magistrates or justices of the peace.[S 10] The Court had both a trial and an appellate function.[2] It could try "offences of a political character" at the discretion of the Attorney-General, faction-fighting when the latter decided that the provisions of the native law were more appropriate, or any offence specially provided for by statute.[S 6] At the trial the judge could exclude legal representation in certain classes of cases, as determined by him.[3] Local conditions were accommodated to a limited extent; "native messengers" could subpoena other Blacks orally [Rule 8] and the court proceedings could be conducted in a native language.[Rule 8] In prosecutions before this Court, the Code of Native Law of 1878[4]

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1. Ord 3 of 1849 s 2.
2. Hearing appeals from decisions of the administrators of native law, Law 10 of 1876 s 8.
3. Rules of Conduct of Business in the Native High Court, 7 October 1878, Cadiz op cit vol II 1429 rule 11. Similar provisions in respect of the courts of administrators of native law, Law 44 of 1887 s 4.
4. Drafted by the Board in terms of Act 27 of 1875 s 10, published in Government Notice 194 of 21 June 1878.

made the evidence of an accomplice admissible [S 60] and the accused could be examined by the Court "on the subject of the accusation".[S 59]

The special court for the prosecution of cattle theft cases was continued, now with the judicial officer a judge of the Native High Court, sitting alone or with assessors.[1] The proceedings were conducted in English[2] and the right of legal representation was not recognized.[Rule 14] In the absence of legal assistance, there were attempts to make the court process, which was modelled on the magistrates' court procedure, more accessible to the Black accused. The court was empowered to permit the accused "such aid in cross-examination of any witness in the case as would by Native usage be allowed".[Rule 21] To assist the indigent accused, material and necessary witnesses for the defence would be subpoenaed by the clerk of the court.[Rule 15] The Supreme Court's appellate and review jurisdiction over these proceedings was specifically excluded,[S 16] and the Lt-Governor maintained administrative control over them.[S 15]

A temporary decline of the separate court system for Blacks was heralded in 1894 by the provision that an appeal from the Native High Court could be pursued in the Natal Supreme

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1. Law 27 of 1875 s 14.
2. Rules of court, rule 25, in Cadiz op cit vol II 1438.

Court.[1] In the following year, both the Native High Court and the 'cattle court' were abolished[2] and the Supreme Court and the magistrates' court respectively exercised jurisdiction in their place.[S 8] The uniform court structure was reaffirmed in 1896 with the express provision that the Supreme Court "shall have jurisdiction in all cases whether affecting Europeans or Natives".[3]

The Native High Court was revived once again in 1898, and the court of the administrator of native law was renamed the court of the resident magistrate in native cases.[4] It was said that the resuscitation of the Native High Court was occasioned by the additional court work caused by the annexation of Zululand in 1897.[5] It had jurisdiction over all "native cases",[S 25 and 26] Hottentots and Griquas being included in the category "native".[S 1] Its substantive jurisdiction covered most intra-racial offences[6] and its sentencing jurisdiction was the same as that of the Supreme Court except for the death penalty,[S 30] a power granted by one of the last acts of the Natal parliament.[7] The Supreme Court's jurisdiction over the Native High Court was again expressly excluded.[S 26]

In Zululand the chiefs' courts were recognized, although

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1. Act 2 of 1894 s 2.
2. Act 13 of 1895 s 1.
3. Act 39 of 1896 s 6.
4. Act 49 of 1898. See ES Henochsberg "The Passing of the Natal Native High Court" (1954) 71 SALJ 221 224.
5. Henochsberg op cit 224.
6. See s 6 & 29.
7. Act 30 of 1910 (N) s 1.

they had limited jurisdiction to try offences committed by members of their own tribe according to "native law".[S 63]

The rules of the Native High Court of 1903[1] contained a few provisions in which the interests of the undefended accused were accommodated. If the accused was in gaol and undefended, then the person who served the indictment on him had to ask whether there were any material witnesses required to be summoned. These witnesses would then be summoned by the registrar of the Native High Court, free of charge.[Rule 16] Before a plea of guilty was accepted, care had to be taken

> "to discriminate in cases of an admission whether the full legal meaning and effect thereof be fully understood by the prisoner. In all instances of silence on the part of the prisoner, or doubt as to the meaning or intention of his admission, a plea of not guilty must be recorded."[Rule 22]

A provision for civil litigants to be represented by "any near male relative or inmate of their kraal",[Rule 61] was not extended to criminal cases.

An indirect measure of control was achieved by imposing a duty on the governor of each gaol to submit monthly returns to the registrar of the Native High Court "of every native in his custody who [was] accused of any crime cognizable by the Native High Court".[Rule 49]

The effectiveness of the Native High Court from the prosecuting point of view must have been apparent, as its

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1. Of 16 June 1903 issued in terms of Act 49 of 1898 s 71.

jurisdiction was extended in 1899 to include accused persons to whom "native law" would have been alien. "For the better prevention of cattle stealing"[1] the definition "native" not only included Griquas and Hottentots but also "illegitimate children of mixed European and native parentage and their descendants",[S 5] and for some offences even "Asiatics".[S 63]

The establishment of separate criminal courts to try Blacks according to customary law had the potential to limit unequal justice in an unequal society. While the accused would have been deprived of the benefit of any protective measures provided for in the colonial criminal proceedings, the full application of customary law would have benefitted Black accused in the settlement of intra-racial disputes. The fact that accused were not defended would not be a source of inequality amongst accused since none were defended, or as between the prosecutor and the accused, because the procedure was simple and familiar to the latter. Customary law was not, however, used solely to settle intra-group conflicts nor was it applied in its entirety. Instead, its repressive features were effectively used to prosecute Blacks for offences involving White interests, while the more accessible customary law and procedure was diluted. The

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1. See Act 1 of 1899 title, my italics.

result of this selective use of customary law is best described by a practitioner of those days, JB Moodie. As counsel for Chief Langalibalele, who faced a charge of treason in 1874, he commented on the procedure as follows:

> "All the disadvantages of both systems, English and Kafir, were arrayed against him. He had the advantages of neither. While on the one hand there was a systematic and consistent prosecution, there was, on the other, none of the laxity of native law. While the prosecution availed itself of one of the privileges of native law, namely, to find a man guilty without evidence, it gave him nothing in return".[1]

The Black accused tried in the separate courts were doubly prejudiced. They were faced with repressive rules, distilled from customary law, without the benefit of the full customary law and did not enjoy the same protection as accused prosecuted in the ordinary courts. They had neither a right to legal representation nor any legal recourse to the supervisory powers of the Supreme Court. The separate criminal courts created for Blacks thus became just one more part of a system weighted heavily against the achievement of equal justice for the indigent and illiterate accused.

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1. Quoted by D Welsh Roots of Segregation: Native Policy in Colonial Natal, 1845-1910 (1971) 140.

3. TRANSVAAL

The first constitutional document of the South African Republic, the Thirty Three Articles of 1844,[1] was a conglomeration of substantive offences, procedural rules, punishments and election procedures for the Volksraad.[2] Trial by jury was established but "bastaards"[3] were excluded from jury duty.[Art 6] A person could be represented in court although this need not necessarily be by a lawyer.[Art 16] The actual mode of procedure was not specified and in practice ranged from "the accusatorial procedure in its most primitive form to a moderate type of inquisitorial procedure".[4]

The Grondwet of 1858 and Bijlage No 3[5] enacted largely the Cape adversary mode of proceedings.[6] Although the

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1. Drawn up at Potchefstroom 9 April 1844 and ratified at Derdepoort 23 May 1849, in SS Barber, WA MacFadyen & JHL Findlay Statute Law of the Transvaal (1901) 1. For the earlier history of the administration of justice during the Groot Trek, see JV van der Westhuizen & D van der Merwe "Geskiedenis van die Regspleging in die Transvaal (1835-1952)" (1976) 9 De Jure 250.
2. Cf Van der Westhuizen & Van der Merwe 1976 De Jure 250 257.
3. The word used to describe persons of 'mixed blood'.
4. Dugard 29, 30. See also Ellison Kahn "The History of the Administration of Justice in the South African Republic" (1958) 75 SALJ 294 297-299. See also Van der Westhuizen & Van der Merwe 1976 De Jure 256.
5. In F Jeppe & JG Kotze De Lokalen Wette der Zuid-Afrikaanse Republiek (1849-1885) (1887).
6. JG K[otze] "The Administration of Justice in the South African Republic (Transvaal)"(1919) 36 SALJ 128 132. See also Van der Westhuizen & Van der Merwe 1977 De Jure 92 95.

Grondwet enshrined racial discrimination ("Het volk wil geene gelijkstelling van gekleurden met blank ingezeten toestaan, noch in Kerk noch in Staat" [S 9]), the only expression that this policy found in criminal procedure was that no White person could be sentenced to a whipping.[S 149] This rule was slowly whittled down until there was no explicit distinction based on colour.[1]

The criminal code of 1864[2] was based on the Cape Ordinances 40 of 1828 and 72 and 73 of 1830, and introduced the Cape procedure almost in its entirety.[3] The code made reference to the doctrine of equality, and in a few instances affirmatively extended rights to accused who were disadvantaged by their socio-economic position. Section 27 read:

> "In order to do equal justice to all accused persons in the conduct of criminal proceedings, the state attorney shall cause the service of the indictment mentioned in Art. 25 to be effected upon all prisoners and persons accused of crimes, without distinction of person, consequently also upon free blacks or Kaffirs, and if they cannot read, the indictment shall be read out and explained by one of the officials, or if necessary by an interpreter, which fact shall be duly recorded in the minute book, as otherwise the progress of the case might be stopped."

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1. See Law 14 of 1880 s 14; Law 4 of 1888; Law 21 of 1892.
2. Ord 4 of 1864, but only ratified two years later in substantially the same form by Ord 9 of 1866. See Jeppe & Kotze op cit 185; K[otze] op cit 132.
3. K[otze] op cit 132; Van der Westhuizen & Van der Merwe 1977 De Jure 92 107.

The code simultaneously contained explicit discriminatory rules and provided that for "persons not being burghers or Christian inhabitants or people of the same class" no warrant of arrest was required.[S 41]

An accused had no right to legal representation during the preparatory examination [S 88] but could be assisted during the trial before the High Court.[1] If he was an indigent, there was the novel provision that the Court was obliged to appoint a pro Deo advocate or law agent for his trial.[S 98] The additional assistance of attorneys in pro Deo cases was, however, disapproved of by the Volksraad.[2] A more investigatory role was envisaged for the court, and the judge and jury were free to put any question to a witness that could "lead to the discovery or elucidation of the truth".[S 84] The State attorney was accorded a supervisory role and he could institute inquiries in respect of any irregularities in the conduct of any case and "forthwith redress the same".[S 14]

The rules of the lower courts[3] obliged the State to subpoena "important and necessary" witnesses for an indigent accused [Rule 7] and provided for pro Deo counsel for appeal or review proceedings.[Rule 17] The costs in criminal cases would be borne by the State in respect of indigent accused.[4]

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1. S 88. See also s 91.
2. Volksraad resolution 9 June 1870 art 172.
3. Issued in terms of Law 1 of 1874.
4. Volksraad resolution 21 June 1870 art 211.

The code thus took into account the existence of inequality amongst accused persons, and positively attempted to assist the indigent through the granting of legal aid in the High Court and dispensing with certain legal fees for which an accused could be liable.

After the annexation of the Transvaal by Britain in 1877[1] the new Administrator, Sir Theophilus Shepstone, the architect of the "native" policy in Natal,[2] introduced a separate court system for Blacks.[3] The new dispensation for Blacks was confirmed in 1885 after the retrocessation of the Transvaal in 1881.[4] The policy was similar to that in Natal:

> "The laws, habits and customs hitherto observed among natives shall continue to remain in force in this republic as long as they have not appeared to be inconsistent with the general principles of civilization recognized in the civilized world".[S 2]

The administration of justice was to be conducted by "Native Commissioners" appointed by the State President. In a district where no such commissioners were appointed, the landdrost would perform these duties ex officio. The offences over which the new court had jurisdiction were more limited than in Natal. The court of the commissioner could try minor offences of assault and theft [S 6] and other offences determined by the State attorney after consultation with the Superintendent of Native Affairs.[S 9] All other offences committed by Blacks were

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1. See Kahn op cit (1958) 75 SALJ 297.
2. Brooks & Webb op cit 58.
3. Law 11 of 1881. See also Kahn op cit 396.
4. Law 4 of 1885.

tried in the ordinary courts "in the same manner as if the crimes had been committed by persons of European descent".[S 11] There was no right to legal representation in the commissioners' court, but leave could be obtained from the Superintendent of Native Affairs.[Rule 2] The prosecutors of the ordinary court could conduct the prosecution in these courts.[Rule 21] The rules regulating the conduct of the proceedings merely reproduced the rules operative in the ordinary lower courts. The control over these courts was not entrusted to the Supreme Court; instead, the State President, in conjunction with the Executive Council, could review the proceedings.[S 7] The rationale given for the creation of separate courts for Blacks - that they would apply customary law and procedure - was never reflected in the law. The procedural rules of the ordinary courts were followed and the same judicial officers and prosecutors applied them. Black accused were not, however, granted the benefits of legal representation or the Supreme Court's supervision. Separate courts were thus not designed to assist illiterate or tribal Blacks by either fully embracing customary law and procedure or incorporating the important safeguards of the ordinary courts.

The annexation of the Transvaal by Britain in 1900 saw the introduction of a court structure similar to that of the Cape,[1] while the existing rules of procedure and evidence remained in force.[S 11] The Cape institution of automatic

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1. Proc 6 of 1901 s 1, 6.

review was introduced. At first, it was carried out administratively by the "Legal Adviser of the Transvaal Administrator" in relation to sentences passed by magistrates that exceeded £10 fines, three months' imprisonment, or 12 lashes,[1] but by 1902 this duty was assumed by the High Court of the Transvaal,[2] which reviewed sentences of the magistrates of more than three months' imprisonment, a fine of £25 and any whipping.[3]

The separate courts for Blacks deviated even further from the initial goal of applying customary law, to include prosecutions for statutory offences. A "native court" with a jurisdiction similar to a magistrates' court, was established for Johannesburg,[S 56] to try all contraventions of "provisions of any law or regulation applicable exclusively to natives".[4]

The Code of Criminal Procedure of 1903, although more comprehensive than all the other colonial codes, added little to the existing law. The accused's rights were laid out in general terms, with no special consideration being given to special classes of accused, such as the indigent, illiterate or undefended. For example, the accused's right to counsel both at the preparatory examination and the trial was acknowledged but no mention was made of pro Deo

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1. Proc 19 of 1901 s 3.
2. Proc 14 of 1902 s 1. See also Ord 2 of 1902.
3. Proc 21 of 1902 s 39.
4. S 57. Proc 40 of 1902 s 1 further increased its jurisdiction to include contraventions of the Native Pass laws and complaints by Whites.

counsel.[S 168]

The Transvaal statutes, with a few exceptions, incorporated the principle of formal equality before the law, ie, the absence of discriminatory rules. In the earlier republican statutes, ironically, more cognizance was taken of the existence of indigence and provision was made for legal aid. The comprehensive code of 1903 failed to give recognition to inequalities that could have existed amongst accused persons and rights were expressed in general terms with no attempt to extend equal justice to all accused.

The use of "native courts" for the prosecution of Blacks was not as extensive in the Transvaal as in Natal, and little attempt was made to incorporate customary law in its procedure. The separate courts were eventually used not to settle intra-racial disputes but to enforce "native" policy. With the establishment of what were to become known as the "pass courts", the justification for separate courts finally fell away, since the intention was patently no longer to apply customary law. In the face of political considerations the doctrine of equality before the law was abandoned. Little emphasis was placed upon a unified court structure which formally, at least, would guarantee equal justice to all accused.

4. THE ORANGE FREE STATE

The 1854 constitution of the new republic of the Orange Free State provided for the basic regulation of the administration of justice and expressed as fundamental the principle of equal and impartial justice: "De wet is voor allen gelijk; met dien verstande, dat de rechter alle wetten met onpartijdigheid zal uitoefen, sonder aanzien van personen".[Art 58] The rules of criminal procedure of the Orange Free State were based on the Cape Ordinances of 1828 and 1832 and few innovative measures were introduced.[1] Where the rules were silent on a point the court had to follow the Cape law.[2]

At first the right to legal representation was not recognized before or during the preparatory examination of an accused,[3] but both of these rights were granted in 1891.[4] During the trial the accused was entitled to employ a legal practitioner, including a "wetsagent".[5] If no lawyer was available, the accused could be assisted by any other person approved by the Court.[Ch 4 s 57] No provision was made for the representation of indigent accused, but reference was made to pro Deo counsel who could be appointed for appeal proceedings.[6] For the indigent accused provision was made

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1. See rules issued on 31 May 1856 for the High Court and rules of 27 September 1856 for lower courts. See also Hahlo & Kahn South Africa 244.
2. High Court Rules 31 May 1856 rule 47.
3. Ord 4 of 1856 s 40, 41.
4. Wetboek of 1891 ch 8 s 45, 46.
5. Wetboek of 1891 ch 4 s 58.
6. High Court Rules 31 May 1856 rule 17; Wetboek of 1991 ch 8 s 150.

that the prosecutor would subpoena defence witnesses free of charge.[1]

In 1885 automatic review by the superior court was introduced for sentences of the lower courts that exceeded one month's imprisonment, fines of £10 or 15 lashes.[2] The reviewing judge was called upon to certify whether the proceedings were in accordance with "feitlijke recht en billijkheid".[3] He could not, however, withhold the certificate merely because the sentence was "onnodiglik overdreven of buitengewoon" but could in this event recommend clemency to the State President.[Rule 167] If the judge required argument on review, he could appoint counsel for the accused.[Rule 169] Likewise, if the prosecutor exercised his right to ask for a review of lower court proceedings,[4] the Court of review could appoint counsel on behalf of the accused.[Rule 176] Judicial control over the detention of accused persons was facilitated by the compulsory submission of lists of detainees by the prison keepers at each session of the circuit court.[5]

The colonization of the Orange Free State in 1900 by the British brought the introduction of the Cape court structure but little change in the law of criminal procedure.[6] The

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1. Rules of the lower courts 27 September 1856 rule 7; See also Wetboek of 1891 ch 4 schedule rule 142; ch 8 s 143.
2. Ord 5 of 1885 s 76; Wetboek of 1891 ch 4 s 76.
3. Wetboek of 1891 ch 4 schedule rule 166.
4. Wetboek of 1891 ch 4 s 77.
5. Ord 4 of 1856 s 61; Wetboek of 1891 ch 8 s 148.
6. Ord 7 of 1902 s 18.

accused's right of access to friends and a legal advisor while in custody prior to the preparatory examination was, however, revoked.[1]

The criminal procedure of the republic of the Orange Free State was a classic expression of the 19th century doctrine of equal and impartial justice. The doctrine was enshrined in the constitution and the procedure was characterised by the absence of overtly discriminatory rules. However, there was scant provision for the active pursuit of the ideal and attempts to ensure that equal justice was meted out to indigent and undefended accused were few and far between.

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5. Ord 12 of 1902 s 44.

5. SOUTH AFRICA 1910-1985

5.1. THE CONSOLIDATION OF CRIMINAL PROCEDURE

The Criminal Procedure and Evidence Act 31 of 1917 and the Magistrates' Court Act 32 of 1917 consolidated criminal procedure in the various provinces. These acts, based on the Transvaal Proclamation of 1903, contained few innovatory measures.[1] The undefended accused received no attention in the parliamentary debates preceding these Acts[2] and the limited protective measures already applicable in the provinces were adopted.

There was a recognition of the right to legal representation during the preparatory examination[3] as well as during the trial.[S 218] The only reference to legal aid was in a provision to the effect that the counsel assigned by the court to defend the accused pro Deo was entitled to a copy of the record of the preparatory examination free of charge.[S 93] The lack of legal representation in criminal proceedings was clearly accepted, as several sections referred to the "accused or his legal representative".[4]

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1. Strauss 1960 Acta Juridica 157 159.
2. Debates of the House of Assembly 2 March, 30, 31 May 1917.
3. Act 31 of 1917 s 97(2).
4. Eg the opening address to the court or jury,(s 221(4)); the examination of witnesses (s 221(4)); addressing the court (s 222) or jury (s 223) on the merits.

Some provision was made that neither the accused's indigence nor his ignorance should prevent him from participating effectively in the trial. The clerk of the court had to subpoena defence witnesses if he was satisfied that the accused was indigent and the witnesses were "necessary and material".[S 244(2)] To guard against the accused's ignorance impeding his participation, the court was under a general duty to explain the existence of some of his rights to him, in particular, his right to remain silent, to produce evidence,[S 74(1), 221(4)] and to challenge the jury.[S 193]

The expeditious completion of proceedings was ensured by the provision that the detention of awaiting trial prisoners was to be limited to the duration of the court session for which they were committed.[S 322-323] Furthermore, gaolers had to submit a list of all unsentenced prisoners at each criminal session to the circuit court, specifying the date of admission and commitment, and the authority for the imprisonment.[S 324]

The jury trial was maintained for trials in the Supreme Court [S 165-214] but in "political trials" the Minister of Justice could direct a trial without a jury.[1] The accused also had the right to choose a trial without a jury.[S 216(1)] In such cases the judge could summon two assessors

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1. S 215. It was already provided for by Act 27 of 1914.

to advise him on questions of fact.[S 216] This was important for Black accused because the only exception, introduced in 1931, to an all-White male jury, was an all-White woman jury empanelled at the request of a female accused or a male under the age of 18 years.[1] Whether, however, the average Black accused was aware of this right, what it meant and how to exercise it, is doubtful.

The system of automatic review was made uniform and extended to the province of Natal. The function of this review, the Minister of Justice declared in Parliament, "was [as] a safeguard for the protection of people convicted before the Magistrate".[2] All sentences in which the punishment exceeded three months' imprisonment, or fines of £25 or any whipping, were subject to automatic review.[S 93] The whipping of juveniles under the age of 16 years was excluded.[S 93]

The policy of separate courts for Black offenders was partially continued when the courts of the native commissioners were confirmed and extended by the Native Administration Act 38 of 1927. The commissioners' courts had concurrent and similar jurisdiction to that of the magistrates' courts regarding any offence committed by a Black,[S 9] and the procedure to be followed was exactly the same as in the magistrates' court.[S 9] The commissioners were, however, at liberty to call to their assistance, in an advisory capacity, any native assessors

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1. Act 20 of 1931.
2. Debates of the House of Assembly 27 Feb 1917.

they might deem necessary.[S 19(1)] The offences tried in these courts were eventually limited to those committed by Blacks under laws relating exclusively to Blacks.[1] The chief's court was also retained with criminal jurisdiction over members of the chief's tribe in respect of offences punishable under native law and custom.[S 20(1)]

In 1926 the accused was afforded greater protection when the Supreme Court was given the power to initiate review proceedings mero motu when it was brought to its notice that proceedings had not been in accordance with justice, even though the case was not automatically reviewable.[2]

In 1935, however, the scope of automatic review was narrowed by the exclusion of all sentences of whipping of males below the age of 21 years.[3] This process was continued by the Magistrates' Court Act 32 of 1944. The sentence passed in respect of each count - and not the cumulative effect of the total sentence - would determine whether the case was reviewable.[S 96(2)]

5.2 THE LANSDOWN COMMISSION

The Lansdown Commission, which reported in 1947,[4] addressed for the first time since the Colebrooke and Brigge Commission 120 years before, the problem of inequality

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1. Hoexter Report part V par 2.3.7.
2. Act 39 of 1926 s 55.
3. Act 46 of 1935 s 91.
4. Report of the Penal and Prison Reform Commission UG 47 of 1947, Chairman Mr Justice Lansdown, hereinafter referred to as the Lansdown Report.

amongst accused persons and attempted to deal with the effects which poverty, illiteracy and differences in language and culture had on the administration of justice.

The Commission's basic premise was the principle of equality before the law. The factor most likely to lead to unequal treatment, it observed, was the inability of an accused person to engage a legal practitioner. Since legal representation was a commodity to be purchased, the financial status of an accused determined whether he could obtain the services of a lawyer. The point of departure of the Commission, therefore, was that "it is a cardinal principle of democracy that the ability to obtain justice should not be defeated by poverty".[Par 222] Conscious of the fact that the majority of South Africa's accused were indigent and therefore unrepresented, the Commission's response to the ideal of equal justice was twofold. First, free legal assistance should be given as far as possible to accused who could not afford it themselves. Secondly, in the absence of legal aid, the procedure in court should be so adapted that the lack of legal representation would not materially jeopardize the attainment of equal justice.

The legal services available to indigent accused at the time were; (a) pro Deo counsel in capital cases, (b) a "dock brief" in the Supreme Court in non-capital cases where the accused could select any counsel present in the court on his tendering of a small fee of between 3 and 10 guineas, and (c) Court-appointed counsel to argue matters on review

without a fee.[Par 226, 227] In the lower courts legal aid was provided on an irregular basis by various legal aid bureaux situated in a few urban centres.[Par 227]

The Commission stated as an ideal that, since legal assistance was necessary in all the courts, it should be possible to obtain legal aid in all criminal courts from the Appellate Division downwards.[Par 266] In practice it recommended the retention of the system of pro Deo counsel in the Supreme Court, with the proviso that the court might call in the aid of an attorney, not only to assist counsel at the trial, but also to represent accused facing capital charges at their preparatory examination.[Par 226] A general State-funded legal aid scheme for all 'suitable' criminal cases was also proposed. Although the scheme was to be State-funded, it should not be controlled by the State as the confidential nature of the relationship between attorney and client would be threatened if the applicant had to deal with government officials.[Par 259] The Commission was aware of the realities of South African political life and observed that

> "the Coloured and Native sections are sensitive to, and suspicious of officialdom, and would not have the necessary confidence in the government legal aid officials. Officials would not enjoy the full confidence of the accused inasmuch as they would always suspect collusion between a state defender and the prosecutor."[Par 259]

The Commission therefore recommended that the control of the legal aid scheme should be placed in the hands of the law societies of each province, whilst the Department of Justice

would bear the financial costs.[Par 268]

Since the provision of legal aid to all accused was an ideal, the Commission devoted much of its attention to the position of those accused who would remain unrepresented for the then foreseeable future. In a chapter entitled "Possible simplification of procedure in criminal cases, especially those in which ignorant non-Europeans are concerned", the Commission described the difficulties which confronted undefended accused, particularly when they were Black.

The procedure followed in the criminal courts was totally alien to most Blacks. For those accustomed to the informality of the traditional tribal court, the rigidity of the court procedure confused participants and stifled participation. In the tribal court, for example, the accused could at any stage interpose by statement or argument.[Par 272-273] A cause of particular confusion in the ordinary court, then, was the inability of the accused to participate in the proceedings until the State case had been closed. Accused persons frequently tried to tell their story after they had pleaded, only to be silenced by the magistrate.

Black accused who did not understand the official languages, furthermore, frequently suffered injustice through their failure to comprehend the rules and the proceedings.[Par 272] The situation was further complicated by the "lamentably low" standard of the interpretation by the official court interpreters.[Par 296] No minimum education

qualification was required [Par 297] and there was no check on the accuracy of the translation as only in exceptional cases was the magistrate or the prosecutor conversant in a Black language.[Par 298]

The "untutored Native" could plead guilty without fully appreciating the implications of this step, while he might even have had a valid defence to the charge.[Par 275, 279]. The difference between an unsworn statement by the accused and evidence under oath was usually fully explained but "seldom fully appreciated by the accused."[Par 285] This was equally true of undefended Whites and detribalized Blacks.[Par 273]

These problems were further compounded by the haste with which the proceedings were conducted. The large numbers of petty cases in the large urban areas prevented magistrates from spending sufficient time on individual cases.[Par 274-5]

The solutions which the Commission offered in regard to the undefended accused were twofold; first, to inform the accused of his rights before and during the trial, and secondly, to omit features in the procedure that cause confusion. The Commission rejected as follows the notion that a different procedure should apply for Blacks:

> "It would be undesirable to deny to the non-European population of the Union, or to any section of them, principles of law which operate in favour of the European section of the community; nor would it be easy in application."[Par 278]

The chief's court, operating within the tribal structure and

context and still serving a useful function, should, however, be allowed to continue.[Par 278]

The accused was to be fully apprised of his rights and of the implications of any decision he might make. To begin with, the charge was to be fully explained to him, both in court and by a policeman when a summons, with an admission of guilt attached to it, was served on the accused.[Par 281] The accused should further be instructed in the basic features of court procedure. This should preferably happen before the start of the trial. An explanatory notice should be displayed in the prison or police cells in both the official languages and the Black language of the area. If an accused could not read, then the notice should be explained to him. The Commission suggested the following explanation:

> "What will take place in court.
> (1) When your case is called, the charge against you will be read to you, and you will be asked to plead guilty or not guilty.
> (2) If you do not fully understand the charge, ask the magistrate or the interpreter, before you plead, to explain what you do not understand.
> (3) With your plea you may, if you wish, tell the magistrate briefly what your position in the matter is, and what your defence will be.
> (4) The evidence of witnesses will then be heard. The whole object of this is that the court may know whether the charge against you is true or false.
> (5) Immediately after each witness for the prosecution has finished his replies to all the prosecutor's questions, you may put to the witness such questions as you think might help you in your case - for instance, by showing that the witness is not telling the truth, or that he has left out facts in your favour.
> (6) After all the witnesses for the prosecution have been heard, you will, unless you have pleaded guilty, be able to call any witness who may help you in your case, and you may give evidence yourself. You may ask each of these witnesses questions to get from him what you want the court to know; the prosecutor will then be

> able to put questions to him; and after that, you may put further questions to him.
> (7) After your witnesses have been heard and the prosecutor has addressed the magistrate, you will be permitted to address the magistrate and argue the matter, whether you have given evidence or not, but your statements in argument will not have the value of evidence because you are not making them under oath and so have not given the prosecutor the opportunity of testing their truth by questioning you."[Par 289]

The Commission's view of the accused's rights was thus limited as the focus of this explanation was only on the production of evidence. No mention was made of the rights regarding remands, bail or legal representation, all of which are fundamental to a fair trial.

To simplify and make the procedure more comprehensible to the "untutored Native", the Commission recommended the abolition of the opportunity to make an unsworn statement; instead, the accused should be advised that he could only give evidence under oath. Thereafter, whether he gave evidence or not, he should be informed that he could address the court.[Par 288]

To assist Black accused, the Commission also suggested a procedure which, it said, was present in customary procedure, ie, permitting the accused to offer with his plea a brief explanation of his position in relation to the charge and an account of the nature of his defence.[Par 283] This innovation, the Commission thought, would assist the undefended accused, as it would enable the presiding judicial officer to test more effectively the evidence of the prosecution and thus render him better able to assist

the accused in presenting his defence.[Par 283] The same reasoning was employed in argument for the retention of the preparatory examination for trials in the Supreme Court. In undefended cases or cases where the accused was unsatisfactorily defended, the record of the preparatory examination frequently enabled the judge to test the evidence of the State more fully.[Par 321]

To improve the competency of interpreters, the Commission suggested that all interpreters should have obtained matriculation, have a competent knowledge of both official languages and a Black language, and have an elementary knowledge of legal procedure.[Par 299]

The Commission, in recommending the creation of intermediate courts between the Supreme and magistrates' courts,[Par 352] stressed that these courts should be presided over by impartial judicial officers. It suggested that they should be appointed from the ranks of senior advocates, because magistrates would not be suitable since "there is the danger of pro-Crown bias resulting from court training exclusively as public prosecutors and from the exercise over many years of both judicial and administrative functions".[Par 352] The Commission thus reaffirmed the importance of impartiality if equality before the law was to be achieved.

The Report was therefore in the same liberal tradition as that of the Colebrook and Brigge Commission. The touchstone was "equal and impartial justice". Equal justice meant more

than framing rights in general terms. The Commission identified specific factors, such as economic, social, cultural and political differences, which caused de facto inequality before the law. It directly linked indigence with its most negative effect - the inability to obtain legal representation. The Commission proposed specific rules to minimize the effect of those factors and to extend the possibility of a fair trial to all accused persons. The Commission's realistic assessment of the viability of legal aid for all led to the investigation of alternative methods to implement the principle of equal justice. The then former Minister of Justice, HG Lawrence MP QC, justly hailed the Report as "a remarkable illuminating document which undoubtedly is going to be of vast assistance to the Department of Justice in its task in the future".[1]

The Lansdown Report was not, however, of "vast assistance" to the new Nationalist government that came into power in 1948. Despite the repeated questioning by HG Lawrence MP QC, as to whether the Government intended to implement the recommendations of the Commission,[2] CR Swart MP, the Minister of Justice, refused to deal comprehensively with the Report. One of the few recommendations that was implemented was that of intermediary courts; these were

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1. House of Assembly Debates vol 64 col 101 11 Aug 1948.
2. House of Assembly Debates vol 72 col 5145 26 April 1950; vol 79 col 6918 2 June 1952.

established in 1952. The suggestion that the judicial officers for this court should be drawn from the ranks of senior advocates was not, however, adopted. The courts, called regional courts, had a sentencing jurisdiction of three years' imprisonment and fines of up to £300.[1] Sentences of more than one year imprisonment or fines exceeding £100 were subject to automatic review,[S 25(a)] as the Lansdown Commission suggested,[2] but this provision was revoked three years later.[3]

The consolidating Criminal Procedure Act 56 of 1955 did not alter the position of the undefended accused; the limited protective measures of the 1917 Act were merely affirmed.

5.3. LEGAL AID ACT 22 OF 1969

After a number of privately and partially State-funded legal aid bureaux had failed to provide legal aid on a consistent and permanent basis,[4] the Department of Justice in 1962 established a National Legal Aid Scheme. The scheme did not succeed, however, partly because all legal services were to be provided on a voluntary basis.[5] During the same time a private fund, the Defence and Aid Fund, was created to provide legal assistance to indigent

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1. Act 40 of 1952 s 21(b).
2. Lansdown Report par 352.
3. Act 62 of 1955 s 25.
4. See N Abramowitz "Legal Aid in South Africa" (1960) 77 SALJ 351.
5. See GW Cook "A History of Legal Aid in South Africa" in Legal Aid in South Africa 28 31.

accused charged with political offences.[1] When this was declared an unlawful organization in 1966, the Government promised to provide funds for legal defence in political trials.[2] From 1966 to 1969 assistance was provided in only 24 cases.[3] State-funded legal aid was eventually given statutory form in 1969,[4] and Dugard contends that this was largely as a result of the adverse criticism which the Government received after the banning of the Defence and Aid Fund.[5] The legal aid was not regarded as a right but rather as a privilege and the Minister of Justice, PC Pelser MP, was adamant that it was certainly not for the benefit of "the skolly who loafs about, snatches handbags and steals people's money" as "that is not legal aid, but 'subsidizing crime'".[6]

The Act created a body corporate [S 2], the Legal Aid Board, whose object was "to render or make available legal aid to indigent persons".[S 3] The details of the scheme were not spelt out and were left to the Board to develop.[7] Thus the first step had been taken towards relieving the huge lack of legal representation. However, the tight conditions and requirements to qualify for legal aid, coupled with a lack of resources and poor marketing of the service,[8] meant that

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1. Cook op cit 32; Dugard Human Rights 245.
2. Dugard Human Rights 246.
3. Cook op cit 33.
4. Legal Aid Act 22 of 1966.
5. Human Rights 246.
6. House of Assembly Debates vol 25 col 1509 26 Feb 1969.
7. See Minister of Justice's comments, House of Assembly Debates vol 25 col 1495 26 Feb 1969. See ch 2 above for details of scheme.
8. See ch 2 above.

the scheme did not resolve the problems presented by indigent accused in the criminal courts.

5.4 THE BOTHA COMMISSION

Proposals made in 1963 and 1965 by Mr Justice VG Hiemstra[1] that judicially controlled interrogation of accused should replace the preparatory examination, led to the appointment of the Commission of Inquiry into Criminal Procedure and Evidence in 1970, with Mr Justice DH Botha of the Appellate Division as the only member. The Commission reported in 1971,[2] but its proposals were eventually implemented only in 1977.[3]

The Commission expressed at the outset its awareness of the predominance of undefended accused in the criminal courts:

> "The Commission accepts ... that the vast majority of persons who find themselves before our courts, are illiterate and unsophisticated, and find it difficult to adapt themselves to the complexities of modern civilization. They are mostly unaware of their rights, and measures which may be fair to others, may affect them extremely unfairly. All the recommendations of the Commission are made in the light of the above mentioned considerations".[4]

The 'Hiemstra proposals' that the Commission had to consider, involved the question of replacing the preparatory examination with a pre-trial judicial interrogation of accused. This was prompted by Hiemstra's belief that too

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1. "Abolition of the Right not to be Questioned" (1963) 80 SALJ 187 and (1965) 82 SALJ 85.
2. RP 78/1971, hereinafter referred to as the Botha Report/Commission.
3. See Dugard 51-56.
4. Introduction 4.

many acquittals occurred in the Supreme Court as accused benefitted unduly from the disclosure of the State evidence at mandatory preparatory examinations. In his written memorandum to the Commission, Mr Justice Hiemstra proposed that an accused should be brought before a magistrate as soon as possible after arrest and that the charge should be put to him. In the event of a plea of not guilty, he was to be interrogated by the magistrate to establish the basis of his plea. If he remained silent, a negative inference should be drawn from that fact. The accused should not be allowed legal representation during the proceedings as no represented accused would, on the advice of his lawyer, participate.[Par 1.14]

The Commission rejected the notion that legal representation should be excluded. Instead, it recognized the importance of legal assistance in order for the accused to protect his rights at the initial stages, accepting that the basis of a conviction may be laid at the pre-trial interrogation, and that subsequent legal representation at the trial stage would then come too late to be of any assistance to the accused.[Par 1.13] The inherent dangers of the questioning for the undefended accused were realized and the Commission felt that "illiterate and ignorant accused would... probably speak out of ignorance, and it would be extremely unfair to deny him legal representation who is most in need thereof".[Par 1.12]

The Commission also rejected the suggestion that a negative

inference should be drawn from the accused's decision to remain silent on the following basis:

> "The content of the adverse inference is not known to ...the illiterate, and to avoid the unknown he may regard himself obliged to speak. It would be grossly unfair, and against all the recognized principles as accepted by our courts, in any way to compel a suspect to reply to questions which may incriminate him and thus to assist in building up the case against him".[Par 1.17]

The Commission found unconvincing Hiemstra's argument that the interrogation proceedings could lead to an early release of the innocent accused person. The prima facie case on which a charge is based would not be impaired by the explanation of the accused alone, without an actual testing of the State witnesses.[Par 1.19] The explanation of a not guilty plea was not comparable to a preparatory examination where evidence was led; an accused's explanation of his plea could thus not lead to his discharge.[Par 1.30]

The Commission proceeded, however, to recommend that the accused be brought before a magistrate in order to plead to a charge, whether or not it was cognizable in the magistrates' court.[Par 1.31] If the accused pleaded guilty, this might lead to his conviction without any evidence being led.[Par 1.32] If he pleaded not guilty, he could make a statement indicating the basis of his defence or his attitude towards the charge. The reason given for the introduction of the explanation of plea was

> "to afford to the accused...the opportunity to put his side of the case against him to the magistrate at an early stage, which may either lead to his early

> release, or which may considerably shorten the trial, if there should have to be one."[Par 1.33]

The recommendation contradicts all the objections which the Commission itself had levelled against the proposals of Hiemstra. The importance of legal representation to protect the accused from self-incrimination at the pre-trial stage had been stressed,[Par 1.13] but the Commission did not address itself to the question whether the proposed pre-trial questioning per se would prejudice the undefended accused. As most of the accused would be unrepresented, they would most likely, as the Commission admitted,[Par 1.12] make a statement, even though given a choice. If such a statement would not lead to the early release of the accused, as the Commission itself had found, the resurgence of this justification is inexplicable. The more compelling reasons that were advanced by the Lansdown Commission in this regard,[Par 283] that it is more in line with customary procedure for the illiterate Black accused to tell his side of the story right from the outset of the trial, or that the magistrate may use such an explanation in testing the State witnesses, were not mentioned by the Commission. The recognition that the explanation of plea could be used in evidence against the accused,[Par 1.33] suggests a more likely purpose and function of the procedure; the assistance of the State in its prosecution task. Within the Commission's own reasoning, the recommendation is contradictory and ill-conceived and in conflict with its stated concern for "illiterate and unsophisticated" accused.

In contrast, the procedure proposed to follow upon a plea of guilty is more consistent with the stated philosophy of the Commission. The requirement that after a plea of guilty, the State still had to prove the commission of the offence with evidence aliunde, afforded the accused no real protection as the evidence was required only to prove the commission of the offence, not who committed it.[Par 6.10-1] The new procedure proposed required that before a plea of guilty was entered, an accused had to admit the presence of all the elements of the offence and it had to be clear to the court that he understood the charge and had no defence to it.[Par 6.12]

The Commission recommended the abolition of the unsworn statement by the accused since it was a source of confusion, especially for the illiterate and undefended accused who might be prejudiced by such confusion.[Par 7.02, 7.12] For the rest the Commission found no other rules of procedure which were unnecessarily complicated and cumbersome for the layman.[Par 10.01]

The institution of automatic review was strongly defended by the Commission for as long as legal aid was not available to all accused charged with serious offences:

> "It is of the utmost importance to the accused persons, the vast majority of whom are still illiterate and usually unable to afford legal representation. It ensures a measure of uniformity in the administration of justice and the imposition of sentences in the magistrates' court".[Par 4.01]

The system was aimed at controlling inexperienced

magistrates and those who laboured under pressure in the urban courts.[Par 4.02] It was not necessary to extend the system to the regional courts as they were presided over by senior and experienced magistrates who did not work under pressure [Par 4.09] and the existing system should be retained in its present form.[Par 4.18]

In general, the Commission's approach to the administration of justice did not exhibit a deep commitment to the principle of equal justice. Although it was stated that all recommendations were made with a view to the fact that the majority of the accused in court were illiterate, unsophisticated, and unaware of their rights, the rules recommended by the Commission failed to protect substantially the rights of the undefended accused. No duties were expressly placed on the court to inform the accused of his right to a lawyer, or his right to remain silent, before the judicial interrogation commenced. Rules were formulated in the traditional universal fashion, without accommodating the inequality which the Commission identified among accused persons. It thus paid little more than lip service to the principle of equal justice.

In 1971 a bill containing the main recommendations of the Botha Report[1] was made available for comment; the most

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1. GN No R 2231 GG No 3328 of 10 December 1971.

contentious aspect of the bill was the compulsory questioning of an accused by a magistrate after a plea of not guilty.

In introducing the bill once again in 1973,[1] the Minister of Justice, PC Pelser MP, made his ideological stance quite clear. Despite his consistent claims that the compulsory judicial questioning of the accused was to the advantage of the accused, who could state his defence and thus obtain an early release or shorter trial, and could not be accused of fabricating his defence,[2] his emphasis was on the advantages which would accrue to the State for the efficient and speedy prosecution of crime. He stated that "our whole system [was] balanced hopelessly against justice and in favour of the criminal"[3] and that the system "lean[ed] over backwards to protect and to pamper the accused".[4] The innovations, especially the compulsory questioning after a plea of not guilty, constituted an attempt to secure the conviction of 'guilty' accused and to improve the efficiency of the system.[5] The State would benefit from the procedure, the Minister admitted, since accused persons would not be able to fabricate a defence. To elicit the truth from accused persons, it was necessary to question them at the right "psychological moment", which is shortly

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1. AB 38 of 1973.
2. House of Assembly Debate vol 43 col 4464 10 April 1973; col 4708, 4710 12 April 1973; col 4466 10 April 1973.
3. Vol 43 col 4711 12 April 1973.
4. Vol 43 col 4454 10 April 1973.
5. Ibid; col 4492.

after arrest, when they admit their crimes before they have had a chance to think up a story.[1]

The Minister rejected a suggestion by the General Bar Council and the Cape Bar Council that before an accused was asked to plead at his first appearance, he should be notified by the magistrate that (a) he was entitled to a postponement in order that he might consider his position and take legal advice, and (b) he could apply to the Legal Aid Board for legal aid. This would, according to the Minister, merely lead to a waste of time as only a small number of accused who wanted legal representation did not have it already. That the Minister was not enthusiastic about extending legal aid can be deduced from his statement that it was not "fair to expect the taxpayer to bear the costs of all litigation or a large portion of it, in this country".[2]

In opposing the judicial questioning, the Opposition spokesmen based their arguments on the fact that most accused were undefended and illiterate and that the questioning could only be prejudicial to them since they would be unaware of their rights and might assist the State in establishing its case.[3] Furthermore, by imposing an inquisitorial duty on the magistrate to question the accused, it was feared that he might compromise his role as an impartial arbiter and a person who assisted undefended

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1. Vol 43 col 4464 10 April 1973.
2. Vol 43 col 5689 3 May 1973.
3. Vol 43 col 4488; 4492; 4493 10 April 1973.

accused, especially in the eyes of the Black population.[1]

The bill was not passed in 1973 as the committee stage was not completed before the end of the parliamentary session.[2] Before it was re-introduced, a Commission of Inquiry into the Penal System under the chairmanship of Mr Justice G Viljoen was appointed. The introduction of the Criminal Procedure Bill would be postponed until that Commission had reported.[3]

5.5. THE VILJOEN COMMISSION

One of the underlying concerns of this Commission, which reported in 1976,[4] was the overpopulation of the prisons, and many of its recommendations were aimed at reducing the number of prisoners. The Commission suggested that this might be achieved by increasing the granting of bail and by the more expeditious completion of proceedings.

In regard to bail, the Commission merely urged judicial officers to apply the common law principles of bail and to consider applications "most anxiously".[5] The prisoners' friends attached to the courts in bigger centres should be "untiring in their efforts to arrange bail".[Par 4.2.3.4] The Commission did not, however, address the position of the

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1. Col 4492 10 April 1973.
2. House of Assembly Debates vol 66 col 428 31 January 1977. See also Dugard 55.
3. Dugard 55.
4. RP 78/1976.
5. Par 4.2.3.4. See also par 4.4.1.

undefended accused, who might not know of the existence of bail, or that the onus was on him to apply, or how to substantiate an application.

In contrast, the Commission tackled the question of the expeditious completion of cases in a far more robust way. One of the factors identified as contributing to the excess of awaiting trial prisoners was the number of remands necessitated by various administrative arrangements. The rule that the list of previous convictions should be obtained before it could be decided in which court an accused should be arraigned, caused endless unnecessary remands.[Par 4.2.4.1] Although numerous other factors caused delay, often no sufficient reason for the adjournment appeared from the record.[Par 4.2.4.7] The Commission rejected the administative regulation of remands as inadequate and proposed instead that a statutory duty should be placed on the magistrate to justify the granting of a postponement after a certain number of remands.[Par 4.2.4.9] The Commission recommended an amendment to the Criminal Procedure Bill to the effect that no case could be adjourned for more than two weeks, or for a third or subsequent time, unless the court was "satisfied that good and sufficient reason exist[ed] for such adjournment". The reasons for such adjournment should be entered on the record. If a third or subsequent adjournment was granted, the court had to consider the release of the accused on bail or warning.[Par 4.2.4.10] The Commission argued that such a statutory

injunction would remind magistrates to expedite matters and would assist judges in their review of cases.[Par 4.2.4.9] This recommendation was of great importance for the undefended accused since the principle of a speedy trial would thereby be enforced independent of his own efforts which, due to his ignorance, were unlikely to be forthcoming.

In its consideration of legal representation in court, the Commission noted that most accused were indigent and therefore unable to afford the services of legal practitioners.[Par 4.3.1.2] The Commission maintained, however, that these persons were not wholly deprived of legal representation "as sufficient funds [were] made available by Parliament" every year for pro Deo defence or legal aid.[Par 4.3.1.2] On examining the legal aid scheme's operation, the Commission found for the year ending 31 March 1976, that of the 10 600 applications received, only 568 were for criminal matters.[Par 4.3.2.10] Although it was unable to pinpoint the reason for the lack of interest in criminal legal aid, it mentioned two possible reasons. Firstly, public ignorance of the scheme, especially among illiterate Blacks, and secondly, the fact that the Black person is, as far as criminal cases are concerned, "rather suspicious and sceptical of a service for which he is not required to pay".[Par 4.3.2.12] To improve the situation, the Commission recommended the establishment of more sub-offices to publicize the scheme more effectively.[Par 4.3.2.15] The

Commission was hesitant, however, to recommend the easiest method of promoting the scheme, namely notification from the bench; it merely made a half-hearted attempt to involve the magistracy in the promotion of legal aid. It stated:

> "The Commission is conscious and deeply appreciative of the solicitude displayed by magistrates to ensure a fair hearing for accused who are not represented. In such cases valuable assistance is invariably rendered from the bench by magistrates to accused persons and ample care is taken to avert a travesty of justice. There may be instances, however, where the magistrate concerned may in the interests of justice and for the sake of his own easiness of mind, recommend to the accused to obtain the services of a legally trained representative. It is suggested that judicial officers should be requested in a fitting case to bring the legal aid scheme to the notice of the accused concerned".[Par 4.3.2.15]

Only in cases involving "difficult issues of fact and law" were magistrates "requested" to bring the legal aid scheme to the notice of undefended accused.[Par 4.4.5] The prevailing practice and institutions of legal aid and pro Deo counsel were thus left to continue unchanged.[Par 4.3.1.5]

This Commission did not make the principle of equal justice for the accused, its point of departure. It devoted little attention to the inequality existing among accused persons and the effect which that had on the administration of justice. Its approach was problem-orientated - how to solve overcrowding in the South African prisons. The importance of legal representation was not stressed, and the provision of legal aid and the conduct of proceedings in the lower courts was regarded on the whole as adequate and unproblematic.

The Commission's recommendations in respect of a speedy trial constituted an attempt to guide and control judicial officers' discretion to adjourn proceedings through statutory rules. The aim of these rules was to force judicial officers to assume a more active role by questioning the reasons for adjournments, and in the process, considering the granting of bail.

The Viljoen Report thus continued along the path followed by the Botha Commission, equal and impartial justice not constituting an overriding concern in its deliberations.

5.6. CRIMINAL PROCEDURE ACT 51 OF 1977

When the 1973 bill was again introduced in 1977, the recommendations of mandatory questioning by the magistrate after a plea of not guilty had been abandoned; however, the magistrate was to be granted the power to ask questions at his discretion and the bill proposed that where an accused refused to answer a question of the magistrate, an inference that was reasonable in the circumstances could be drawn from such a refusal.[1]

The Opposition's objection to this provision of the bill was again based on the fact that the majority of accused were undefended and illiterate, and would thus be prejudiced

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1. B5 of 1977 clause 115(3); Minister of Justice House of Assembly Debates vol 66 col 429 31 January 1977.

through their ignorance of their rights.[1] Government speakers, on the other hand, gave little attention to the position of the undefended accused, and when it was mentioned their attitude was that this category of accused received sufficient protection. FW de Klerk MP expressed this complacency as follows:

> "The endless trouble that magistrates and prosecutors take to ensure that an undefended accused has a fair trial is quite admirable. I can therefore give the hon. member the assurance that special attention is given to the interests of the undefended accused in the magistrates' courts. Day in and day out one comes across this in the courts".[2]

In defending the provision that a negative inference could be drawn from an accused's non-participation in the questioning, the Minister of Justice, JT Kruger MP, adopted Hiemstra's argument, that innocence speaks out while guilt remains silent.[3] In the wake of strong opposition from the legal profession, however, the Minister in the end abandoned the provision.[4]

The Minister attempted to justify the more active role that magistrates would play as a result of their discretionary questioning of accused persons. The questioning, he argued, did not compromise the magistrate's position as he was not merely an arbiter; the function of the judicial officer was as follows:

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1. See for eg vol 67 col 3209-10 9 March 1977; col 3243 9 March 1977; col 3649 15 March 1977; col 4161, 4173, 4188 23 March 1977.
2. Vol 67 col 4438 25 March 1977.
3. Vol 67 col 3353 10 March 1977.
4. Vol 67 col 4181 23 March 1977.

> "Our presiding officer has a specific task, i.e. that he is seeking justice, not for or against the State, and not for or against the accused, but justice in itself...It is an active, strong and powerful role which he has to play in a court case. He is not there to score points off people; he is there to perform a task and to see that justice is done, whomever it may be. This is the approach we adopted when we were preparing this Bill".[1]

This active role was not, however, extended to encompass the mandatory disclosure of all the accused's due process rights. The Government rejected the suggestion[2] that the accused should be informed (a) that he is entitled to ask for an adjournment of the proceedings to consider his position and/or to take legal advice; and (b) of his rights under, and facilities provided by, the Legal Aid Act. The Minister argued that as magistrates were informing the accused of these rights in any case, there was no need to impose such a duty. Furthermore, if such a duty was created, and the magistrate failed to comply with it, this could lead to an unwarranted interference with the conviction on appeal or review.[3] Also rejected was the suggestion[4] that the accused should be informed of his right to remain silent during the judicial questioning. Such a warning would, according to the Minister, affect the spontaneity of the accused's answers as he might refuse to respond to any questions.[5] In this statement the Minister implicitly rejected the principle of equality before the law; the

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1. Vol 67 col 3349 10 March 1977. My italics.
2. Vol 67 col 3473-4 11 March 1977; col 3645 15 March 1977.
3. Vol 67 col 3475, 3477 11 March 1977; col 3650 15 March; col 4215 23 March 1977.
4. Vol 67 col 4188 23 March 1977.
5. Vol 67 col 4207 23 March 1977.

undefended accused need not be placed in the same position as the defended accused, who would be aware of his rights. To keep the undefended accused ignorant of his rights was functional, as his co-operation in the interrogation would principally benefit the prosecution. The procedure was thus geared towards the aim that Hiemstra advocated - greater crime control.

The scope of automatic review was narrowed down to lighten the load of the Supreme Court, and its protection was restricted to undefended cases.[1] Finally, it should be noted that the attempt of the Viljoen Commission to structure and guide the discretion of the court with regard to the granting of adjournments and bail, was not included in the bill.[2]

The provisions eventually adopted in the legislation of 1977 constituted a watered down version of those proposed in the bill of 1971. Since these provisions are discussed fully in the chapters to follow, only their broad outline will be set out in this section.

The Act provides that after a plea of guilty, the presiding judicial officer has to determine whether the accused admits every element of the offence. If the judicial officer is satisfied that the accused is guilty of the offence, he may convict him on his plea of guilty.[S 112(1)(a)]

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1. As proposed by AS Pitman MP, vol 67 col 4438 25 March 1977.
2. House of Assembly Debates vol 67 col 3214 9 March 1977.

If an accused pleads not guilty to a charge, it is in the discretion of the judicial officer to ask the accused whether he wishes to make a statement indicating the basis of his defence.[S 115(1)] If he refuses to make a statement or if it is unclear from his statement to what extent he denies or admits the issues in dispute, the judicial officer may question him in order to establish which issues are in dispute.[S 115(2)(a)]

Preparatory examinations are made the exception rather than the rule, and will be conducted only on the direction of the Attorney-General.[S 123] Instead, the so called "mini-preparatory examination" is instituted. In respect of charges which exceed the magistrates' substantive and sentencing jurisdictions, the charge may still be put to the accused on his appearance in that court. The procedure the magistrate then has to follow depends on the nature of the accused's plea.[S 121-122]

In this Act, for the first time, the special position of the undefended accused was given recognition by the restriction of automatic review to undefended cases.[S 302] Cases were now to be reviewed only if the accused was undefended and had to serve an effective term of imprisonment or undergo a whipping.[S 302] Furthermore, a distinction was drawn between senior and junior magistrates. Sentences of a magistrate who had not held the substantive rank of a magistrate or higher for a period of seven years, where they exceeded three months' imprisonment or R250 fine, were

reviewable, while for magistrates of more than seven years' standing, the limits were six months and R500 respectively.[S 302(1)(a)] The indigent accused is still entitled to a free copy of the record of the preparatory examination [S 143(2)] and "necessary and material" witnesses may be subpoenaed free of charge.[S 179]

Rules of general application relevant to the undefended accused are: (a) the duty on the court to inform the accused about his right to give evidence and call witnesses,[S 151(1)(a)] and (b) the duty of the head of every prison to deliver lists of all unsentenced prisoners to the Supreme Court at each of its sessions.[S 340] The previous statutory rules for the release of awaiting trial prisoners not brought to trial within a certain period of time,[1] were not, however, re-enacted.

Since 1977, few changes of importance have been enacted. After a number of Supreme Court decisions pointed out the injustices which might result from reviewing suspended prison sentences only when they were invoked, and called for the amendment of the Act,[2] the criteria for automatic review were made applicable to suspended prison sentences as well.[3] In 1984 the monetary limits for reviewable fines were increased to R500 and R1 000 for junior and senior magistrates respectively. This coincided

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1. Act 56 of 1955 s 294-5.
2. See Paulsen 1982 (4) SA 91 (T); Mokoena 1983 (2) SA 312 (O). See ch 10 below for further discussion.
3. See Act 59 of 1983 s 22 deleted s 302(2)(b).

with the increase in the magistrates' court sentencing jurisdiction for fines from R1 000 to R3 000.[1]

5.7 THE HOEXTER COMMISSION

The final report of the Hoexter Commission,[RP 78/1983] published in 1985, recommended fundamental changes in the structure of the administration of justice.[2] Many of the recommendations were directly relevant to the trial of the undefended accused, while others touched tangentially on his position. Underlying these recommendations was a strong adherence to the principle of equal and impartial justice.

Equal justice

Equality before the law, the Commission declared, implied firstly, the absence of rules discriminating on the basis of the race of the accused, and secondly, that procedural rights should be available effectively to all accused irrespective of their financial position.

The criminal jurisdiction of the commissioners' courts, trying Blacks in terms of the ordinary procedure, was a patently discriminatory measure. The Commission stated:

> "That inhabitants of the same country should purely on the grounds of race be criminally prosecuted in separate courts for any offence whatever is...by any civilised standard, unnecessary, humiliating and repugnant"[Part V par 6.1] and added that "There is no moral justification for separate court structures. Such a system is a negation of the principle that all are equal before the law."[Part V par 4.4(c)]

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1. Act 109 of 1984 s 8.
2. See NC Steytler Editorial (1984) 8 SACC 107.

Furthermore, a dual system was objectionable as it was not possible to maintain equal standards in two different court systems.[Part V par 4.4] The Commission therefore recommended the abolition of the commissioners' courts, proposing that all criminal cases heard in the commissioners' courts should be tried in the magistrates' and regional courts.[Part V par 7.2.2] The chiefs' courts, however, should be retained for as long as they continued to meet the needs of rural Blacks still living under the authority of their chiefs.[Part V par 7.1(a)]

The absence of discriminatory rules did not in itself ensure equality before the law. Although legal rights may be expressed in non-discriminatory terms, a judicial system could by its own structure and functioning preclude certain individuals from exercising those rights simply on the basis of their poor financial status. The Commission opined that "high priced lawyers, complex adversary proceedings, and relatively passive judges [were] ill-suited in many cases to the important new rights on behalf of the poor, consumers, tenants, labourers and the like".[Part II par 6.3.2.2]

The principle of equality before the law therefore required that rights should be extended assertively to all concerned:

> "In truth, effective access to justice is increasingly seen to be of great and perhaps of crucial importance to the protection of human rights, since the mere existence of the rights is worthless without the means to assert them. A legal system should not merely proclaim rights - it should guarantee the effective enforcement of those rights."[Part II par 6.6.5]

In the same vein the Commission approved the truism that "unknown rights are no rights at all".[Part II par 6.6.7]

In the adversary system, legal representation was identified as a prerequisite for the enforcement of rights. Access to legal services, the Commission declared, should not be a mere privilege:

> "Any state that prides itself on a democratic way of life should not regard legal representation of parties before its courts as pure luxury or a fortuitous benefaction of the government, but as an essential service. Indispensable to the achievement of the democratic ideal in any modern state is access to its courts for all its inhabitants...For any person who has to appear in court without counsel, whether as an accused in a criminal trial or as a litigant in a civil action, the excellence of his country's judicial system is small comfort and any claim by the state that the courts are open to all has a hollow ring".[Part II par 6.4.1]

To realize the principle of equality before the law, the Commission set as a goal the provision of legal aid to all persons of limited means. The present State-funded legal aid fell far short of this ideal. The Commission found that the pro Deo counsel system was inadequate. Counsel did not have sufficient preparation time and were not assisted by an attorney during the preparation and conduct of the trial.[Part II par 6.4.3.6] The fees paid for such work were also inadequate.[Part II par 6.4.3.7] The Commission accordingly recommended its abolition and replacement by the ordinary legal aid scheme.[Part II par 6.4.4.4]

The legal aid scheme itself was underutilized by accused persons, particularly by Blacks. In the year ending 31 March

1983, only 3 414 of 29 019 applications for legal aid were for criminal matters,[Part II par 6.4.4.2] despite the fact that there were 46 294 and 1 434 884 criminal cases recorded in the regional and magistrates' courts respectively in 1980, while a further 199 487 cases were heard in the commissioners' courts.[Part IV par 2.2.1.2] The Commission accepted as one of the reasons for the reluctance of Blacks to use the scheme, the suspicion with which they viewed it; many legal aid officers were identified with the State as they were either commissioners or magistrates.[Part II par 6.4.4.8] In this regard, however, the Commission merely noted the recommendation of the General Bar Council and the Association of Law Societies that the legal aid scheme should be placed under the control of the legal profession and that the employees of the Board should not be civil servants.[Part II par 6.4.4.10] A further cause for the underutilization could be the ignorance of the general public regarding the existence of the scheme, and the Commission merely suggested that the existence and functions of the scheme should be actively publicised.[Part II par 7.13]

The Commission was also of the opinion that the test of indigence was too restricted and that legal aid should be available to all persons of limited means.[Part II par 6.4.4.6] The Commission did not attempt a definition of limited means, nor did it make any suggestions as to how the scheme was to be financed. However, some practical

recommendations, aimed at promoting legal aid through less conventional means, were made. Official recognition should be given to legal aid clinics and salaried legal practitioners, funded by the Legal Aid Board, should be employed in such clinics. The idea of student practice rules was also viewed favourably by the Commission.[Part IV par 4.1.9]

Impartial justice

For impartial justice to be attained, the independence of judicial officers in both the Supreme Court and the lower courts was vital. The principle should be maintained in the Supreme Court and extended to the lower courts.

Structurally, magistrates were not in the same independent position as judges of the Supreme Court. They could be transferred without consent and were dependent on merit assessments by the Department of Justice for promotion and salary increases. There was no tenure of office or security of salary.[Part II par 1.4.2] Due to their position as civil servants, magistrates could be exposed to undue influence by the State.[Part IV par 4.2.1] The Commission recommended that magistrates should be independent of the public service. The appointment, disciplining and discharge of judicial officers in the lower courts should be the responsibility of a proposed Judicial Council.[1] All aspects of conditions of their service should be controlled by

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1. See Part II par 4.1.2-4.1.7 for its composition and function.

statute. There should be no differentiation between salaries of the various officers so as to create the impression that magistrates were prompted by financial incentives to aspire to higher office.[Part II par 3.2] The Commission also stressed that the identification of magistrates with the State would continue as long as magistrates were appointed solely from the ranks of public prosecutors.[Part IV par 5.1.3]

The Commission noted that various administrative duties which they had to perform, some being overtly political,[1] compromised their impartiality. The administrative burden that magistrates had to carry, the Commission recommended, should be the responsibility of a new judicial officer, the proposed resident magistrate. Apart from his administrative duties, the resident magistrate would be vested with limited criminal jurisdiction.[Part IV par 5.10.3]

Also to attain a greater degree of independence and impartiality, the Commission recommended the greater participation of the public in the adjudication process by their appointment as assessors in the lower criminal courts.[2]

The Hoexter Report heralded the unequivocal return of the principle of equal and impartial justice as espoused by the earlier commissions. Equality before the law was not

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1. Part IV par 4.2.1. For example, their powers in terms of Demonstrations in or near Court Buildings Prohibition Act 71 of 1982 s 2(2); Internal Security Act 72 of 1982 ss 19(1), 20, 21, 22, 29(9), 31(5), 46, 53(2), 70(2).
2. See part IV par 5.12.1.5.; par 5.12.1.4; par 5.12.2.4.

possible while Blacks were, in respect of certain offences, subject to a separate court system. The inability of most accused to engage the services of lawyers resulted in unequal treatment in court and the extension of legal aid to persons of limited means was the solution proposed by the court in respect of criminal cases. The major failing of the Commission, however, was that it did little to suggest ways of implementing the rhetoric of equal justice. No specific recommendations were made, for example, as to how the availability of legal aid should be communicated to undefended accused. With the full implementation of the legal aid system set as a goal, the Commission failed to address the problem of how the principle of equal justice could be pursued until such time as the ideal could be realized. By contrast, the Commission's recommendations in respect of civil procedure - the establishment of the small claims court - innovatively tackled the problem of litigation without legal representation.[1]

The goal of impartial justice, on the other hand, was boldly pursued. The Commission made recommendations which would fundamentally restructure the court system and promote the independence of the judiciary.

The Hoexter Commission's approach to law reform differed markedly from the Viljoen Commission's problem-solving orientation. Although the Hoexter Commission also faced the problem of overcrowded prisons, and

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1. See par 5.8 below.

recognized the financial implications of its innovative measures, the Commission's view was that "in all law reform the interests of the general public should be the deciding factor whenever conflicting interests are weighed".[Part II par 6.1.7]

In a motion to discuss the Report, the Minister of Justice, HJ Coetzee MP, cautiously accepted some of the recommendations but merely noted the more fundamental changes proposed.[1] The important principle of a uniform court structure for all the population groups was accepted, as was the recommendation that all the judicial functions of the commissioners' courts be exercised by the Department of Justice.[2] While accepting the principle that the administrative and judicial duties of magistrates should be separated, the Minister did not find it necessary that the magistracy should be removed from the control of the executive.[3] He argued that the judiciary, whether in the Supreme Court or the lower courts, was independent of the executive, and that it was therefore unnecessary to reflect this reality in a statutory separation of lower courts from the civil service.[4] Apart from the unification of the court structure, the Government has initiated no significant

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1. For criticism of the Minister's response, see DJ Dalling MP House of Assembly Debates vol 113 col 4873-78 12 April 1984.
2. House of Assembly Debates vol 113 col 4913 12 April 1984; House of Assembly, Debates of the Standing Committee col 9 17 May 1984.
3. House of Assembly, Debates of the Standing Committee col 115 17 May 1984.
4. Ibid.

changes with regard to the position of the undefended accused. The provision of legal aid has not been extended; to the contrary, the 1984/85 budget of the Legal Aid Board had been cut by R2,2 million.[1]

5.8 SMALL CLAIMS COURT ACT 61 OF 1984

In the Hoexter Commission's Fourth Interim Report, the establishment of a small claims court was recommended to facilitate litigation in respect of small civil claims without the assistance of lawyers. The Commission found that civil litigation had become inaccessible to many individuals in respect of small claims. Most individuals found it difficult, if not impossible, to proceed without assistance in a court of law due to the complicated and professionalized procedures and the passive role played by the presiding officer. Access to law thus necessitated the employment of lawyers, but lawyers' fees often made it economically unfeasible to sue for small amounts. Justice would thus be denied to many. To remedy the situation, the Commission devised a method by which the individual could proceed without the assistance of lawyers. The Commission's solution to the problem was the creation of a more active and inquisitorial judicial officer, whose duty it would be to see that justice was done. It advocated the principle that "above all, the judge's function must be recognized as first and foremost the task of investigation, with adjudication being an ancillary role".[Par 3.5] It would be

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1. Legal Aid Board Annual Report 1984 4.

the court's duty to unravel the facts of a particular case, and then decide the claim in accordance with the law.[Par 10.4.10] The court should not be bound by the strict rules of evidence [Par 10.3.11] and the procedure should be characterized by informality.[Par 10.4.10] Due to the manpower shortage, the judicial officer would not be drawn from the civil service, but be appointed from the ranks of practising lawyers.[Par 13.1]

These proposals materialized in the Small Claims Courts Act 61 of 1984, which established an inquisitorial procedure by which small civil claims may be settled without the assistance of lawyers.[S 7(2)] The procedure to be followed requires the judicial officer, called a commissioner,[S 8] to adopt an active inquisitorial role to establish the relevant facts of the case. This duty of the commissioner is set out as follows:

> "A party shall not question or cross-examine any other party to the proceedings in question or a witness called by the latter party, but the presiding commissioner shall proceed inquisitorially to ascertain the relevant facts, and to that end he may question any party or witness at any stage of the proceedings: provided that the commissioner may in his discretion permit any party to put a question to any other party or any witness".[S 26(3)]

In executing his inquisitorial duty the judicial officer is not bound by the rules of evidence and may establish any fact in any manner.[S 26(1)] Evidence may be submitted in writing or orally.[S 26(2)] The right of a litigant to call witnesses is subject to the court's power to decide whether sufficient evidence has been adduced and thus to exclude

further evidence.[S 27]

Although the procedure relates to civil matters, it may be of considerable importance for criminal procedure as it marks the first departure from the traditional adversary process, and recognizes the important role that the presiding judicial officer may play where the litigants are unrepresented.

6. CONCLUSION

The legislative development of criminal procedure in respect of trial proceedings was characterized by the steady professionalization of the adversary process. The introduction of the English law of procedure and evidence established a framework within which the accused was burdened with the responsibility to protect his own interests, yet complex rules meant that he required the knowledge and expertise of a lawyer to do so successfully. Accompanying the professionalization of the process was the recognition of the right to legal representation, and to a large extent the rules applicable in court proceedings - although assumed to be available to all - were in practice accessible only to lawyers. Little attention was paid to the position of the undefended accused and few provisions were made to incorporate the principle of equal justice into legislation.

6.1. THE PRINCIPLE OF EQUAL AND IMPARTIAL JUSTICE

The commissions of enquiry have exhibited varying degrees of commitment to the principle of equal and impartial justice. It formed the frame of reference for the Colebrook and Brigge, Lansdown, and Hoexter Commissions. Having identified great inequality amongst accused persons on the grounds of financial status and/or race, they envisaged the realization of equality before the law, where the mode of procedure was adversary, through the provision of legal aid to indigent accused. The same commitment to the principle was not shared by the Botha and Viljoen Commissions and they paid little attention to the plight of the undefended accused.

Most Commissions, however, failed to address themselves to the problem of how to ensure equal justice for indigent accused <u>without</u> lawyers. Only the Lansdown Commission attempted to address the issue with its recommendation that procedure should be simplified and basic rules should be explained to the accused. In this regard the recommendations of the Hoexter Commission - that a small claims court should be conducted in an inquisitorial manner - could serve as a model for criminal procedure.

The Colebrook and Brigge, Lansdown, and Hoexter Commissions saw impartial justice, and its prerequisite, an independent judiciary, as an essential corollary to equal justice. This is of particular significance for the undefended accused,

because where the fairness of a trial is largely dependent on the efforts of the judicial officer, only an impartial judicial officer can ensure equal justice.

The principle of equal and impartial justice has found some expression in statutes regulating criminal procedure. Since the Cape Ordinance of 1813[1] there have been scattered references to these standards of justice in the Orange Free State[2] and the Transvaal.[3] The adoption of the principle did not, however, prevent the enactment of overtly discriminatory rules in respect of criminal procedure, nor the creation of separate courts for different races. Furthermore, it was not uniformly recognized that an undefended accused did not, in a professionalized adversary system, receive the same justice as those who were defended.

The active pursuit of equal and impartial justice has never, however, been a priority in Parliament. When parliamentary commissions and parliamentarians exposed the inequality of treatment that undefended accused received, and recommended improvements, the Government of the day showed little enthusiasm for the reform of the legal structure or rules. They responded either by ignoring any exposure of inequality (and the ensuing recommendations to ameliorate the position of the undefended accused), or, more recently, by denying

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1. Ord of 25 Sept 1813, Theal vol XI 239.
2. Constitution of 1854 s 58.
3. Ord 4 of 1864 s 27.

that unequal treatment of accused persons occurred. With the majority of accused persons being Black, the Government's lack of concern is explicable in terms of the prevailing socio-political conditions. In a society structured on a policy of discrimination on the basis of race and colour, where equality under the law has never been a goal, unequal treatment before the law has been regarded as being acceptable.

6.2. LEGISLATIVE PROVISIONS OF ASSISTANCE TO DISADVANTAGED ACCUSED

The statutes governing criminal procedure have, however, made some specific provisions to alleviate the inequality which could flow from the economic and racial status of an accused. There have also been a number of general provisions whose application would also have benefitted the undefended accused.

(a) The indigent accused

The indigent accused is assisted by the free subpoenaing of material and necessary defence witnesses. He is able to obtain a free copy of the record of the preparatory examination. The most important development in this regard has been the enactment of the Legal Aid Act 22 of 1969 which could - in theory - provide free legal assistance to most indigent accused. Due to an acute shortage in manpower and lack of finances, however, this ideal has remained unrealized.

(b) The Black accused

The disadvantages that Blacks may suffer under a foreign legal system due to cultural, educational and economic differences, were first acknowledged in the colony of Natal. The retention of customary law to settle intra-group disputes was aimed at preventing inequality in those situations. However, the selective use of customary law to prosecute Blacks in inter-group conflicts ran counter to the whole purpose of the retention of a separate court structure for Blacks. The enforcement of racial policies eventually became the overriding purpose of the separate court structure. The commissioners' courts, established on a country wide basis in 1927, used the same procedure as the ordinary magistrates' courts; there was no attempt to accommodate customary procedure in the process and thus no intention that the use of separate courts would facilitate the participation of the usually undefended Black accused in the court proceedings.

(c) The undefended accused

The restriction of automatic review to undefended cases was the first clear recognition that this class of accused called for special attention and care. There were, and still are, a number of rules which, although generally formulated, can assist the undefended accused in particular. Some of these consist of duties imposed upon the judicial officer, which are to be performed in all cases. After a plea of

guilty, the judicial officer has to establish inquisitorially whether the accused's plea has a factual basis and the accused has to be informed that he can produce evidence at the close of the State's case. On the whole, however, the procedure has remained adversarial and the judicial officer has retained his passive adjudicatory role.

The absence of a thorough legislative commitment to the principle of equal and impartial justice and the failure of the legislature to provide adequately for the protection of the undefended accused in a demanding adversary system, has meant that the only alternative source of assistance in this regard is the court. In particular, the Supreme Court is left with the responsibility to see that "justice" is done to all accused, for this institution may, through the power of review over lower court proceedings and its power to interpret applicable legislative provisions, develop a mode of procedure which will protect and advance the rights of the undefended accused. In the chapters to follow an examination will be made of the Supreme Court's interpretation and implementation of the legislative provisions governing the important stages of the trial process, more particularly, those provisions with important implications - one way or another - for an accused unassisted by a lawyer. The aim will be to establish whether the Supreme Court has incorporated the principle of equal justice into legal rules. This examination will in each case be followed by an empirical

analysis of the application of the law (legislative and judicial) in the lower courts, with the view of establishing (a) the extent to which protective rules are complied with in practice; and (b) whether, if those rules are followed, they are adequate to ensure a fair trial.

SECTION C THE UNDEFENDED ACCUSED ON TRIAL: LAW AND PRACTICE

INTRODUCTION 1. THE UNDEFENDED ACCUSED, THE PRINCIPLES OF A FAIR TRIAL AND THE SUPREME COURT

Judges of the Supreme Court[1] have acknowledged that the majority of South Africa's accused are indigent,[2] illiterate,[3] and undefended.[4] A further complicating factor that the Court has frequently encountered, is that many accused in the rural areas are still in the grip of tribal customs and belief in witchcraft.[5] Accused persons have at times been described as "untutored tribesmen",[6] "unsophisticated",[7] or even primitive.[8] The Courts have often remarked that no legal knowledge can be expected from such accused[9] and that they may have, at best, only a vague idea of their rights.[10]

The Supreme Court has thus been confronted with the problem of how it can ensure that illiterate and indigent accused appearing without the assistance of a lawyer, are tried in

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1. In the text "Court" spelt with a capital C refers to the Supreme Court while "court" spelt with a lower case c, refers to the lower courts.
2. Nhlapo 1954 (4) SA 56 (T) 57; Songongo 1984 (2) SA 146 (EC) 150; Abrahams 1981 (2) PH H209 (O).
3. Mokubung, Lesibo 1983 (2) SA 710 (O) 715C. See also Matonsi 1958 (2) SA 450 (A) 458G; Mawolaula 1922 TPD 33 35; M 1982 (1) SA 240 (N) 242D.
4. Mokubung, Lesibo supra 715C. See also Maphinda 1979 (2) SA 343 (N) 343G; M supra 242D.
5. Mhlati 1976 (2) SA 426 (Tk) 427C.
6. Lebang 1965 (3) SA 774 (SR) 775C.
7. Mhlati supra 427C; Shangase 1972 (2) SA 410 (N) 431B; M supra 242D.
8. Shangase supra 431B.
9. Mawolaula supra 35; Finger 1981 (1) PH H65 (O).
10. Taylor 1972 (2) SA 307 (C) 311G.

accordance with the principles of a fair trial. Unable to ensure legal aid for all indigent accused, the Court sought the solution in the presiding judicial officer's general duty to see that justice is done; he was thus entrusted with the responsibility to ensure that the undefended accused is fairly tried. In Kekwana 1978 (2) SA 172 (NC) Van der Heever J summed up the problem and the Court's solution as follows:

> "Die persone wat in my ondervinding hier in die binneland cannabis besit en soms daarmee, werklik of teoreties, handel dryf, is in die oorgroote meerderheid van gevalle swart of bruin, en meerendeels óf ongeletterd óf met geen hoë opvoedingspeil nie en betreklik ongesofistikeerd. Hierdie feite maak die taak van die landdros om toe te sien dat die beskuldigde billik verhoor word, 'n moeilike, wat sonder die medewerking van die aanklaer amper onmoontlik word, by die beweerde oortreding van art 2(a) [van Wet 41 van 1971]".[1]

The judicial officer is thus accorded primary responsibility for ensuring that the accused receives a fair trial. In order to achieve this, he is expected to adopt a role different from that followed in defended cases; his active intervention in the proceedings is envisaged. He is also to receive the co-operation of the prosecutor in carrying out this task.

The role of the judicial officer has traditionally been a passive one - that of an impartial arbiter - in the adversary process.[2] This role has been best described by Holmes JA in Sigwahla 1967 (4) SA 566 (A):

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1. 175A. My italics.
2. Enslin v Truter (1852) 1 SC 215; Grootboom 1982 (1) PH H78 (E); Nkosi 1972 (2) SA 753 (T) 763H.

> "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".[568G-H]

Important here is the concession that it may be necessary for the judicial officer to act differently, more actively, in the case of an undefended accused. This exception is founded on the general consideration that it is the overriding duty of the judicial officer to see that justice is done. In the words of Curlewis JA in Hepworth 1928 AD 265:

> "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".[1]

In the following chapters, procedural law will be analysed with a view to ascertaining whether special provision has been made by the Supreme Court for assistance to undefended accused in circumstances where the governing legislation and common law rules would create difficulties and/or disadvantages for this accused. This analysis will be

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1. 277. See also Seheri 1964 (1) SA 29 (A) 34H-35A; Baloyi 1978 (3) SA 290 (T) 293G.

followed in each instance by an account of the results of an empirical study conducted in the lower courts to examine the operation of the legal rules and principles in practice.

2. AN EMPIRICAL ANALYSIS OF THE ADMINISTRATION OF JUSTICE IN THE LOWER COURTS

In order to ascertain the manner in which the undefended accused is dealt with by the courts - the extent to which the legislative and judicial procedural rules designed to secure a fair trial for this accused are adhered to and the areas in which further legal protection is required - a study of the court proceedings in Durban's lower courts was conducted in 1984 and 1985. The nature of this empirical research will be described in terms of the methodology adopted, the material examined and some of the difficulties encountered.

2.1. METHODOLOGY AND MATERIAL

A quantitative analysis of criminal justice, confined to court statistics,[1] has increasingly been abandoned by researchers.[2] The limitation of this method is that the

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1. See eg M Zander "Unrepresented Defendants in the Criminal Courts" 1969 Criminal LR 632; Zander "A Study of Bail/Custody Decisions in London Magistrates' Courts" 1971 Criminal LR 191; DI Warren "Justice in Recorder's Court: An Analysis of Misdemeanor Cases in Detroit" in JA Robertson (ed) Rough Justice (1974) 326; RG Hann Decisionmaking in the Canadian Criminal Court System: A Systems Analysis (1973).
2. See Feeley 123.

statistics can only establish statistical relationships. The causal explanation of these relationships cannot be sought in terms of the same statistics. In the end the statistics reveal how the system operates, but not why.[1] Statistics reveal little of the important dynamic interaction which characterizes court proceedings.[2] On the other hand, a purely descriptive account of events without statistical validation tends to be selective, more subjective, and hence not entirely convincing. The combination of these types of knowledge, however, can enhance the understanding of court practices.[3]

In the present study both quantitative and qualitative methods were adopted. The proceedings in the magistrates' and regional courts sitting at the Durban magistrates' court building were recorded during February 1984. Five observers participated; they included three final year LLB students, one LLB graduate and the writer.

Six of the nine Durban magistrates' courts (also called district courts) were selected and the proceedings in these

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1. D Van Zyl Smit "Criminology and Criminal Justice: New Directions for Research in South Africa" (1983) 7 SACC 107; D Hansson Structural Ambiguity of Evidence as a Determinant of Evidence Credibility (1984).
2. Van Zyl Smit op cit 107.
3. See eg M Mileski "Courtroom Encounters: An Observational Study of the Lower Criminal Courts" (1970-71) 5 Law and Society Review 473; Feeley; Hansson op cit.

courts were recorded on structured questionnaires. The juvenile court and two courts dealing predominantly with traffic offences were not included in the observation. In the courts observed, petty cases that were disposed of following a plea of guilty [S 112(1)(a)] were not recorded, as the emphasis of the study was to investigate how accused faced with more serious charges were tried. The six courts were observed intermittently for a period of three weeks and then on four successive Fridays in March. Since the number of court observers was limited, they circulated among the courts in order to obtain a representative sample of each of the magistrates presiding in those courts.

The direct observational method of recording court proceedings proved to be difficult and time-consuming. The magistrates' courts seldom adhered to the official court hours and each day was characterized by late starts, extended tea and lunch breaks, and early adjournments. A further problem experienced was that not all cases were completed on the same day or even within the three week observational period. Due to the heavy court rolls and absent witnesses, few cases were completed in one day. Consequently, not all the cases which commenced during the period were fully recorded.

The study covered the remand, bail and plea proceedings, the presentation of evidence, judgment, sentencing and the invocation of suspended sentences. A separate case form was

completed for each accused. A total sample of 272 cases was obtained in the magistrates' courts, including cases which dealt only with certain aspects of the trial, for example the plea and bail proceedings.

A different method was employed for the recording of the proceedings in the regional courts. Direct observation would have been difficult as there are 18 regional courtrooms in the Durban magistrates' court building. The trials were usually lengthy and protracted, involving numerous remands. The court hours kept by the regional courts were even less punctual than those of the magistrates' courts. It was therefore decided to utilize the tape recordings of the regional court proceedings as the primary source. This method also facilitated the recording of the complete case history of each accused.

The cases in which the accused had been convicted were filed in the record room according to the date of the commencement of the proceedings. The first 90 such cases that commenced from 1 July 1983 (a number of which were completed only in January 1984), were recorded. The records of the cases where acquittals were returned, were filed separately according to the date of their completion. Because these records are destroyed three months after the date of completion of the case, some of the records of cases commencing in July 1983 were no longer in existence when the survey was conducted. From the court record book it was calculated that approximately 18% of the accused were

acquitted during that period. To make a comparison between cases ending in convictions and acquittals possible, it was decided to analyse the records of the first 16 cases in which acquittals were recorded during November 1983.

Since the two samples did not represent a finite group, it was difficult to establish accurately the influence which lawyers had upon the conviction rate. For this purpose, recourse was then had to the records of non-petty cases which commenced in four magistrates' courts during March 1984. A sample of 212 cases were so recorded.

In analyzing the data, the need to investigate the role of the interpreters soon became apparent since they played a part in the majority of cases. During July 1985 a further observational study was embarked upon to examine this aspect. The aim of the study was to uncover modes of conduct rather than to record statistically the accuracy and extent of interpretation. The same regional and magistrates' courts of the previous study were observed and most of the interpreters encountered the previous year, were still performing the same task. Three Zulu-speaking law students, armed with a structured questionnaire, observed the various interpreters on a rotating basis. A total of 100 cases were recorded.

The statistics used in the text refer to 272 magistrates' court cases and 106 regional court cases. Individual cases are cited as Case (a number) with RC or DC, indicating a

regional or magistrates' court respectively. The cases recorded in the study on interpreters, are prefixed by the letter A, for example, Case A19 RC. These cases were not used in the calculation of statistics. References to race, age and sex of accused will be made where these characteristics may be relevant to the accused's participation or the conduct of court officials. It should be noted that reference will be made to other empiricial studies of the prosecution of undefended accused in Anglo-American jurisdictions in order to complement - and sometimes supplement - the results of this writer's study.

The methods employed to gather data were not without their difficulties. The presence of an observer could possibly have influenced the behaviour of magistrates, prosecutors and interpreters. A magistrate may, when he becomes aware of the presence of an observer, change his usual mode of behaviour, or alternatively, have the observer removed from the courtroom.[1] In evaluating the data, the possibility that the personnel in the magistrates' court could have varied their conduct, should be kept in mind. This consideration did not, however, apply to the recording of the regional court proceedings. In the court observation, the observer's immediate surroundings - a crowded public gallery with poor acoustics

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1. This occurred on a few occasions. For similar judicial conduct see Doreen McBarnet "Magistrates' Courts and the Ideology of Justice" (1981) 8 British Journal of Law and Society 181 190.

and mumbling court officials - were not always conducive to accurate recording. The tape recordings of the proceedings, on the other hand, were free from these impediments but many of the finer nuances and non-verbal interactions remained unrecorded. Finally, as mentioned above, the data on the magistrates' court include many uncompleted proceedings due to the delays in the processing of the cases. Despite those difficulties, some of which impede statistical analysis, it is submitted that the data presented below nevertheless provide an accurate account of the dynamics of courtroom behaviour and decisionmaking.

The aim of the empirical study was to investigate the methods by which decisions were reached, rather than to describe merely the results of the decisions. The emphasis is thus on the way proceedings were conducted; the statistical analysis of decision outcomes is used to illustrate the consequences of those modes of conduct.

2.2. THE UNDEFENDED ACCUSED IN COURT

The majority of accused persons arraigned before the lower courts in Anglo-American jurisdictions have been from the lower socio-economic strata, usually occupying a marginal position in the dominant society,[1] and seldom

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1. See eg SR Bing & SS Rosenfield "The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston" in JA Robertson (ed) Rough Justice (1974) 259 270; P Cashman "Representation in Criminal Cases" in J Basten, M Richardson, C Reynolds & G Zdendowski (eds) Criminal Injustice System (1982) 195 196.

enjoying the assistance of defence lawyers.[1] For the majority of accused their court appearance is their first encounter with the formality of legal rules and procedures. This accused is thus the "one-shot" or occasional actor who lacks the knowledge which is at the command of the other actors in the system, the judicial officer and the prosecutor.[2] The undefended accused has accordingly been described as "scared, inarticulate, unfamiliar with the procedure and commonly unable to understand what is going on".[3] Such a person lacks the ability to make any headway in the foreign, if not hostile environment. Ericson and Baranek describe his position as follows:

> "An accused person is no more competent in the criminal process than a judge would be in using language and obeying other rules of social organization that pertain among youths who regularly congregate in the parking lot of a hamburger stand. The difference is, of course, that the judge can leave rather than to pay lip service to thoughts and actions he might find foreign or even repulsive; he would only suffer embarrassment".[20]

Studies have shown that accused persons' "anxiety, despair, and alienation that arise from the strangeness of the proceedings", often lead to their withdrawal and passivity in the proceedings.[4] They lack the ability to participate and, more importantly, to participate correctly and effectively in asserting their procedural rights. Without

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1. Cashman op cit 195.
2. RV Ericson & PM Baranek The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process (1982) 3.
3. Justice The Unrepresented Defendant in the Magistrates' Court (1970) 15. See also S Dell Silent in Court (1971); PA Sallman & J Willis Criminal Justice in Australia (1984) 139.
4. Ericson & Baranek op cit 192.

legal representation, their participation in the proceedings remains superficial and their rights are ineffectually protected.

In South Africa the majority of accused arraigned before the lower courts are from the lower socio-economic classes. Socio-economic status being significantly related to race in South Africa, the accused are also predominantly Black. The racial distribution of the accused in this survey was as follows: Blacks 75,6%; Indians 10,4%; Whites 8,2% and Coloureds 5,8%. Most of the Black accused required the assistance of an interpreter. Of those accused whose age could be assessed, 63% were under the age of thirty. It was determined that 21% of the accused were unemployed at the time of their court appearance. Judging from their dress in court,[1] the vast majority of the accused appearing in the magistrates' court were unskilled labourers, with only a few being skilled or white collar workers. The majority of the accused (73,5%) appeared alone. There was a co-accused in 15,1% of the cases and more than two accused in 11,4%. Of the 378 accused only 11,6% were represented. A single charge was brought against most of the accused (85,7%). The most common offences were theft and other property offences (43,9%). The other offences involved were assaults and culpable homicide (15,9%), drug-related offences (15,9%), house-breaking (10,1%), rape (8,3%) and public order offences (5,8%).

The majority of the accused in the sample, then, were indigent, Black, unskilled and probably uneducated persons

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1. For the use of this indicator, see Warren op cit 334.

who were not versed in the language of the court. Even if they were familiar with English or Afrikaans, they would be confounded by the legal jargon used by the court personnel. The rules of court conduct were quite alien to them and they would have had a minimal idea of any of their legal rights.[1]

In contrast to the accused, the court personnel - the judicial officers and prosecutors - showed great ability, skill and legal knowledge. Most of the prosecutors were LLB graduates and were able to match the skills of attorneys and advocates in defended cases. Most of them had more than a year's experience, and the few who were inexperienced quickly gained the necessary skills. The magistrates, though not law graduates, were well versed in the law and were astute in practice. Generally, the court personnel did not lack legal skills or experience and were probably equal to the best in the Department of Justice. With the exception of two Indian prosecutors, the prosecutors and the judicial officers were White, and thus did not share the same social, cultural and linguistic background as the majority of the accused.

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1. Cf MK Robertson Preventive Legal Education (1981) 73.

CHAPTER FOUR GENERAL PROCEDURAL RIGHTS

1. PARTICIPATION BY THE ACCUSED IN THE PROCEEDINGS

One of the fundamental principles of a fair trial is that the accused should be afforded the opportunity to participate in the decisionmaking processes which may affect his interests. To assist him in such participation he is entitled to be represented by a lawyer, whose duty it will be to ensure that the opportunity to participate is afforded and utilized fully. In undefended cases, on the other hand, the accused bears that responsibility. A prerequisite for participation is the accused's presence at his trial. His presence is required on three levels, namely the physical, the cognitive, and the communicative. Where the accused is undefended the court bears the duty to ensure that these prerequisites are met.

1.1. THE RIGHT TO LEGAL REPRESENTATION

An accused person has the right to be represented by a lawyer at criminal proceedings.[1] This right also extends to every person whose liberty may be infringed, for example, a recalcitrant witness.[2] The importance of legal representation for securing a fair trial is widely

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1. Act 51 of 1977 s 73(2) (Unless specified otherwise, all references to sections of an act hereinafter, refer to Act 51 of 1977). See generally S Selikowitz "Defence by Counsel in Criminal Proceedings under South African Law" 1965-66 Acta Juridica 53.
2. Heyman 1966 (4) SA 598 (A) 604F-G. See also J Dugard "The Right to Counsel: South African and American Developments" (1967) 84 SALJ 1.

recognized. In Ngula 1974 (1) SA 801 (E) Eksteen J commented as follows in this regard:

> "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 and 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 better position to put the case of an accused person much better and more clearly than that person could fairly do himself".[804E-F]

Where an accused at his first appearance in court is not represented, it cannot be assumed that he is aware of this right (or of the availability of legal aid), and that he chooses not to avail himself of it.[1] The court is not, however, obliged to render the right accessible to him.

1.1.1. INFORMING THE ACCUSED OF HIS RIGHT TO LEGAL REPRESENTATION

The Natal Provincial Division in Mthetwa 1978 (2) SA 773 (N) ruled that there is no duty on the court to inform the accused that he has a right to engage the services of a lawyer, but that it might be desirable to do so.[776F] The Transvaal Provincial Division expressed a similar opinion in Baloyi 1978 (3) SA 290 (T), stating that if the accused does not seek legal representation and is not deprived of the opportunity to do so, no irregularity is committed.[293F] Margo J added, however, that

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1. SE van der Merwe Handleiding tot Artikels 112 en 115 van die Strafproseswet (1980) 107.

> " where an accused is not legally represented - and this is especially so in the case of an illiterate or foreign accused who is not familiar with the judicial process, the court will be careful to draw attention to the advisability of being legally represented".[293G-H]

In Kunene 1984 (1) PH H66 (A) the Appellate Division confirmed that in the absence of a bona fide request for legal assistance by a recalcitrant witness, the Court is under no obligation to suggest or to arrange for such assistance, and its failure to do so does not constitute an irregularity.

There is also no general duty on the court to inform undefended accused of the existence of legal aid or how to apply for such assistance. Margo J in Baloyi, however, intimated that there are cases where the gravity of the charge or the complexity of the matter is such that "in the interests of justice" the accused ought to be represented even though he cannot afford it.[293F] In such cases, the judge declared obiter, it would be the duty of the court either to appoint pro Deo counsel or to refer the case to legal aid or other professional bodies to appoint a lawyer pro bono.[294A] This obiter dictum is in sharp contrast to the Appellate Division's decision in Chaane 1978 (2) SA 891 (A) that there was no legal duty on a court to appoint pro Deo counsel on a capital charge, even if the accused himself requested such assistance.[1] The Court held that it was merely a rule of practice to appoint pro Deo counsel for indigent accused, and no irregularity was committed if an

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1. See also Mati 1960 (1) SA 304 (A) 306H.

indigent accused facing the death penalty was denied a court-appointed counsel. If the Appellate Division was reluctant to create a duty to appoint counsel in such extreme circumstances, it is difficult to imagine other cases in which a judicial officer would be obliged "in the interests of justice" to appoint counsel for the accused because of the gravity of the offence. Even if the guidelines formulated in Baloyi were to be accepted, however, their vagueness would prevent their being of much use. The criterion of the complexity of a case is difficult, if not impossible, to apply.[1] To enable the court to assess the complexity of a case, there should be a considerable amount of information available to it;[2] this is not always forthcoming before the commencement of the trial, particularly when the accused failed to disclose his defence at an early stage of the proceedings. It is also possible that the complexity of a case may only become apparent during the trial. Finally, a case apparently straightforward from the court's point of view may present an illiterate accused with severe difficulties. More practical guidelines are therefore required if the cases most needy of legal assistance are to be identified.

Various recommendations have been made that the judicial officer should play a more active role in respect of the issue of legal representation.[3] Kentridge has suggested

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1. Cf Justice Unrepresented Defendent (1972) 19.
2. Op cit 21.
3. See ch 3 above for the proposals in Parliament in 1973 and 1977.

that in 'serious' cases an undefended accused should at least be asked whether he wants a lawyer, whether he has applied for legal aid, and if not, be told how he can apply.[1] McQuoid-Mason argues that the common law right to counsel is not satisfied if the presiding officer does not enquire whether an undefended accused wishes to be represented.[118] If the accused answers that he cannot afford a lawyer, the court should then advise him how to apply for legal aid. This duty should apply primarily where an accused runs the risk of a sentence of imprisonment.[118] Mr Justice AJ Milne, however, has argued that this suggestion does not go far enough and may in any case be difficult to apply in practice.[2] He points out that there are a large number of offences for which a prison sentence is competent; that there is always the risk of a prison sentence being imposed in default of a fine, and finally, that the previous convictions of an accused, adduced only after conviction, may warrant a prison sentence despite the minor nature of the offence. The solution he suggests is that in certain classes of offences it should automatically be the duty of the magistrate to inform the accused, whereas in others it would be left to his discretion.[687] It is submitted that the latter is the most practicable method of introducing the entitlement to legal aid, but that no such restrictions should be placed upon the court's duty to inform the accused

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1. Sidney Kentridge in University of Natal Legal Aid in South Africa (1974) 265.
2. AJ Milne "Equal Access to Free and Independent Courts" (1984) 100 SALJ 681.

of his right to legal representation.

It is submitted that it should be the duty of the court to inform the accused in every case of his right to representation. It has been suggested by Mr Justice Milne that the law should be amended so as to require courts to inform accused of this right.[1] It is submitted that no legislative intervention is required to impose such a duty, as the Supreme Court can accomplish this simply by viewing the non-disclosure of this right as an irregularity. It should be regarded as an irregularity which *per se* leads to a failure of justice, because by keeping the accused ignorant of this right, he is denied one of the fundamental elements of a fair trial.[2] The irregularity may also affect the sufficiency and reliability of the evidence produced in court. The denial of the right would prejudice the accused as it cannot be said, in the absence of a defence lawyer, that all the evidence is before court or has been tested properly. There must therefore be some doubt as to whether the guilt of the accused has been proved beyond reasonable doubt.[3]

The appropriate time for this apprisal is at the accused's first appearance. This would enable him to engage the services of a lawyer forthwith and would obviate the adjournment of the proceedings for this purpose later on.

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1. *Op cit* 685. See also J van den Berg "Legal Representation: Right or Privilege" (1984) 47 *THRHR* 454.
2. See *Moodie* 1961 (4) SA 752 (A) 758F; *Mushimba* 1977 (2) SA 829 (A) 844D.
3. See *Tuge* 1966 (4) SA 565 (A).

1.1.2. GRANTING THE OPPORTUNITY TO OBTAIN LEGAL REPRESENTATION

Since an accused is entitled to obtain legal representation, he should be afforded an opportunity to do so.[1] A refusal to allow an accused such an opportunity was described in Blooms 1966 (4) SA 411 (C) as "such a gross departure from established rules of procedure that the accused in such circumstances has not been properly tried and this brings per se a failure of justice".[2] An accused's request for a remand to retain a lawyer may thus not be refused out of hand. The court is not, however, obliged to acquiesce to each and every application for a remand to secure a lawyer; the accused bears the onus to convince the court that the remand is justified.[3] To succeed in his application, Van den Berg argues, the accused must show (a) good cause, and (b) absence of prejudice to the State.[450] Good cause would be shown if the accused would be prejudiced by a refusal to postpone the case, and if the absence of the legal advisor is not due to the fault of the accused. Since this onus may present difficulties for an accused, particularly if he is illiterate or poorly educated, provision has been made that the court should assist him by ensuring that all the facts relevant to the consideration of the application are put on record. In Seheri 1964 (1) SA 29 (A) the accused's lawyer did not appear in court on the

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1. Mtetwe 1957 (4) SA 298 (O); Nel 1974 (2) SA 445 (NC).
2. 420. See also Mkize 1978 (3) SA 1065 (T) 1066G.
3. Van den Berg (1984) 47 THRHR 447.

trial date and when the accused requested a remand to secure legal representation, the judge refused without affording them an opportunity to substantiate their application. Botha JA commented that the accused were probably unaware of how to substantiate their application and that the court, with a few questions, could have assisted them in their predicament.[34G] The convictions were thus set aside because the accused were denied their right to legal representation.

Where the accused does not timeously secure the services of a lawyer, he may be refused a further opportunity to effect this. The right to be afforded the opportunity to obtain legal representation is thus not an absolute one, and it may on occasions become a 'privilege'.[1] Van den Berg therefore suggests that the court should warn the accused that the right may become a privilege if he is at fault in not securing in time the presence of a lawyer at his trial.[452-3]

Since the exercise of the opportunity to obtain legal representation is dependent upon the accused's knowledge thereof, it is submitted that the judicial officer should be required to inform the accused of his general right to such an opportunity, subject to its being exercised in a timely manner.

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1. Van den Berg op cit 452.

1.2. THE PHYSICAL PRESENCE OF THE ACCUSED

Section 158 makes the presence of the accused obligatory at all criminal proceedings.[1] Section 159(1), however, makes provision for the conduct of the proceedings in the absence of the accused, if he, through his conduct in court, makes the continuation of the proceedings impracticable. Since an undefended accused would generally be unaware of such a provision, it has been decided that there is a duty upon the court to warn him that should he continue with his disruptive conduct, the trial will be conducted in his absence.[2]

1.3. THE ACCUSED'S MENTAL CAPACITY TO UNDERSTAND THE PROCEEDINGS

Section 77(1) states that if it appears to the court at any stage of criminal proceedings that the accused is, by reason of mental illness or defect, not capable of understanding the proceedings so as to make a proper defence, the court is obliged to send him to a mental institution for observation.[3]

Where an accused is not represented by a lawyer who, in his communications with his client, could assess the latter's ability to comprehend legal proceedings, the referral of an undefended accused for observation will usually depend upon

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1. Price 1955 (1) SA 219 (A); Eyden 1982 (4) SA 141 (T); Kahita 1983 (4) SA 618 (C) 620D; Motlatla 1975 (1) SA 814 (T). See also Mokoa 1985 (1) SA 350 (O) 355F.
2. Mokoa 1985 (1) SA 350 (O). See also Hiemstra 341.
3. See V 1984 (1) SA 33 (T) 37E.

the initiative of the police or court personnel. They will be acting, however, on their perfunctory observation of the accused and perhaps on information received from his relatives. Hiemstra CJ has thus pointed out in Morake 1979 (1) SA 121 (BSC) that there is little information available to the court pertaining to the mental condition of an undefended accused.[122G] This means that his mental incapacity may not always be detected by the court. The only safeguard is for the court to order an enquiry if it has any doubt as to the accused's capacity to stand trial.[1] In such an instance it is desirable for the court to indicate that the enquiry should cover both the accused's capacity to understand the proceedings and his criminal capacity at the time of the commission of the offence, as the court may not know which field of enquiry would be the most appropriate.[2]

1.3.1. THE ENQUIRY

In the case of a non-capital charge, the enquiry is conducted by the medical superintendent of a mental hospital or by a psychiatrist appointed by him.[S 79(1)(a)] The court has the discretion to appoint an additional psychiatrist who is not in the full-time service of the State.[S 79(1)(b)] The appointment of a second independent psychiatrist is compulsory in capital cases. The court may also direct that a psychiatrist appointed by the accused participate in the

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1. V supra 37E.
2. Morake supra 122F. See also V supra 37H.

enquiry in both instances.[S 79(1)(b)(iii)] Although the Code provides the accused with the opportunity to dispute and contest the findings of the State psychiatrist,[S 77(2)] an undefended accused is unlikely to be able to do so, due to the specialized nature of the enquiry, even if he is in a sane condition, let alone where his mental capacity is in doubt. The only real safeguard against an incorrect diagnosis by a solitary State psychiatrist is the participation of an independent psychiatrist in the enquiry. It is therefore submitted that in undefended non-capital cases the court should, as a rule, appoint a second psychiatrist who is not in the service of the State.[1]

1.3.2. THE TEST FOR TRIABILITY

The Code bases the test of triability on whether the accused "is by reason of mental illness or mental defect, not capable of understanding the proceedings so as to make a proper defence".[S 77(1)] The accused's ability "to make a proper defence" has traditionally been ascertained according to his ability to give his legal adviser sufficient instructions on the basis of which a defence may be put forward.[2] This test thus has little applicability where the accused is undefended.[3] No other criterion which could accommodate the undefended accused has yet been formulated

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1. For a critique of State psychiatrists see JE Wild "Mad or Bad: The Psychiatrist's Discretion" in Olmesdahl & Steytler 224.
2. SA Strauss in Hiemstra 165.
3. T Verschoor & PHJ van Rensburg "Kriteria vir Verhoorbaarheid" (1983) 7 SACC 16 17.

by the Court. It is submitted that a more appropriate test would simply be to determine whether the accused can, firstly, communicate and secondly, understand the proceedings.[1] The accused's ability to give instructions to a legal practitioner should therefore be regarded as merely one of the factors which can be used to judge his capacities for communication and comprehension.

1.3.3. THE DECLARATION AS A STATE PRESIDENT'S PATIENT

The accused is entitled to a hearing before the court makes a decision regarding his triability. He may challenge the evidence of the psychiatrist and present evidence on his own behalf.[2] For an undefended accused whose mental capacity is in issue, this provision may not be of much value. The judicial officer is seldom in a position to be of much assistance to the accused in testing the psychiatric evidence, as he would not know the accused's background or any additional information which may contradict the psychiatrist's findings. The appointment of an independent psychiatrist, as suggested above, may not obviate the problem, particularly where there is a conflict in the experts' opinions. The only solution to the problem is for the court to appoint counsel for the accused, who could provide the necessary forensic skills to assist the court in evaluating the evidence.[3] The need for legal assistance is

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1. Verschoor & Van Rensburg op cit 18.
2. S 77; Kahita 1983 (4) SA 618 (C) 620E.
3. See Wild op cit.

increased by the fact that the order declaring the accused a State President's patient is not subject to automatic review.[1]

If the court finds that the accused is not triable, it must direct that he be detained in a mental hospital or a prison pending the signification of the decision of the State President.[S 77(6)] If the enquiry is conducted before the trial, then there is no certainty as to whether the accused was in fact involved in the offence.[2] The Rumpff Commission[3] did not deem it necessary that there should be any 'trial of facts', and assumed that the accused would not have been charged unless there was evidence linking him to the offence. Such an assumption may be erroneous and without an independent assessment of the evidence, the possibility cannot be excluded that a person may be accused and consequently detained without probable cause. A 'trial of facts' is thus essential, particularly in the case of an undefended accused, because he may be unable, without the assistance of a lawyer, to challenge the State's allegations which could prove to be unfounded.

The detention of an accused as a State President's patient could in many cases be unreasonable because the punishment

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1. See s 302; Blaauw 1980 (1) SA 536 (C).
2. Verschoor and Van Rensburg op cit 17.
3. Report of the Commission of Enquiry into the Responsibility of Mentally Deranged Persons and Related Matters RP 69/1967 57 under the chairmanship of Mr Justice Rumpff.

the court would otherwise have imposed for the offence might be negligible in comparison to the detention, which may be for a considerable length of time. The court is not, however, obliged to declare the accused a State President's patient if the prosecution abandons the case altogether.[1] If the prosecutor withdraws the charge before the accused has pleaded, or stops the proceedings where pleading has taken place, there would be no proceedings before the court and the latter would therefore not be obliged to make such a declaration. The prosecutor is thus burdened with the onerous responsibility of determining whether the case should proceed. This requires the judicious exercise of his discretion on a matter which has far reaching consequences for the accused.[2] A defence lawyer would render valuable assistance to the prosecutor by advancing information and argument as to how he should exercise his discretion. This underlines again the importance of the appointment of counsel for the accused in these proceedings. In the absence of a lawyer, though, it is submitted that the prosecutor, in the exercise of his discretion, should take due cognizance of the interests of the undefended accused and the court may well advise him in this regard.

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1. Kahita 1983 (4) SA 618 (C); Dweba 1983 (1) PH H16 (Ck).
2. Kahita supra 620E.

1.4. COMMUNICATING WITH THE ACCUSED

Effective communication with the accused is an essential prerequisite for a fair trial. Consequently, if no communication is possible, as in the case of a mute,[1] or a person speaking only a foreign language,[2] the accused cannot be tried and any trial of such a person would be regarded as a nullity.[3]

The Magistrates' Court Act 32 of 1944 places a duty on a magistrate to call a competent interpreter if he is of the opinion that the accused is not sufficiently conversant in the language in which the evidence is given, irrespective of whether it is one of the official languages.[S 6(2)] The magistrate should not wait until the accused complains about communication difficulties but must himself ascertain whether the accused can follow the proceedings.[4] A formal enquiry is not, however, necessary on a regular basis when it is obvious that the accused is conversant in the language of the court.[5]

As Black accused are not always conversant in the official languages, interpreters are an integral part of most court proceedings. They must translate accurately, comprehensively, and without bias all communications in

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1. Pachourie v Additional Magistrate, Ladysmith 1978 (3) SA 986 (N).
2. Mafu 1978 (1) SA 454 (C).
3. Pachourie supra.
4. Mackessack v Assistant Magistrate, Empangeni 1963 (1) SA 892 (N). See also Lee Kun [1916] 1 KB 337.
5. Geidel v Bosman NO 1963 (4) SA 253 (T).

court in a language which the accused can understand.[1] As most Black accused, particularly when they are undefended, are dependent on the interpreters for their understanding of and participation in the trial, it is the duty of the court to ensure that the function of these officials is properly executed. Should the court fail to exercise the necessary control over the translation of all court communications, then the accused's other rights and duties, all of which presuppose effective communication between all the court participants, may be rendered worthless.

2. THE EXPEDITIOUS COMPLETION OF PROCEEDINGS AND ADJOURNMENT

The expeditious completion of proceedings is a well recognized criterion for a fair trial.[2] The rationale underlying this principle is, inter alia,

> "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusations and to limit the possibilities that long delay will impair the ability of the accused to defend himself".[3]

Ensuring that trials are expeditiously completed, is today almost exclusively[4] the responsibility of the judicial

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1. See Mzo 1980 (1) SA 538 (C) 539E; Mafu 1978 (1) SA 454(C). See generally ON Channon The Role of the Court Interpreter (1982).
2. Yontolo 1977 (2) SA 146 (E) 149H. See also Makata 1975 (2) SA 315 (T) 319; Mokoena 1983 (4) SA 401 (TkSC); Du Toit 136; Michael Donen "In Search of Rights of a Fair Trial" (1985) 102 SALJ 310.
3. United States v Ewell 383 US 116 (1966).
4. But see s 340 for submission of prison lists of unsentenced prisoners in custody for longer than 90 days.

officer.[1] Section 168 vests the court with the discretion to remand proceedings if it "deems it necessary or expedient". The discretion must, however, be exercised judicially.[2]

With no time limit set by statute for the commencement or the completion of the trial, the court's decision is guided by principles formulated by the Supreme Court.[3] While defence lawyers tend to object readily to further remands, especially if State witnesses are absent,[4] undefended accused, unaware of the right to object, accept repeated remands as part of the vicissitudes of a criminal trial.[5] Although the courts have occasionally acted in favour of the accused,[6] no clear principle has been articulated in this regard to guide judicial officers in dealing with undefended accused.

It is submitted that the correct approach to the matter would be for the court to conduct an enquiry before

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1. For previous statutory regulation see Act 56 of 1955 s 150, 294-295, 298. See also the Viljoen Commission's recommendation of a statutory injunction to judicial officers that they should apply their minds to the expeditious completion of proceedings and the granting of bail (par 4.2.4.10). See further ch 3 above.
2. Zackey 1945 AD 505 511; Magoda 1984 (4) SA 462 (C).
3. See Geritis 1966 (1) SA 753 (W); Paweni 1985 (1) SA 301 (ZHC) 307; Magoda 1984 (4) SA 462 (C); Mokoena 1983 (4) SA 401 (TkSC). See generally N Steytler "The Right to a Speedy Trial" (1985) 9 SACC 173.
4. Snyman & Morkel 311.
5. See eg Mokoena 1983 (4) SA 401 (TkSC).
6. See eg Magoda 1984 (4) SA 462 (C).

making this decision.[1] Since the decision entails mediating between the interests of the accused and the State on the basis of policy considerations, the court bears the responsibility to inform itself about the relevant factors involved and thus be in a position to make a considered decision. It should first afford the State and the accused the fullest opportunity to advance relevant information and argument. If they fail to provide a sufficient factual basis, the court should establish this inquisitorially. It is therefore submitted that the court should question the prosecutor if it is not sufficiently informed of the reasons for his application for a remand. If the accused, having been invited to participate in the decisionmaking, fails to submit any relevant information, the court may also question him.

Recognizing that the expeditious completion of proceedings is the court's duty, the implementation of a routine enquiry for the execution of that duty would place the remand process on a sound theoretical footing. Such an administrative-type decision based on policy considerations is best made by means of an enquiry into all relevant facts. More importantly, however, this approach would assist the undefended accused to secure a speedy trial. The process would become less adversarial and the undefended accused

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1. For a fuller exposition of the concept and principles of an enquiry preceding the exercise of a discretion, see the discussion of the bail decision in par 3 below and sentencing, ch 9 below.

would accordingly suffer less prejudice due to his inability to perform his role as an adversary. No onus would be placed upon him to contest the prosecution's requests for remands and he would be invited to participate before any decision was made. At the same time, the court would be in a position to exercise the necessary control over the prosecutions's application for further remands.

3. THE JUDICIAL RELEASE OF AWAITING-TRIAL PRISONERS

The release of an awaiting-trial prisoner is an expression of the fundamental principle that the accused is presumed to be innocent until proven guilty.[1] The rule that all bail arrangements are terminated on conviction, whereafter it is in the discretion of the court to extend it,[S 58] is evidence of this relationship between bail and the presumption. Where an accused is not likely to prejudice the administration of justice by either absconding or interfering with State witnesses, he should be released on warning [S 72] or bail.[S 60(1)] The release of an accused in this way not only gives effect to the presumption of innocence and an individual's right to liberty, but it also facilitates an accused's challenge of the State case by making it easier for him, for example, to engage the services of a lawyer, search for witnesses and generally prepare his defence. Judicial release will be examined in terms of the rules applicable to the bail process since this

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1. See eg Stack v Boyle 342 US 1 (1951).

is more prevalent than release on warning.

The accused may at his first appearance in court apply to be released on bail.[S 60(1)] In Liebman v Attorney-General 1950 (1) SA 607 (W) it was held that the accused is required to put forward a prima facie case that his release would not prejudice the administration of justice, in that he would not abscond or interfere with State witnesses.[1] This prima facie case has to be proved by the accused on a balance of probabilities.[2] The onus is therefore on the accused to apply for bail and to convince the court that bail should be granted; failure to do both will mean his continued detention. There is no duty placed on the court to inform the undefended accused of his right to apply for bail, making this right invariably inaccessible to most undefended accused. They would be ignorant in the first instance of the fact that they may apply to be released on bail and secondly, that the onus is on them to apply. Even if they are aware of bail and the onus, they may not know how to substantiate a successful bail application.[3]

While this procedure prevails, it is submitted that the undefended accused should be informed thoroughly of his rights and duties in respect of bail. It will be argued, however, that the rules outlined above are not only

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1. 611. See also Maharaj 1976 (3) SA 205 (D) 208A; Hiemstra 132; Lansdown & Campbell 324; Snyman & Morkel 187.
2. C 1955 (1) PH H93 (C); Hlongwa 1979 (4) SA 112 (D).
3. See Steytler "Bail" in Olmesdahl & Steytler 124.

prejudicial to the undefended accused, but are also theoretically unsound. It is submitted that the correct procedure to be followed in the determination of bail is an enquiry by the court, relieving the parties of adversarial responsibility in this regard.

3.1. THE BAIL DECISION AS AN ENQUIRY

The release decision lends itself less to an adversary mode of procedure than does the decision on the merits; the two types of decisions are essentially different. The decision on the merits of the case involves the settlement of disputed facts. The release decision, on the other hand, is concerned with regulating human behaviour - ensuring that the accused will stand trial and not interfere with witnesses. It deals thus with future events and the court bears the responsibility to make a decision which will serve the ends of justice. Schmidt accordingly describes the granting or refusal of bail as an administrative rather than a judicial act.[67] To arrive, then, at an appropriate decision, the court should first conduct an enquiry.

The basic structure of an enquiry is the following: Firstly, where the court bears the responsibility of arriving at a decision which will serve the interests of justice, no party bears an onus to prove a particular correct decision. Secondly, the court can arrive at an appropriate decision only if information is available regarding all pertinent considerations which it should take into account. To this

end, the court should afford the parties the fullest opportunity to present information and argument. Thirdly, if they should fail to inform the court sufficiently, it should establish inquisitorially an adequate factual basis for its decision. Such a routine enquiry into the bail question would be the most appropriate means of determining whether bail should be granted, for the court would equip itself with all the relevant considerations - either by means of the parties' contributions or through its own questioning. Where an undefended accused is unable to put forward his circumstances, then, these would be elicited by the court and in this way he would have a greater chance of release than at present.

There is support in the case law for the view that the bail process should be regarded as an enquiry. It has been held that the court bears the responsibility to ensure that an accused is not unnecessarily incarcerated. In Budlender 1973 (1) SA 264 (C) Van Zijl JP stated that "the courts do not like ever to deprive a man of his freedom while awaiting trial".[1] More forthright is the dictum of Milne JP in Mdhluli 1968 (2) PH H303 (N):

> "The Magistrate, even without an application from the accused, should insist on bail being granted wherever possible in order to ensure that the accused will not be kept unnecessarily in custody. It is not every Bantu man who knows that he has the right to apply to be released on bail".

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1. 269E. See also McCarthy v Rex 1906 TS 657 659.

In Joone 1973 (1) SA 841 (C), Steyn J clearly stated that the correct bail decision is the court's responsibility and that neither it nor the prosecutor is a rubberstamp of the decision of the investigating officer as to whether bail should be granted or what the amount should be. Arriving at a just decision requires an assessment based on the relevant information. In this regard Steyn J said the following:

> "'n Strenge, onafhanklike beoordeling van die feite van elke saak wat sal insluit 'n versigtige oorweging van die omstandighede van elke beskuldigde, die erns van die misdaad en die belange van die gemeenskap, behoort deur die voorsittende beampte in elke geval gedoen te word."[847A]

Such an assessment presupposes that the information is available to the court. Where it is not provided by the parties, the court should establish such inquisitorially. The enquiry has already been recognized as essential in the determination of the amount of bail to be granted. In making this decision it is an established principle that the financial ability of the accused person is a factor the court should take into account.[1] If the court is not sufficiently informed in this regard, Steyn J held in Visser 1975 (2) SA 342 (C), it is under a duty to investigate the ability of the accused to pay a suggested amount of bail.[2]

Clearly, an enquiry would be unnecessary where the accused and the prosecution had reached an agreement on the matter

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1. Mohamed 1977 (2) SA 531 (A); Budlender 1973 (1) SA 364 (C) 269E-F.
2. 343C. See also Budlender 1973 (1) SA 264 (C) 269E-F.

of bail. In the case of the undefended accused, however, where negotiations between the prosecutor and the accused may be difficult to conduct and the accused may be a weak adversary, it should be the duty of the court to address the issue of bail in every case.

Imposition of such a duty upon the court would quite likely be resisted on the basis that a routine enquiry would be extremely time-consuming in a process geared towards maximum efficiency in crime control. While it is this writer's submission that the protection of the majority of accused persons' rights to liberty should supercede any such practical drawbacks, it should be noted that a continuation of the present procedure is not the only alternative. If a strict adversary mode is to be retained at this stage of the trial, then there remains scope for protecting the interests of the undefended accused in a manner not as satisfactory as an enquiry, but more effective than the present system and more in line with general principles of procedural law. This would be to burden the State with the onus of proof that the accused should not be released.

3.2. PLACING THE ONUS ON THE STATE

The presumption of innocence of which bail is an expression, holds that the individual's liberty can be interfered with only once the State has shown reasonable cause for such infringement. The police must show reasonable cause for the arrest of a person [S 40] and in a habeas corpus application

the detaining body, the State, is called upon to show why the detention is lawful.[1] Furthermore, the State bears the burden of proving the guilt of the accused beyond reasonable doubt. In exactly the same way, the onus should be placed on the State to convince the court that the accused's liberty should be infringed upon before he is found guilty. Clearly the continued detention of the accused can be justified only if the prosecutor can show a probability that the accused will not stand trial or would interfere with State witnesses. There is thus no basis in logic or in principle for the decision in Liebman v Attorney-General placing the onus on the accused to prove that he will stand trial. Although s 60(1) mentions that the accused may apply for bail, it is submitted that this is not a sufficient indication that the common law presumption of innocence has been overruled by statute and the onus is to be placed on the accused. Moreover, s 72 makes no suggestion that an accused should apply to be released on warning.

Were the legislature or the Supreme Court to impose a duty to enquire upon the court or an onus of proof upon the prosecutor, there is no certainty that these would be adhered to in the absence of a defence lawyer. The Supreme Court faces serious difficulties, however, in imposing duties on the lower courts in respect of bail. Despite irregularities in the bail process, the conviction and

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1. Ganyile v Minister of Justice 1962 (1) SA 647 (E) 654B.

sentence will stand, as it is assumed that neither of these decisions was directly affected by the bail determination. The possible range of sanctions is therefore limited. In Visser 1975 (2) SA 343 (C) Steyn J, after confirming both the conviction and sentence on review, could only reprimand the magistrate for his irregular conduct in routinely setting high bail amounts as a deterrent for drunken drivers. The only sanction available to the Court on review is the subtraction of any time unduly spent in custody prior to sentencing from the sentence imposed. The fact that the accused in Mdhluli 1968 (2) PH H303 (N) spent more than two months in custody pending the proof, if any, of his previous convictions, moved the Court to reduce his sentence by half.[1] The rule need not be restricted to cases where a sentence of imprisonment is imposed. It can also be applied to fines. The length of the pre-sentence custody can be subtracted from the length of imprisonment set in default of the payment of the fine. The portion of the fine to be paid can thus be calculated with reference to the length of "default" imprisonment already served.

3.3. THE BREACH OF BAIL CONDITIONS OR THE FAILURE TO APPEAR

Where the State alleges that a bail condition has been breached, the onus is on the prosecution to prove such an allegation. The accused is given the opportunity to contest such evidence.[S 66(1)] If the court finds that there was a

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1. See also Mokoena 1983 (4) SA 401 (TkSC); Grey 1983 (2) SA 536 (C) 539E; Du Toit 273.

failure to comply with a condition, and such failure was due to the accused's fault, the court may cancel the bail and declare the money forfeited to the State.[S 66(3)]

The forfeiture of the bail money does not, however, follow automatically on the cancellation of bail. The court has a discretion in this regard and may take into account considerations other than those applicable to the cancellation of bail. It must therefore apply its mind specifically to the issue[1] and conduct an enquiry to consider such factors as may be relevant to the question of the forfeiture as opposed to the cancellation.[2]
In conducting the enquiry, it is submitted, the court should invite the accused to advance relevant considerations, and where he is not able to do so adequately, it should inquisitorially establish a sufficient factual basis for its decision. By assuming an active role in the proceedings, the court will compensate for the undefended accused's inability to participate as a skilled adversary.

If the accused fails to appear in court on the remand date or fails to remain in attendance, the court must cancel his bail provisionally and the money will be provisionally forfeited to the State.[S 67(1)] The accused can prevent the final forfeiture of the money if he can show within 14 days that it was not his fault that he did not appear on the

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1. Sebe v Magistrate, Zwelitsha 1984 (3) SA 885 (CkSC) 890C.
2. Sebe supra 891C. See also Hiemstra J's reference to an enquiry in Pillay v Regional Magistrate, Pretoria 1977 (1) SA 533 (T) 535F; Hiemstra 143.

court date or did not remain in attendance.[S 67(2)] The onus is placed on the accused to convince the court of his innocence in this regard.[1] It is submitted that the court should inform the accused of this onus and, where necessary and feasible, assist him in advancing relevant information.

Once the 14 day period has expired without an application by the accused, the money is finally forfeited to the State, even if the accused was not at fault.[S 67(2)(c)] The only recourse for the accused would be to apply to the Minister of Justice for the remission of the whole or part of the money.[S 70] It is submitted that the court should inform an undefended accused whose bail money has been forfeited either in terms of s 66 or 67, about the avenue open to him to reclaim his money.

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1. Sibuya 1979 (3) SA 192 (T) 192.

4. GENERAL PROCEDURAL RIGHTS - AN EMPIRICAL ANALYSIS

4.1. LEGAL REPRESENTATION

In accordance with the case law, all but one magistrate did not at any stage of the proceedings apprise the accused of their right to legal representation. Even in the regional court, where serious charges were tried and long terms of imprisonment imposed, the right to counsel was never mentioned, let alone the existence of legal aid. Only one magistrate attempted to make the right more accessible by routinely asking the accused, "Do you have a lawyer?" or when he remanded a case, warning the accused that if he had a lawyer, the latter should be in court at the next hearing.

In a survey by Bekker et al in 1984 of a number of lower courts in KwaZulu and Natal, it was found that in only 2% of the cases in their sample was the accused informed of this right.[4]

Since undefended accused are not routinely informed in court of this right, knowledge of and access to lawyers depends upon outside sources. In this regard awaiting-trial prisoners may face considerable difficulties. One possible source of assistance outside the courtroom is the prisoners' friend, a Department of Justice official. His task of assisting prisoners consists principally of arranging for sentenced prisoners to pay fines in instalments, and arranging bail hearings where the granting of bail is opposed by the State. In practice, he is mainly occupied

with the receiving of monies for the payment of fines and bail. One person is designated as the prisoners' friend and he serves all the accused in the court building. His office is located below the courtrooms and prisoners have access to it. Assistance is given on a reactive basis; the onus is on the prisoner firstly, to locate his office and secondly, to seek the required assistance.

The prisoners' friend at the Durban magistrates' court proved not to be very helpful in the arrangement of legal assistance. When she was asked whether she assisted prisoners in obtaining legal aid, she replied that she handed them the telephone directory to enable them to trace the telephone number of an attorney. When questioned specifically about the legal aid scheme, she replied that she had heard of it, but had no further knowledge thereof. A colleague of hers ventured the information that it was the institution through which a cheap divorce could be obtained.

The Legal Aid Board did not advertise its services. No notices about legal aid were found in the magistrates' court building nor in the cells below. It was in fact the policy of the police officer in charge of the cells that no notices were to be displayed in the cells for fear of their being defaced. The appearance of a lawyer instructed by the Legal Aid Board was indeed a rare occurrence and it happened only twice in the sample.

On the rare occasions where the accused was aware of his

right to a lawyer and indicated that he desired to consult a lawyer before pleading to the charge, he had to follow the correct procedure and adopt an assertive manner in order to succeed, as is illustrated by case 390 DC.

Case 390 DC

A young working class male appeared on a charge of drunken driving. Before the court proceedings started the prosecutor asked him what he was going to plead and showed him the district surgeon's report, which stated that he had been drunk. When the court was in session the prosecutor read out the charge, phrased in legal jargon, and asked the accused to plead.

Accused (A): I have to speak to my lawyer.
Prosecutor (P): All I am asking is what do you plead!
A: According to the doctor I must plead guilty.
A friend of the accused, casually dressed, walked up to the dock and audibly told the accused not to plead. The magistrate immediately ordered the court orderly to remove the person from the court and that was promptly done.
Magistrate (M): What do you plead, accused?
A: I want to see my lawyer.
M: You want to see your lawyer first?
A: Yes.
Only then did the magistrate remand the case.

The prosecutor, unencumbered by any legal duty to respect the accused's wish to see a lawyer, was eager to record the plea, which seemed likely to be one of guilty. The magistrate acknowledged the accused's legal right to consult a lawyer only when the right was claimed in the proper adversary manner - clearly and correctly formulated. To halt the case's progression towards conviction, the accused had to assert his right to be represented forcefully.

It was thus not the policy of the courts to assist undefended accused in the matter of legal representation. Accused were not referred to legal aid even though most of

them would have qualified in terms of the means test. Furthermore, they were not encouraged to seek legal advice despite the fact that some faced serious and complex charges. The established norm was thus that accused were tried undefended, and little effort was made to change the situation.

4.2. THE ADJOURNMENT OF PROCEEDINGS AND THEIR EXPEDITIOUS COMPLETION

4.2.1. THE FIRST REMAND

Most of the undefended accused were in custody at their first appearance in court. The charges against a few accused were withdrawn and they were simply told, "You may go". The majority of the accused in the magistrates' court were asked to plead to the charge forthwith and where they pleaded guilty and were convicted, a few were sentenced immediately. In the cases where the accused were not asked to plead, they were not informed what the charges against them were. In the cases other than those where the charges were withdrawn or sentence imposed at the first appearance, a remand was requested by the prosecutor. Forty per cent of the remands recorded in the regional courts were requested for further investigation, the rest for trial or sentence.

The remand procedure exhibited a great measure of co-operation between the prosecutor and the magistrate; the prosecutor's requests were always granted without further discussion. The magistrates hardly ever invited the accused

to participate in the decisionmaking and merely informed them of the remand date and the reason for the remand. The interpreters approached the proceedings in the same expeditious way. They would, as a rule, only translate the court order - the date to which the proceedings were remanded. Neither the application nor the reason for it was interpreted and the accused was usually confronted with the result - the remand date.

4.2.2 SUBSEQUENT REMANDS

With the first remand it would have been unnecessary for the court to conduct an enquiry as the reason for the remand was clear and well-founded. In considering subsequent applications for remands, which were most often made by the State,[1] it should have been the task of the court to enquire whether these were justified. The matter was generally not treated as an enquiry and the prosecution's request, never challenged by an undefended accused, was invariably granted. A few judicial officers, however, approached the matter as an enquiry. They questioned the prosecutor regarding his reasons and invited the accused to participate in the decisionmaking. In Case 176 DC, after the accused was convicted of theft, the prosecutor asked for a remand in order to obtain his record of previous convictions. The magistrate asked why this was still outstanding since the accused had been arrested six weeks before. When the

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1. Cf Steytler "Bail" 122 table 4. Bekker et al (4) found that the State requested remands in 77% of the cases.

prosecutor was unable to offer any explanation the magistrate refused the application and sentenced the accused on the same day. There was only one magistrate who routinely attempted to include accused in the decisionmaking process, asking whether they wished to comment on the prosecutor's request for a remand. In Case 191 DC, for example, the prosecutor requested a remand in order to obtain a further State witness. The magistrate asked the accused what his attitude was. The accused informed the court that he would prefer the case to go ahead that day as he had already lost two jobs and was starting a new one the following day. The prosecutor's request was refused and he had to close his case without leading any evidence. By inviting the accused's participation, the court was placed in a position to be able to exercise its discretion after considering all the relevant information.

Because few judicial officers routinely conducted enquiries before remanding the proceedings, the cases were not always completed expeditiously. In a number of cases, however, the court refused further remands. Of the 18 discharges of accused at the end of the State case, three were occasioned by the court's refusal to allow further remands for the prosecution to obtain absentee State witnesses.

The possibility of the accused's participation was further minimized by the conduct of the interpreters. The latter failed to translate the prosecutor's request to the accused

and in most instances the accused merely heard the remand being granted by the court. Although it was obvious even to an observer not familiar with Zulu that the accused was not kept informed, the court did not instruct interpreters to translate all the verbal exchanges to the accused.[1] In fact, the interpreters' conduct merely reflected the lack of interest displayed by the court in involving the accused in its deliberations.

In the absence of clear rules governing the conduct of remand proceedings and burdening the court with the responsibility to ensure the expeditious completion of proceedings, inconsistent court practices, invariably prejudicial to the undefended accused, resulted.

4.3. THE RELEASE OF AWAITING-TRIAL PRISONERS

In Anglo-American jurisdictions bail practices in the lower courts have exhibited a number of common problems. The bail determination process usually takes place without the assistance of defence lawyers who would be able to present relevant information and marshal applicable legal principles.[2] Where the accused's right in regard to bail is not asserted at the correct time in the correct manner, there are few sanctions which would compel courts to observe this right. Bail is routinely set according to the offence

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1. Bekker et al (4) also found that in 38% of all remands the reasons were not translated to the accused.
2. RB Flemming Allocating Freedom and Punishment: Pretrial Release Policies in Detroit and Baltimore (1982) 8; MM Feeley Court Reform on Trial (1983) 78.

charged and criteria which are legally objectionable, like the race and economic status of the accused, frequently become the more important determinants,[1] with little or no investigation as to whether the accused will stand trial.[2] There is usually a dearth of information regarding the accused's ties with his community, and when information is given, usually by the police, it tends to be of a negative kind, supporting the need for a custodial remand rather than stressing the accused's suitability for bail.[3] The importance of legal representation in order for an accused to be released on bail has thus been widely recognized, particularly in cases where bail is opposed by the police.[4] The bail decision is not only important for the liberty of the accused, but may also influence subsequent decisions such as the verdict and sentence.[5] These problems are not only applicable to the granting of bail in South Africa, but are exacerbated by the large number of undefended accused.

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1. JS Goldkamp Two Classes of Accused: A Study of Bail and Detention in American Justice (1979) 228.
2. Packer 214; Goldkamp op cit 77.
3. PG Ward "Bail Statistics" in University of Sydney, Proceedings of the Institute of Criminology Seminar on Bail (1969) 72.
4. Zander 1971 Criminal LR 74; New Zealand Criminal Law Reform Committee Report on Bail (1982) 41; Hann op cit 294.
5. Goldkamp op cit 229; ML Friedland Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Court (1969) 110-111; AK Bottomley Decisions in the Penal Process (1973) 88ff.

4.3.1. INITIATING THE BAIL DECISION

In South Africa the onus rests upon the accused to apply for bail and to convince the court that he will stand trial. Most undefended accused in this study did not appear to be aware of the possibility of bail or that the onus rested on them to make and substantiate an application. In the sample only a quarter (24,4% of 128 observed cases in the magistrates' court) took the initiative on their first appearance to apply for bail. Although not legally bound to initiate the process, prosecutors are instructed by departmental circulars to suggest to the court, where appropriate, the granting of bail and a suitable amount of money. The prosecutors raised the issue in 41,7% of the cases, either suggesting or objecting to bail. Where prosecutors failed to do this, the court in a further 12,2% of the cases raised the question.[1] In the remaining 21,7% of the cases bail was not raised by anyone, resulting in a custodial remand for the accused.

A study of the Johannesburg commissioners' courts conducted in December 1982, revealed similar bail practices.[2] It was found that commissioners did not explain to the accused their right to bail, and where the accused did not apply for bail, the matter was never considered.[3]

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1. Bekker et al (5) found the percentage to be 13.
2. R Monama Is this Justice? A Study of the Johannesburg Commissioners' ('Pass') Courts (1983).
3. Op cit 28.

Whether the question of bail was discussed thus depended on the initiative of the court officials. As there was no well-established legal duty on the court to address mero motu the question, the exercise of this discretion, guided only by unenforceable administrative directives, was open to arbitrary and capricious decisionmaking resulting in disparate bail practices. In the bail study conducted in the Durban magistrates' courts in 1981, wide divergences were found among the release rates of magistrates.[1] Similarly, prosecutors differed considerably in the extent to which they initiated the bail process.[2] The highest number of accused were granted bail where the court actively participated in the process. On a multiple regression of the factors that influenced the bail decision, it was found that the type of magistrate, ie whether active or passive, was the most important factor.[3] A multiple regression of the factors which influenced the decision of magistrates with low release figures, showed that the race of the accused was the most significant; Black accused were released less than all other accused. For the active magistrates with high release figures, on the other hand, the race of the accused was irrelevant.[4] In the absence of a duty to investigate the issue of bail in each case, a legally objectionable factor, such as the race of the accused, was allowed to play a dominant role.

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1. Steytler "Bail" 125 table 5.
2. Op cit 126 table 6.
3. Op cit 131 table 8.
4. Op cit 132 table 9.

Where the accused did make an application for bail, and the State opposed it, a different procedure was followed. The court routinely refused to entertain the application and referred the accused to the prisoners' friend to make a "formal application". This involved the following steps: The accused first had to locate the prisoners' friend. Once located, the latter filled in a roneoed bail application form, which was to be forwarded to the clerk of the court. From there the application went to the control public prosecutor who contacted the investigating officer. If the latter still opposed the granting of bail, he would appear in court to testify in support of his objection.

Thus the accused's bail application was not always sufficient per se to initiate the bail process. In an opposed application, he had to take the further step of mobilizing the State witness who was opposing bail. If, however, the accused failed to reach the prisoners' friend, the process was terminated. On investigation it was found that very few accused contacted the prisoners' friend. This was hardly surprising as one interpreter translated the magistrate's instruction, "Tell the accused to see the prisoners' friend", as, "someone down there will help you."[Case A87 DC] The prisoners' friend informed the writer during 1985 that one or two bail cases were brought to his notice per week; these consituted only a fraction of the number of accused referred to his office every week. This could account for the fact that not once during the

observation period in 1984 did an investigating officer testify in support of his initial objection to bail. The result was that the State's initial opposition to the granting of bail remained on the whole uncontested. This procedure, which has been in operation for at least the past five years,[1] epitomizes the consequences of a legally unstructured bail process and the inaccessibility of "normal" adversary process to the undefended accused.

4.3.2. THE BAIL PROCESS AS AN ENQUIRY

Where the question of bail was raised, magistrates did not routinely conduct an enquiry to establish a factual basis for the bail decision by questioning either the accused or the prosecutor. The court seldom sought further information from prosecutors regarding their reasons for objecting, even though in 63% of the 30 cases where the State objected to the granting of bail, no reasons were advanced. The accused were never invited to participate in the decisionmaking process; little information was elicited regarding their suitability to be released and less than a quarter of the accused (22,8%) were questioned regarding their ties with their community. Moreover, the questioning usually remained superficial and on average only 2,3 questions were asked of each of the accused. In the end 79,2% of the prosecutors' suggestions regarding the granting or the refusal of bail were accepted without question. Only two objections to bail

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1. See Steytler op cit 128.

were not upheld. In a further 11,8% of the cases the objections to bail were questioned, but eventually accepted. The standard court practice is illustrated by the following two cases:

Case 349 DC

A 50 year old accused man appeared in the magistrates' court.
Prosecutor (P): 1 March for further investigation.
Magistrate (M): 1 March for further investigation, in custody.

Case 193 DC

After the conviction of an accused for the possession of dagga, the prosecutor asked for a remand to ascertain the accused's previous convictions.
M: (to the prosecutor) Object to bail?
P: Yes.
M: Case remanded to [date]. In custody.

A few magistrates, however, conducted enquiries of varying degrees of thoroughness before reaching their decision as illustrated by the following two cases.

Case 191 DC

An accused pleaded guilty to the theft of a 25 kg bag of sugar which he picked up on the shunting yard where he was employed by the Transport Services. The prosecutor asked for a remand of three weeks to obtain a record of his previous convictions.
M: Bail?
P: The police say no fixed abode.
M: He is in fixed employment. I'm getting a bit sceptical about 'no fixed abode' stories.
P: Yes.
M: Bail fixed at R80.

Case 320 DC

An accused in his late twenties was arraigned on a charge of aggravated assault. The prosecutor asked for a remand of three weeks for further investigation.
M: What about bail?
P: The State opposes bail.

M: On what grounds?
P: It is a serious offence.
M: Not sufficient grounds.
P: Not opposed to R200 bail.
M: Accused, what do you say, can you get R100?
A: Yes.
M: Bail fixed at R100. If you want to phone anyone, speak to the prisoner's friend.

On the whole, however, the prosecutors dominated the proceedings and the magistrates played a passive role.

The negative approach of both magistrates and prosecutors regarding the liberty of the accused, was also reflected in the attitude of some of the interpreters who, by their conduct, effectively excluded the accused from participating in the process. In an extreme case (Case A87 DC) an interpreter refused to translate the accused's application for bail.

Case A87 DC

The case was remanded for sentence and both the prosecutor and magistrate failed to initiate bail. The accused then spoke to the interpreter.
A (Zulu): Please ask for payment so that I will be out.
I (Zulu): That is not my business. Go down! (indicating towards the cells).
This conversation was not translated and the magistrate did not instruct the interpreter to interpret it.

The accused was only on rare occasions informed by the interpreter that the prosecutor was applying for a remand and/or that bail was being opposed and for what reason. Case A78 DC illustrates this exclusionary practice.

Case A78 DC
After applying for a remand, the prosecutor said the following:
P: Since the accused have no fixed abode and have no address the State is opposed to bail being granted.
I (Zulu): You have no fixed abode and no address and the court will not give you bail.

The interpreter, fully conscious of the fact that the court would not conduct an enquiry, transformed an allegation by the State into a court order and thus, by confronting the accused with a fait accompli, effectively precluded his participation.

As noted above, magistrates did not always exercise strict control over the interpretation of all verbal exchanges. On many occasions they even delegated the explanation of bail conditions to the interpreter, who performed this function with varying degrees of thoroughness.

4.3.3. ENQUIRING ABOUT AN APPROPRIATE AMOUNT OF BAIL

The determination of an appropriate amount of bail, taking into consideration the resources of the accused and the likelihood of his absconding, did not receive much of the court's attention. This inevitably led to a failure to individualize the bail amount. In the 1981 bail study, the amount was fixed at R50 in almost half (47,8%) of the cases where bail was granted, irrespective of the circumstances of the case.[1] The result was that only 42,2% of the accused could pay the amount on the same day while 31,1% were never able to raise the required money.[2]

In the present study, few of the judicial officers enquired into the accused's ability to pay bail. The questioning,

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1. Steytler "Bail" 135 table 11.
2. Op cit 136, 137 table 13.

when it did occur, was often superficial. It seldom went beyond, "Can you pay this amount of bail?". The accused's financial position was hardly ever investigated. Common here too was a tendency of the court to accept, without question, the bail amount suggested by the prosecutor, as in Case 225 DC.

Case 225 DC

On a charge of assault with the intention to do grievous bodily harm, a young accused pleaded not guilty. The prosecutor suggested that bail be fixed at R100.
M: Why such a high amount?
P: That is the amount suggested by the police.
M: Case remanded to 2 April for trial. Bail fixed at R100.

Once again, however, there were exceptions. Case 220 DC is an example of both the prosecutor and the magistrate participating inquisitorially to arrive at a considered bail decision.

Case 220 DC

When an accused, charged with bag snatching, appeared in the dock the prosecutor questioned him extensively about his place and length of employment, his marital status, any dependents, and his ability to pay R400 bail. The accused said he could manage R100. When the prosecutor thereupon suggested R300 to the magistrate, he was questioned about the high bail amount.
The prosecutor replied that the matter would be going to the regional court because of the nature of the offence. The magistrate then asked the accused how much he could pay. He replied that he had R136 in his savings account. The magistrate let the matter stand down and instructed the prosecutor to investigate whether the accused had in fact been working for four years at the stated place and what his bank balance was.

A lack of interest in individualizing the bail amount was also evident among some of the interpreters. In Case A45 DC, when the accused was informed that bail was fixed at R100,

he said:

A (Zulu): There is no one to pay such money for me.
I (Zulu): Go down, don't tell me that, just go down!
(indicating the cells below)

The accused's problem was not translated to court and the magistrate did not insist that the interpreter disclose what had been said.

4.3.4. THE GRANTING OF BAIL

The accused, unaided by a lawyer, faced formidable obstacles in firstly, raising the bail decision, secondly, knowing how to participate in the process, and thirdly, securing a reasonable amount of bail. Unassisted, the accused was, at times, exposed to the arbitrary exercise of discretion by the prosecutor, the magistrate and the interpreter. In the sample 35,9% of the 128 undefended accused were not released on bail at their first appearance, and where bail was fixed the most common amount was either R100 or R150, an amount which few accused could afford. The presence of a lawyer made a considerable difference to the granting of bail both at the charge office and at court. In the regional court, for example, six of the nine defended accused (66,6%) were granted bail at their first appearance while only 20,3% of the undefended accused were so fortunate.

There was no onus on the prosecutor to justify the further detention of the accused or duty on the court to enquire into each case. Although the right to bail existed, the legal structure did not facilitate its uniform enforcement

in respect of undefended accused. Any assistance that the undefended accused happened to receive from the prosecutor and magistrate was despite the legal position, not because of it. The result was disparate court practices marked by arbitrary or even biased decisionmaking.

5. CONCLUSION

The majority of persons arraigned in court are Black, indigent, undefended, probably uneducated, and in custody; at their first appearance in court they face unfamiliar proceedings in a foreign language. Little or no perception of their procedural rights and no forensic skills can be attributed to them. To receive a fair trial they are totally reliant on the judicial officer for the enforcement of their procedural rights and on the interpreter for their comprehension of and communication in the proceedings. Such assistance, however, is neither clearly prescribed in law nor routinely rendered in practice. The Supreme Court does not require that undefended accused should be informed of their right to legal representation, of the existence of legal aid (for which most accused would qualify), that the proceedings may be remanded to afford an opportunity for seeking legal assistance, or that they may be released on bail during an adjournment of the proceedings. In consequence, judicial officers do not apprise undefended accused of these rights. The suggestion in Baloyi 1978 (3) SA 298 (T) that the court should, in complex or serious cases, refer an accused to the Legal Aid Board, is not only

vague and impracticable, but also obiter so that it is valueless. Moreover, the Supreme Court has not deemed it necessary that counsel be appointed to represent an accused in enquiries into his capacity to stand trial despite the complexity of such proceedings and the accused's suspected mental defect or disease.

The basic information which would put undefended accused in a position to become effective adversaries in the trial by means of legal representation is thus routinely withheld. While lip-service is given to the extension of legal assistance as a solution to the problem of achieving equal justice for the indigent accused, no attempt is made in legal or practical terms to realize this goal. It is thus important to ascertain whether, in the absence of dedication to the ideal of legal representation, the other possible sources of assistance to this accused - assistance geared to make him a competent adversary or inquisitorial intervention on his behalf by the judicial officer - are pursued meaningfully in the ensuing stages of the trial.

Little attention is paid, however, to the accused's rights relating to the remand of proceedings or in the granting of bail. The Supreme Court has failed to encumber the judicial officer with the duty to ensure the accused's participation in the decisionmaking process regarding remands or to bring about an expeditious completion of proceedings.

In bail proceedings, where the onus is on the accused to

apply for bail and to substantiate such an application, no rule requires the judicial officer to inform him accordingly or to conduct an enquiry in order to arrive at an appropriate decision. The lack of structuring of the bail decision leads to disparate and arbitrary decisionmaking and the development of informal procedures, some of which may effectively infringe upon the accused's rights to bail.

The accused's understanding of and participation in the proceedings is further hampered by the frequently low standard of translation in the courts. Some interpreters, functioning within a judicial environment which exhibits little concern for the accused's procedural rights, incorporate this attitude into the performance of their task and produce incomplete and incorrect translations.

Instead of being informed of their legal rights, then, the majority of the accused in the lower courts are confronted at their first appearance with their most important choice during the proceedings - how to plead to the charge. Their decision at this stage can only be adversely affected by the effective denial of their right to legal assistance, their right to an opportunity to consider their position and seek advice, and their right to possible release from custody in the interim period.

CHAPTER FIVE PLEA PROCEEDINGS

Of all the constituent parts of the criminal trial, the plea proceedings have the most important consequences for the accused. At the same time, however, they are the most formal and hence the least comprehensible to the undefended accused. To formulate a charge the prosecutor must transform an event to fit into the legal strictures of a criminal offence. To plead to the charge the accused must reduce his perception and assessment of an event to a single, simplified response. Both the charge and the pleas are, by the artificiality of their construction, far removed from the everyday experiences of most accused persons and belong to the professional domain of the legal practitioner. To make the proceedings more comprehensible to the accused, it is essential that he be fully informed of the charge that he has to meet and of the possible pleas to the charge. When the significant consequences which may flow from a plea are taken into account, the importance of the accused's right to consider the plea and, if possible, to obtain legal advice, becomes clear.

1. INFORMING THE ACCUSED OF THE CHARGE HE HAS TO MEET

1.1 A CLEAR AND DETAILED CHARGE

For the accused to know the case he has to meet, it is first and foremost essential that he be provided with a clear and detailed charge. It is thus peremptory "that the charge shall set forth the relevant offence in such manner and with

such particulars...as may be reasonably sufficient to inform the accused of the nature of the charge".[S 84] It is open to an accused to object to the charge on the ground that it does not contain essential allegations or elements of the offence, or sufficient particulars of any matter alleged in the charge.[S 85(1)] If the court finds that the objection is well-founded, it may order the amendment of the charge and, should the prosecutor fail to comply with the order, quash the charge.[S 85(2)] The accused is further entitled to request further particulars to the allegations made in the charge.[S 87] The onus thus rests formally on the accused to raise any objection or request further particulars.

These rights are not, however, readily accessible to undefended accused as they may not be aware of their existence, or the means of exercising and enforcing them. There is thus often no challenge to charge sheets which are too terse to provide an accurate outline of the act which the accused is alleged to have committed. Didcott J observed in Mapinda 1979 (2) SA 343 (N) that "most people who face .... charges are undefended, and further particulars are seldom sought or furnished. Unless they are forthcoming, the State may enjoy what turns out to be an unfair advantage".[343F-G]

The presiding officer has, however, a supplementary or residual duty to ensure that the charge meets the various requirements, even if the accused fails to object. He must

ensure that charges are formulated in clear language, outlining the specific allegations made against the accused.[1] Some protection has been extended to the undefended and illiterate accused in decisions to the effect that he must be given an adequate explanation by the judicial officer of the precise charge made against him.[2]

1.2. PRESUMPTIONS

If any statutory presumption is to be relied upon by the State, the accused should be apprised thereof before he pleads to the charge.[3] The approach of the Court to this matter was expressed by Harcourt J in Shangase 1972 (2) SA 410 (N) as follows:

> "It is in general undesirable and unfair to permit definitions, inferences and statutory presumptions to operate to the prejudice of an accused without him being aware of the potential danger to which he is subjected....If, however, he is undefended, the court should see that by means of a properly framed and explained charge sheet...the accused is effectively alerted to such dangers and to the manner in which he can seek to meet or avert them".[452E]

The best way in which the accused can be alerted to the operation of presumptions is by including these in the charge sheet. It is not sufficient merely to explain the existence of a presumption; it is also necessary to explain the allegations which form the factual basis for putting it into operation. It is therefore submitted that the charge

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1. Mapinda supra. See also Hiemstra 198.
2. Nsibande 1935 TPD 370; Maketi 1979 (4) SA 569 (C).
3. Mthalane 1968 (4) SA 256 (N) 259A; Fikizolo 1978 (2) SA 676 (NC) 679.

should contain references to the presumption and to the factual allegations on which it is based.[1]

1.3 COMPETENT VERDICTS

The Code makes provision for the conviction of accused persons of offences other than those proferred in the charge sheet, on the so-called competent verdicts.[S 256-270] A competent verdict has two possible sources. Firstly, if the evidence does not prove the offence with which the accused was originally charged, but proves the commission of some other offence, all the elements of which are contained in the original or main charge, then conviction upon the latter is competent.[S 270] The principle is that by facing the main charge, the accused automatically faces the lesser charge by the mere fact that the latter is contained in the former. Secondly, any offence may be made a competent verdict by statute even if the elements of such an offence are not all contained in the main charge.[2] As competent verdicts are not alternative charges, they need not normally be included in the charge sheet.[3]

The possibility of prejudice to the undefended accused is obvious if the competent verdict involves elements different to those mentioned in the original charge; he would be

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1. See Mapinda 1979 (2) SA 343 (N) 344A.
2. See eg s 256, 257, 258(c)&(f)&(g), 259(b)&(e)&(f), 260(e)&(f), 261(1)(d)&(e)&(g)&(h), 261(2)(b)&(d)&(e), 264(a)&(b)&(c), 265(b)&(a), 266(c), 267, 268(a)&(b)&(c), 269.
3. Velela 1979 (4) SA 581 (C).

oblivious of the fact that he faces conviction on different elements. Due to the "dictates of common fairness" to the undefended accused, it has been held that it is incumbent on the court to ensure that these accused are informed of the existence and implications of such competent verdicts.[1] Most decisions, however, state that it is merely desirable that the undefended accused be so informed.[2] Nevertheless, where explanations have been omitted and the accused were prejudiced thereby, the convictions have invariably been set aside.[3] Where the offence which constitutes the competent verdict places an onus on the accused, the Court has more readily regarded apprisal as a duty.[4] It is submitted that the duty should apply to all competent verdicts containing elements other than those in the charge, and particular care should be taken where an onus is placed on the accused.

The duty of informing the accused at the outset of the trial should fall on the State as only it would know whether it intends to rely on any competent verdict. If the accused is informed later, the court must take the necessary steps to prevent any prejudice being caused thereby.[5] It is submitted

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1. Mkize 1961 (4) SA 77 (N) 78A. See also Mtimkulu 1959 (4) SA 597 (O) 598.
2. Velela 1979 (4) SA 581 (C); Van Eck 1958 (2) SA 182 (O) 183H; Mogandi 1961 (4) SA 112 (T) 114A; Arendse 1980 (1) SA 610 (C) 613B, 613H.
3. See eg Velela supra; De Bruyn 1981 (2) PH H121 (C); Muller 1959 (1) PH H99 (O).
4. Velela supra; Mkize 1961 (4) SA 77 (N) 78; Prinsloo 1958 (1) SA 77 (T) 78C; Mtimkulu supra 598.
5. Van Eck supra 184.

that it should be incumbent on the court to remind the accused once again at the close of the State case of the possibility of the competent verdict since the giving of evidence in respect of different elements could be of importance to the defence.

The decisions have not been ad idem regarding the form which the notification should take. In Dayi 1961 (3) SA 8 (N) it was held that if the State contemplates asking for a competent verdict, this should formally be put to the accused as an alternative charge.[1] In Mkize 1961 (4) SA 77 (N) the Court merely required that a notice "of some sort" be given, not necessarily in the form of an alternative charge, and this could be done at any stage of the trial.[2] The notification should, however, be recorded.[3]

Hiemstra argues that the effect of Dayi would be to nullify the use of competent verdicts, as the State would then be restricted to alternative charges.[533] It is submitted, however, that the approach of Dayi is to be preferred in proceedings against undefended accused. If this accused is to be warned at the outset of the trial,[4] and the warning should entail an exposition of the various elements of the offence contained in the competent verdict, then the competent verdict is de facto given as an alternative charge in

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1. 9. See also Prinsloo 1958 (1) SA 77 (T) 78B-C.
2. 78A. See also Arendse 1980 (1) SA 610 (C) 613A-B.
3. Ndlovu 1963 (1) PH H77 (N).
4. Van Eck 1958 (2) SA 182 (O) 184; Hiemstra 554.

any event. The formalization of the competent verdict into an alternative charge has the advantage of ensuring that the accused is fully informed and that the charge is at the same time put on record. Furthermore, where the competent verdict is included in the charge sheet, the accused is in fact notified of the possibility that he may plead guilty to a lesser charge.

Merely informing the accused on the day of the trial of a host of competent verdicts may not totally eliminate prejudice. He should also be given an opportunity to prepare his defence in respect of those charges. In Dayi the court expressed this requirement as follows:

> "In an undefended case particularly the presiding officer should at least ensure that the accused is given an opportunity of appreciating the nature of the alternative offence, including the answer he may raise in defence thereto".[1]

A conviction will be set aside where an accused has not been informed about the intended use of a competent verdict and has been prejudiced because of this.[2] Whether the accused was prejudiced is a factual question.[3] In Arendse 1980 (1) SA 610 (C) the Court had to decide whether an accused charged with theft would have been prejudiced if, without prior warning, he was convicted of contravening s 36 of Act 62 of 1955. Section 36 makes it an offence for a person to be found in possession of goods where there is a

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1. 9G. See also Mogandi 1961 (4) SA 112 (T) 113.
2. Johnson 1970 (1) PH H19 (NC); Mogandi supra 114A; Arendse 1980 (1) SA (C) 613B.
3. Velela 1979 (4) SA 581 (C).

reasonable suspicion that they are stolen, and the accused cannot give a reasonable account for their possession. Although the Court agreed that it was desirable that the accused should be warned, the question remained whether he was prejudiced by such an omission.[613H] The Court decided that s 36 does not place an onus on an accused and if the State proves all the elements of the offence, there exists little, if any opportunity for the accused to be prejudiced.[613A]

It is respectfully submitted that the Court overlooked an important aspect of the offence. Section 36 enables the accused to escape liability by giving a reasonable explanation any time before conviction, despite the fact that he did not give such an explanation to the person who found him in possession of the goods.[1] Since the accused was not made aware of this competent verdict, he was not given an opportunity to offer an explanation for his possession of the goods. Although the State proved all the elements of the offence, if the accused's attention was not drawn to the different charge, he could not have been in a position to dispute the allegations. He would not be able to cross-examine, testify and search for possible witnesses. The possibility of prejudice could therefore not have been excluded.

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1. PM Hunt South African Criminal Law and Procedure Vol II (1982) 667.

1.4. PENALTY CLAUSES

For a number of offences specified penalties are obligatory in the absence of any mitigating circumstances.[1] It has been held that, while legally it is not necessary to include the penalty clause in the charge sheet,[2] it may be desirable to do so.[3] In the trial of an undefended accused, however, it has been held to be "highly desirable" for the charge sheet to refer to the penalty provisions.[4] This is in order that the accused may be in a position, from the outset, to assess the full effect of any plea he may enter.

Despite the fact that the Court in Seleke set out the various ways in which undefended accused should be assisted by the magistrate during the trial, it was hesitant to lay down any rules governing the explanation of penalty provisions, including when this should be done. The Court expressed the fear that if a rule is laid down, non-compliance therewith would lead to an unjustified attack on an otherwise fair trial. The only requirement that the Court laid down was that as much information must be given as is reasonably necessary to inform the undefended accused of the

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1. See eg Dangerous Weapons Act 71 of 1968 s 4(1) which created a mandatory penalty of two years' imprisonment if a person over the age of 18 years uses a dangerous weapon in an assault in a prescribed area, unless circumstances exist justifying a lesser sentence.
2. Mzolo, Mangele 1976 (1) SA 49 (N) 50C.
3. Seleke 1976 (1) SA 675 (T). See also Mokoena 1958 (3) SA 437 (T) 438; Motsoeneng, Moloi 1975 (4) SA 297 (O); Mzolo, Mangele supra 50.
4. Seleke supra 682; Mzolo, Mangele supra 50G.

penalty provisions. How that should be done, the Court concluded, depends on the circumstances of each case. The only requirement set in Motsoeneng, Moloi 1975 (4) SA 297 (O) was that the accused should be informed of the provisions of the section before sentencing and should then be given the opportunity to advance mitigating circumstances.[303B]

This approach cannot be supported. Because of the fear that convictions might be set aside, the Court has produced a guideline which is so vague and general that it provides no guidance at all. A general rule compelling judicial officers to inform undefended accused of the possible penal consequences of a conviction is more likely to be followed than a vague guideline which leaves the form, content and timing of the apprisal to the discretion of these officers, and it is submitted that the more stringent measure is essential for the protection of the undefended accused.

There has been support in the case law for such a duty to inform. In Ackerman 1972 (1) SA 130 (C) the Court insisted that s 4(1) of the Dangerous Weapons Act 71 of 1968, had to be included in the charge sheet on the basis that an accused ought to be informed fully of the case he has to meet, including the possible penalty.[1] It was pointed out that the knowledge of the provisions of s 4(1) could lead an accused who would otherwise plead guilty, to plead not

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1. 131G. See also Innocent 1966 (2) SA 362 (R); Ndlovu 1974 (4) SA 567 (N) 569F; Malosi 1983 (2) PH H101 (N).

guilty. While the accused remains uninformed, therefore, the possibility of prejudice cannot be excluded.[1]

2. GUARDING AGAINST AN IMPROPER SPLITTING OF CHARGES

An accused may object to an improper splitting of charges where one culpable act has been made the basis of more than one charge.[2] The principal aim of the rule against an improper splitting of charges is that an accused should not be punished more than once for what is substantially one offence. Multiple convictions could also adversely affect the sentencing of the accused in subsequent criminal proceedings.[3]

Should the onus be on the accused to raise this issue, the undefended accused would suffer considerable prejudice since it is unlikely that he would have any understanding whatever of this complex legal concept. In recognition of this position, Harcourt J held in Makazela 1965 (3) SA 675 (N) that in the case of an undefended accused the magistrate should consider it as part of his duty to order the prosecutor to amend a charge sheet if a splitting of charges is present. On review, the Supreme Court has in numerous cases involving undefended accused, altered convictions to avoid a multiplicity of convictions on the same culpable

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1. Pheka 1975 (4) SA 231 (NC) 231.
2. See Grobler 1966 (1) SA 507 (A).
3. Ndovu 1962 (1) SA 108 (N). In the past the sentences following upon a splitting of charges could also have qualified an accused unjustifiably for corrective training, Makazela 1965 (3) SA 675 (N) 676.

facts.[1] If it is apparent at the outset of the trial that there is an improper splitting of charges, the court should act immediately as all the available information is before it. If there is any doubt, or if it is not clear that there is a splitting of charges, the court should consider the matter again before judgment is given.

3. AMENDING THE CHARGE SHEET

Section 86 grants the court wide powers to correct a charge sheet,[2] subject to the consideration of whether the accused will be prejudiced in his defence by the amendment.[3] The accused is entitled to object to an amendment perceived to be prejudicial. The undefended accused, however, will normally be unaware of this right; indeed, such an accused probably has little way of knowing when an amendment is prejudicial. Only the court, then, can ensure that no prejudice befalls the accused, and protection of the accused should require it to order an amendment when this favours the accused, and to refuse an amendment which would be to his detriment. In Makazela 1965 (3) SA 675 (N) Harcourt J, in ordering a consolidation of charges after an improper splitting of charges, expressed the former duty as

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1. See eg Xowanisa 1947 (4) SA 399 (T); Sakombunda 1953 (1) PH H91 (SWA); Maloko 1959 (1) SA 569 (O); Peter 1965 (3) SA 19 (SR); Zulu 1965 (4) SA 103 (N); Ndovu 1962 (1) SA 108 (N); Ntswakele 1982 (1) SA 325 (T).
2. Grey 1983 (2) SA 536 (C) 539A.
3. S 86(1). See also Grey supra 539A; Magwana 1958 (3) SA 135 (T) 137C-D.

follows:

> "[T]he magistrate had the power to act mero motu in regard to an amendment (see sec 180 of the Code) and, in any event, would be quite within his rights, and indeed should have considered it part of his duty, to use that undoubted and considerable influence which the court has over the conduct of prosecutions to obtain an amendment of the charge. If prosecutors are inexperienced a court should be alert to see that accused are not prejudiced by the unfortunate state of affairs. This is particularly so when the accused is unrepresented".[676D-E]

Where the magistrate orders an amendment of the charge, the accused should be fully apprised as to the effect thereof and, if necessary, his right to lead further evidence and recall witnesses should be explained.[1]

4. POSTPONING THE PLEA PROCEEDINGS

Once an accused is arraigned, the charge may be put to him and he shall be required by the court forthwith to plead thereto.[S 105] If the accused refuses to plead, the court is obliged to enter a plea of not guilty.[S 109] Section 105 mentions only two exceptions to the rule that the accused must plead forthwith; firstly, if the accused is by reason of mental illness or defect not capable of understanding the proceedings so as to make a proper defence,[S 77(1)] and secondly, if he wants to object that the charge does not comply with the essential requirements as set out in s 85.

Section 105 does not, however, regulate the position exhaustively. Where an accused has indicated to the court that he wishes to consult with a lawyer before pleading to

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1. See Grey 1983 (2) SA 536 (C) 537.

the charge, it would be a gross irregularity for the court to refuse him such an opportunity by insisting that he plead to a charge forthwith.[1] Furthermore, the accused is entitled to a postponement of the plea proceedings to afford him an opportunity to consider his plea or to be arraigned in a court having territorial jurisdiction.

4.1. THE ACCUSED'S RIGHT TO CONSIDER HIS PLEA

The accused's right to an opportunity for considering his position before pleading or facing a trial has been firmly established.[2] A refusal by a court to grant an accused's request for a remand for this purpose would be a gross irregularity, leading to the setting aside of the conviction.

Problems arise, however, in respect of the undefended accused who, being unaware of this right, is in no position to enforce it. No duty has been placed upon the court to inform the undefended accused of this right and it was held in Sigodolo v Attorney-General 1984 (2) SA 172 (E) that the court commits no irregularity if it fails to determine whether the accused requires an opportunity to consider his position before he is asked to plead to a charge.

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1. Mkize 1978 (3) SA 1065 (T) 1066G. See also Mtetwe 1957 (4) SA 298 (O); Blooms 1966 (4) SA 417 (C); Nel 1974 (2) SA 445 (NC).
2. Thane 1925 TPD 850; Khumbusa v The State 1977 (1) SA 394 (N); Yontolo 1977 (2) SA 146 (E); Sigodolo v Attorney-General 1985 (2) SA 172 (E).

Nevertheless, relief has on occasions been granted on review to accused who claimed that they were too hastily tried and convicted. In Yontolo 1977 (2) SA 146 (E) the accused, an illiterate elderly Black woman, was arrested at 12 noon for the possession of 117 gm dagga. She was kept in custody incommunicado until 2 pm when she was brought to court and charged with the offence of dealing in dagga. After the explanation of the presumption contained in s 10 of the 'Drugs' Act 41 of 1971, and an enquiry as to whether she required an attorney, she was called upon to plead. She pleaded guilty and was convicted of dealing in dagga, only to realize then that the mandatory sentence (as it then was) was five years' imprisonment. On review the accused claimed that she had been confused, bewildered and nervous and had no knowledge of court procedure. In setting the conviction aside Addleson J said:

> "Whether or not the present applicant would have pleaded guilty after mature consideration and with full knowledge of the stakes, is not presently the issue. She said she would not have done so, but the important factor is that she does not appear to have had a reasonable opportunity to weigh her position, to seek advice if she wanted to do so and to come to a mature decision with full knowledge of the implications of the decision....(I)t is essential that, when an accused is brought to court to face such a possible sentence, the procedure which is followed must leave no room for doubt as to whether such an accused has had an opportunity to understand and appreciate the seriousness of a charge and its consequences".[150A-C]

It has been held that the Court on review is likely to intervene more readily in cases where the charge is complex and the penalty imposed is severe, particularly if it is

mandatory.[1]

It is submitted that the protection of the undefended accused's right to have an opportunity to consider his plea is inadequate. Firstly, there is no duty on the court to establish whether the undefended accused requires an opportunity to consider his plea. The majority of undefended accused are thus denied this fundamental right. The principle of equal justice holds that all rights should be accessible to all accused and not only to those who are defended. It is therefore submitted that the presiding judicial officer should inform every undefended accused that he may seek a remand to obtain legal assistance or to consider his defence.

Secondly, when the right is asserted after conviction, it is recognized only in very restricted categories.[2]
To demand that the accused failed to appreciate the seriousness of the matter due to illiteracy or any other specific reason seems to be unrealistic. Even educated persons have a very rudimentary knowledge of law in general, let alone of criminal procedure. Charges that do not seem complex to a lawyer could be confounding even to a person with a school education, especially in the unfamiliar and hasty atmosphere of a courtroom.

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1. Baloyi 1978 (3) SA 290 (T) 294.
2. See NC Steytler "The too Speedy Trial - the Right to be Prepared" (1985) 9 SACC 180.

The requirement that the penalty should be severe (which it is a fortiori if it is compulsory), is untenable. The deprivation of liberty for any length of time is surely viewed by most accused as of the utmost importance and rights should not merely be enforced to temper the harshness of severe or mandatory sentences[1] or forfeiture orders.[2] The overriding principle should be that all accused are entitled to equal protection under the law no matter what penalty they ultimately receive.

4.2. TERRITORIAL JURISDICTION

Section 106(1)(f) provides that the accused may plead "that the court has no jurisdiction to try the offence". Should he, however, fail to object to the court's lack of territorial jurisdiction, the court is deemed to have such jurisdiction.[3]

The onus is thus on the accused to raise the question of territorial jurisdiction. The rationale for this rule is that the accused may tacitly waive his right to be tried by a court which has territorial jurisdiction.[4] The basis of this rationale, in turn, can be found in a dictum of Gane J in Mpili 1935 EDL 183:

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1. Cf Yontolo supra.
2. Cf Sigodolo v Attorney-General supra.
3. S 110(1). The section does not confer jurisdiction on a court for an offence committed outside the borders of South Africa (Ngozi v Magistrate, Stutterheim 1977 (2) SA 150 (E); Ntwana 1979 (2) SA 1160 (Tk)), or for an offence falling outside its substantive jurisdiction (M 1979 (2) SA 959 (T) 969F).
4. Hiemstra 217.

> "Moreover, the accused, like everybody else, is presumed to know the law, and should have been aware of the legal situs of the offence. The magistrate is not called upon to explain the position to him at every stage. I can even conceive of a case where a magistrate himself noticing the apparent excess of jurisdiction, keeps silent, and waits for the accused to make his request. I need hardly say I must not be taken as recommending such a course. It would be kinder for the magistrate to explain the position to the accused. But I cannot say that there is an absolute obligation to do so".[185-6]

In Wells 1965 (1) PH H60 (N) Fannin J went so far as to say that the court may not transfer the case to the court which has appropriate jurisdiction unless the accused requests this, and if no such request is made, the court is obliged to continue with the trial despite its original lack of jurisdiction.[1]

This approach by the legislature and the Supreme Court is indefensible in the light of the predominance of undefended accused in South Africa's courts. The assumption that every person knows the law is patently fictitious, particularly in respect of a technical objection to the court's territorial jurisdiction. Since the practice exists of putting the charge to the accused at the first possible opportunity, usually at his first appearance, the right to object, if not exercised there and then, will be lost irrevocably.

There are, however, arguments which challenge this approach. Ferreira argues that section 75 could have a limiting effect on the operation of s 110.[96-97] Section 75 states peremptorily that an accused shall be tried at a summary

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1. See also Shangase 1964 (1) SA 776 (N).

trial in a court that has jurisdiction. The only exceptions mentioned are pleadings to charges justiciable in the Supreme [S 119] or regional court [S 122A] or a preparatory examination.[S 123] 'Jurisdiction' here can refer only to sentencing or territorial jurisdiction. Hiemstra suggests that it refers only to the former.[162] There is, however, no indication that the term is to be given such an interpretation. If the accused, because of his previous convictions, merits punishment which would exceed the sentencing jurisdiction of the magistrates' court, the court would still have jurisdiction to try the case but would then commit the accused for sentencing in a regional court.[S 114] It is therefore submitted that the term 'jurisdiction' used in s 75 refers to territorial jurisdiction, and that if the court does not have such jurisdiction, the prosecutor must request the court to refer the accused to the appropriate forum. Placing a duty on the prosecutor to ascertain the correct forum accords with the rule that the onus is on him to prove that the court has territorial jurisdiction.[1] He would also have access to the necessary information as contained in the police docket. Finally, it is suggested that it would not be irregular for the judicial officer to act mero motu where it is apparent that the court has no territorial jurisdiction. The operation of s 110(1) would thus be limited to those situations where neither the prosecutor nor the judicial officer was aware that the court lacked territorial jurisdiction.

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1. Radebe 1945 AD 589 693.

5. PLEAS

Section 106 sets out eight pleas which are open to an accused. Only the most common pleas - of double jeopardy, guilty and not guilty - will be discussed.

5.1. THE PLEA OF DOUBLE JEOPARDY

The plea of double jeopardy is available not only to protect the accused from being punished twice, but also to prevent him from being put on trial for a second time. The onus is on the accused to raise the plea,[1] and if he intends to do so, he must give reasonable notice to the prosecutor and state the grounds on which he bases his plea.[S 106(3)] The prosecutor may, however, waive his right to such notice and the court may, on "good cause shown", dispense therewith.[S 106(3)] The appropriate time to raise the plea is at the commencement of the trial and not on appeal.[2]

These rules will operate harshly if applied to undefended accused unaware of their existence. The Court in Mgilane 1974 (4) SA 303 (Tk) has consequently allowed the plea to be raised on appeal for the first time. Lansdown and Campbell justify the deviation from the general principle as follows:

> "There may be circumstances, especially in the case of an unsophisticated and uneducated person who is not represented, when a rigid application of this ruling would be repugnant to one's feeling of fair play and justice."[437]

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1. Lansdown & Campbell 446; Hiemstra 232.
2. Burns (1901) 19 SC 477.

This approach was also adopted by Eloff J in Kgatlane 1978 (2) SA 10 (T), who said that entertaining the plea at a late stage of the proceedings still serves the objective of the plea by preventing the accused from being punished twice. Similarly, where the court rejects the plea at the outset of the trial, but during the proceedings it becomes apparent, in the light of new evidence, that the plea is good, the court should uphold it.[1]

It has been held that the court should raise the issue mero motu if, during the proceedings, it comes to its notice that the accused could have raised a plea of double jeopardy.[2] The decision in Motsepa 1982 (1) SA 304 (O), where the Court opined that an accused is not obliged to raise the plea and where he does not, he is deemed to have waived it,[306E] cannot be interpreted to allow a judicial officer to ignore knowingly the possibility of such a plea when it comes to his notice and the accused fails to raise it. Firstly, for a valid waiver, the accused should have been aware of the existence of the plea and of the possibility of entering it, and have intelligently waived that right. Secondly, if the court is aware that the accused may be placed in jeopardy a second time, it would surely be an abuse of the court process knowingly to punish or put a person on trial twice for the same offence. It is therefore submitted that whenever the possibility of such a plea

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1. Lampbrecht 1958 (2) SA 622 (C).
2. See Serote 1960 (2) SA 670 (O) 674.

exists, the trial court or the Court of review should raise the issue mero motu and, where appropriate, record such a plea.

When the plea of double jeopardy has been raised, either by the accused or by the court, the question arises as to the proof thereof. Formally the onus is on the accused to prove his plea. He may do so by submitting to court a verified copy of the record of the previous trial [S 235] or an extract thereof.[S 233] It cannot, however, be expected of an illiterate or poorly educated person to trace the record of the previous proceedings and make a copy thereof. That his adversary, the prosecutor, should assist and conduct such a search, is a possibility in the light of the latter's duty to present the truth to the court, but the adversary nature of the process does not provide a healthy basis for such an investigation. Should the duty of the court in this regard also extend to the investigation of the plea?

In Ngcobo 1979 (3) SA 1358 (N) the accused, having pleaded not guilty, added that he had been acquitted by the same court on a similar charge. Without settling the point in limine, the cases for the State and the accused were concluded. The magistrate then called the accused to give evidence in support of his plea of autrefois acquit before remanding the case. At this stage the magistrate personally examined the court record books and the prison records but could not find any evidence of a previous acquittal. When the trial resumed the magistrate once again cross-examined

the accused on the previous acquittal, but eventually ruled against him. On review the conviction was set aside because the magistrate in his investigation assumed the role of a witness for the prosecution and thus committed a gross irregularity which per se vitiated the proceedings.[1359G-H] The magistrate here clearly recognized the importance of his intervention on the question of a previous acquittal. It is submitted, however, that the Court correctly held that the magistrate misapprehended the nature of his inquisitorial powers. He may not investigate extra curia and then bear witness in court on his findings. He was competent and indeed under an obligation to call the necessary witnesses,[1] for example, the clerk of the court and the keeper of the prison records. It is submitted that it is indeed the court's duty, whenever the possibility of a plea of double jeopardy is raised at a trial of an undefended accused, to conduct an enquiry and, by means of its inquisitorial powers, call the appropriate witnesses to establish whether or not the plea is good.

5.2. THE PLEA OF GUILTY

An accused may plead guilty to the proferred charge or to any competent verdict thereon.[S 106(1)(a)] Once the prosecutor has accepted the plea of guilty, the provisions of s 112 apply. In terms of this section the accused may be convicted without any evidence being led, except that the

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1. In terms of s 186. See further ch 7 below.

death penalty may not be imposed unless the accused's guilt is proved as if he had pleaded not guilty.[S 112(1)(b)] In minor cases which do not merit a punishment of a fine exceeding R300, the court may convict the accused merely on his plea of guilty,[S 112(1)(a)] while in all other cases the court must first, by questioning the accused, be satisfied that he is in fact guilty.[S 112(1)(b)]

5.2.1. CONVICTING ON A GUILTY PLEA ONLY

Section 112(1)(a) vests the judicial officer with the discretion to convict an accused on his guilty plea only, if he is of the opinion that the offence does not merit a sentence other than a fine of not more than R300. Van der Merwe et al describe the procedure as follows:"The accused indirectly becomes the arbiter of his own case and the formal conviction by the court simply follows the accused's conclusion that he is guilty as indicated by his plea".[21] Because of the accused's determination of his own guilt, this procedure contains the danger that an undefended accused may mistakenly believe that he is guilty. In the implementation of this procedure, is the undefended accused afforded some protection against such a possibility?

Although the aim of the procedure is the expeditious disposal of minor cases, it is not totally without safeguards. A duty rests on the judicial officer to determine whether a particular offence is a minor one and whether the case may thus be disposed of merely on a guilty

plea.[1] The court must exercise this discretion judicially, which, in turn, requires the consideration of all the information pertaining thereto.[2] The court must consider the nature of the offence, the maximum penalty provided for, and the particulars of the charge.[3] The prosecutor may also place before the court such particulars as he would have furnished to the accused had he been so requested. On the basis of this information the court should assess the seriousness of the offence and the likely penalty.[4] Where there is doubt about what the appropriate penalty may be, the court should not apply the procedure.[5]

In the past Courts have stressed that the summary procedure was to be used only for trivial offences,[6] but since the permissible penalty was first increased to R100 in 1974[7] and now to R300, the potential scope of its application has been dramatically increased.[8] It could clearly be misguided to regard all offences subject to a penalty less than R300 to be trivial. Nevertheless, the Courts have exercised their discretion judicially and in order to avoid

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1. Cook 1977 (1) SA 653 (A).
2. Block 1960 (1) SA 570 (C) 571-2. See also Paterson 1977 (1) SA 27 (E) 28F.
3. Vabaza 1948 (1) SA 451 (E) 456; Nzimande 1957 (4) SA 430 (O); Silva 1975 (4) SA 104 (N) 107B; Paterson supra 29C; Cook supra.
4. Cook supra.
5. Ferreira 338.
6. Vabaza supra.
7. Act 32 of 1974.
8. Silva supra 106B; Paterson supra 28F.

unjust results, have sometimes refused to apply this procedure, for example, to common law crimes.[1] It is submitted that this cautionary approach should continue and the court should follow the s 112(1)(b) procedure where there is a likelihood of injustice resulting from the application of the s 112(1)(a) procedure.

These requirements do not, however, afford the undefended accused much protection as the court's focus is on the offence and not on the accused's plea. It is therefore unlikely that a mistaken guilty plea will be detected. From a number of older decisions[2] there emerges a possible means of preventing undefended accused from mistakenly pleading guilty. In Nsibande 1935 TPD 370 Tindall AJP said that if an accused pleads guilty, then the magistrate should see that the essential elements of the offence are put to him separately in order to determine whether he agrees with each one. The judge observed that where this was done, it was frequently found that the accused never intended to plead guilty at all. This procedure was again advanced in Matswele 1940 TPD 348 and in the Appellate Division decision of Mutimba 1944 AD 23.[3] It is submitted that this procedure should be consistently followed as it affords a measure of protection to ignorant undefended accused.[4] The court must

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1. Vabaza 1948 (2) SA 451 (E); Silva 1975 (4) SA 104 (N). Ferreira 338 suggests that this practice should continue also under the present Code.
2. See Ferreira 339 n 63.
3. See also Mawolaula 1922 NPD 33 35.
4. Van der Merwe Handleiding (1980) 11 also advocates this procedure in the case of an undefended accused who pleads guilty to a complicated statutory charge.

put to the accused each element of the offence, which he can either deny or affirm. This procedure differs from the s 112(1)(b) procedure in that the magistrate need only be satisfied that the accused knows and admits the elements of the offence; he need not establish whether there is a reliable factual basis for those admissions.

The prosecutor may also play an important role in the protection of the undefended accused in this regard. In terms of s 112(1)(b) he may call on the court to question the accused in a case which otherwise may be disposed of by a guilty plea only. If so requested, the court is obliged to proceed with a s 112(1)(b) enquiry. One of the purposes of this discretion is, no doubt, to allow the magistrate to impose a sentence which may be in excess of a R300 fine where, although the offence may seem trivial, the accused's criminal record - which at this stage is known only to the prosecutor - warrants a more severe sentence. This power can also be used in favour of the undefended accused. Van der Merwe et al argue convincingly as follows:

> "The police docket, which is in the possession of the prosecutor, provides the backdrop against which the plea of guilty must be seen. Factors such as the accused's level of education and occupation, and the circumstances of the case, place the prosecutor in a particularly favourable position to know whether the undefended accused knows what he is doing when he pleads guilty. If he suspects that the accused does not understand the nature of the charge or the consequences of his plea, then it would be proper for the prosecutor to request that the plea be explored in terms of s 112(1)(b). Such a course of action accords with the prosecutor's function and is in harmony with the provision of the section".[44]

Although the prosecutor need not make such a request in every case, he is in a position to select the appropriate ones where the accused is at a disadvantage because of his level of education and/or lack of comprehension of the proceedings.

5.2.2 SECTION 112(1)(b) PROCEDURE

Section 112(1)(b) enables a court to convict an accused who has pleaded guilty if, after questioning him, it is satisfied that he is in fact guilty. The procedure thus dispenses with the previous requirement that the commission of the offence had to be proved by evidence aliunde.[1] The procedure is mandatory,[2] even if the accused changes his plea from not guilty to guilty during the trial.[3] The procedure constitutes an important departure from the adversary mode of procedure by imposing an inquisitorial duty on the judicial officer to determine whether an accused who pleads guilty, is in fact guilty of the alleged offence.

5.2.2.1 EXCLUDING THE COURT'S INQUISITORIAL DUTY

The accused is, however, able to obviate the need for the court's inquisitorial questioning by handing in a written statement setting out the facts which he admits and the charges to which he pleads guilty.[S 112(2)] If the court is satisfied on the strength of the statement that the accused

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1. Act 56 of 1955 s 158(1)(b).
2. Fikizolo 1978 (2) SA 676 (NC) 679.
3. Abrahamse 1980 (4) SA 665 (C) 668.

is guilty, it may convict him without any questioning. The court may, however, put questions to the accused in order to clarify any matter in the statement. This provision is almost exclusively used by lawyers and it enables them to determine, with the consent of the prosecution, which factual information about the offence is placed on record.[1]

Although this procedure is available to all accused, very few who are undefended would know about its existence or how to utilize it. As the protective features of s 112(1)(b) are excluded, the use of the procedure may not be in the best interests of undefended accused. The dangers inherent in the procedure were illustrated in Khiba 1978 (2) SA 540 (E) where the accused's statement to the police was tendered as a statement in terms of s 112(2) and served as the basis for a conviction. The adoption of the s 112(2) procedure, which must have occurred at the instance of the police or the prosecutor, effectively curtailed the court's inquisitorial powers to establish the factual basis of the accused's plea, since its questioning was then limited merely to clarifying matters raised in the statement.[2] Such a circumvention of the safeguards of s 112(1)(b) should not be countenanced, yet the Court on review merely remarked that it was in order for the judicial officer simply to have questioned the accused in respect of the voluntariness of the statement. It

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1. See GA Barton "Standards for the Acceptance of the Plea of Guilty - a Comparative Evaluation of S 112(1)(b) of Act 51 of 1977" (1981) 5 SACC 212 215.
2. See Van der Merwe et al 46.

is submitted that the court should not allow its protective function to be usurped and should accept such a statement from an undefended accused only with the greatest circumspection.

5.2.2.2 THE COURT'S INQUISITORIAL DUTY

Since defence lawyers invariably make use of the s 112(2) statement, the court's inquisitorial duty in terms of s 112(1)(b) is performed primarily in respect of undefended accused. As the judicial supervision of the plea of guilty in relation to all non-minor offences is aimed at the prevention of convictions on mistaken pleas of guilty,[1] the procedure is potentially one of the most important protections that is afforded the undefended accused. The protective value of this procedure will depend, however, on how the court executes its inquisitorial duty. It has been suggested by Van der Merwe et al that the function of the judicial interrogation is to ensure that (a) an accused who has pleaded guilty understands the legal consequences of such a plea, (b) the accused freely and voluntarily admits all the elements of the offence with which he is charged, and (c) the accused is not mistaken in making a plea of guilty.[32] These functions, if they are all legally obligatory, would ensure not only that the factual basis of the accused's guilty plea is established, but also that no undue advantage is taken of the undefended accused's

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1. Nkosi 1984 (3) SA 345 (A) 353C; Magabi 1985 (3) SA 818 (T) 822J.

ignorance and vulnerability in the absence of legal assistance.

(a) ADVISING THE ACCUSED OF THE LEGAL CONSEQUENCES OF THE PLEA

An accused, by pleading guilty, waives certain rights and safeguards which he would have enjoyed had he contested the charge: these include the protection that the State must prove his guilt beyond reasonable doubt and his right to test the veracity of the evidence against him. A defended accused would be well aware of these consequences. Van der Merwe et al contend that it is incumbent on the court to inform the undefended accused of the implications of a guilty plea:

> "The proper administration of justice requires that an accused should only take such a decision when he is aware of all the options, in much the same way as it is customary to inform the undefended accused of his rights at the end of the case for the State in a contested criminal trial".[33]

While it is clearly important, in order to provide equality before the law, that the court should place the undefended accused in the same position as one legally represented, there is unfortunately little support in the case law for the imposition of such a duty on the court. In Mthetwa, Kanyile 1978 (1) SA 773 (N) Law AJ held that "there is no obligation cast on a judicial officer by the provisions of the Criminal Procedure Act ... to explain ... the consequences of a plea of guilty to an accused person..."[776E] He did add, however, that it may be desirable to do so in the case of illiterate or uneducated persons. The same opinion was expressed in Yontolo 1977 (2)

SA 146 (E), where it was held that it was not even obligatory to inform an accused that the consequence of a plea of guilty to dealing in drugs, was a mandatory sentence of five years' imprisonment.

As the plea decision is one of the most important choices an accused makes during the proceedings, the court should only attach consequences to a considered and informed plea. As much as the accused should be afforded an opportunity to consider his plea, he should be informed about the considerations relevant to it. It is an established principle that a court only accepts as binding the consequences of an informed choice. In Daniels 1983 (3) SA 275 (A) the Court held that an admission of an undefended accused is admissible only if he was informed that the effect of making it was to relieve the State of the onus of proving the admitted fact and that he was under no obligation to assist the State in proving the case against him.[1] Since a plea of guilty consists of a series of admissions covering all the allegations, the same cautionary approach should be adopted. Only if it is clear that the accused appreciated the various options open to him and the consequences pertaining to them, should his plea of guilty be accepted.

(b) ESTABLISHING THE VOLUNTARINESS OF THE PLEA

The plea of an accused should be made freely and voluntarily

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1. 315F-G. See also Mavudla 1976 (4) SA 731 (N) 732E.

and without undue influence.[1] The first step to prevent involuntary pleas would be to inform the undefended accused, before he pleads, that he is not obliged to plead guilty, and secondly, after he has pleaded, to question him about the voluntariness of his plea.[2] The court is not, however, obliged to do either.

In Nkosi 1984 (3) SA 345 (A) Jansen JA dismissed the argument that the accused, if not informed about his right to insist that the State prove his guilt, might wrongly plead guilty because of intimidation from the police in whose control he may be. The judge was adamant that the court's questioning of the accused would detect an involuntary plea and added that, in respect of s 119 proceedings, the accused could always raise the involuntariness of his plea in the magistrates' court when he was put on trial before the Supreme Court.[351I]

This decision cannot be endorsed. The Court's confidence that any form of inducement would be exposed during the questioning is, it is submitted, misplaced. The appearance of an accused in court does not necessarily terminate the influence that the police, for example, may exercise over him. He will very likely continue to be under the control of the police after pleading, either directly, if detained in the police cells, or indirectly, if detained in prison. It is thus unlikely that an accused subjected to pressure would

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1. Chetty v Cronje 1979 (1) SA 294 (O) 297G.
2. Van der Merwe et al 34.

volunteer information about intimidation, as suggested by the judge. Furthermore, even if the questioning follows the guidelines laid down by the Supreme Court, it is unlikely that it would uncover such irregularities. As long as the accused appears to be guilty on the face of his statement, the court is not obliged to probe behind what he has said, for example, to enquire whether he has been induced in any way to plead guilty.[1] Finally, the possibility of an accused having a second chance to contest the voluntariness of his plea, applies mainly to trials in the Supreme Court where the s 119 proceedings in the magistrates' court are distinct and separate from the trial. The majority of accused appearing in the lower courts in summary proceedings will be deprived of such an opportunity, particularly where the conviction and sentence occur on the same day.

Support for establishing the voluntariness of pleas can be derived from the rules pertaining to confessions. Since the guilty plea has been equated to a judicial confession,[2] it is submitted that the principal requirements for admissibility of confessions should also be applicable in respect of guilty pleas in facie curia. In order that a confession be admissible, it must be proved that it was made

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1. See the examples in the case law where prima facie the statements were made voluntarily but later proved not to be, Van der Merwe et al 28.
2. Ndlela et al 1984 (4) SA 131 (N) 132 in fin; Becker 1929 AD 167 171.

voluntarily and without any inducement.[1] The basis for the provisions is twofold. Firstly, an involuntary confession may not be truthful and secondly, even if it is truthful, illegal police behaviour which led to a coerced confession, should not be countenanced. For the same reasons, a judicial officer should establish the voluntariness of admissions before convicting an accused on the basis of these. Where it is found that there have been undue pressures or promises influencing the guilty plea, the plea should not be accepted as its truthfulness may be affected thereby and outside interference in the determination of the accused's guilt should not be tolerated. It is therefore submitted that the court should, in addition to informing the accused that he is not obliged to plead guilty, enquire specifically whether the plea and admissions were made freely and voluntarily and without undue inducement.

(c) ESTABLISHING THE FACTUAL BASIS OF THE ACCUSED'S PLEA

The primary purpose of the questioning is to establish whether there is a factual basis for the accused's belief in his own guilt. It thus serves as a safety device against mistaken guilty pleas,[2] particularly in respect of

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1. Barlin 1926 AD 459 462; Schmidt 529. Where, on the face of the document containing the confession, there is no positive assertion as to its voluntariness, the onus rests on the State to prove such (s 217(1)). See Hoffmann 183; Schmidt 527. If it appears on the face of the document that the confession was voluntarily executed, the onus is on the accused to prove the contrary (s 217(1)(b)(ii)).
2. Nkosi 1984 (4) SA 345 (A) 353C; Gresse 1985 (4) SA 410 (T) 404F.

illiterate and undefended accused,[1] whose statements could alone found a conviction. Didcott J in M 1982 (1) SA 240 (N) described the protective function of s 112(1)(b) as follows:

> "The safety device is an important one. Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of their doing so is obvious in a society like ours in which many are illiterate and unsophisticated coming before the courts with no legal assistance. The danger is greater still, it goes without saying, when such a one is a young child with a limited grasp of the proceedings".[242D]

The court's inquisitorial duty is thus to be performed to protect the undefended accused from mistakenly pleading guilty. The procedure may therefore not be used to prove the guilt of the accused where the latter disputes his guilt, and so the court may not cross-examine the accused to prove that his denial of an allegation is wrong,[2] or use its power to call witnesses [S 186] to establish any allegation which the accused disputes.[3]

The Court has urged that the section be applied with great care and circumspection, especially where the accused is undefended and apparently unsophisticated.[4] A number of principles have thus been developed to guide judicial officers in their inquisitorial task. The court must establish whether (i) the accused admits every element of the offence and the factual allegations on which the

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1. Baron 1978 (2) SA 510 (C).
2. Londi 1985 (2) SA 248 (E).
3. Jada 1985 (2) SA 182 (E).
4. Phikwa 1978 (1) SA 397 (E) 398E.

elements are founded, (ii) his admissions are truthful, and (iii) whether they are reliable.

(i) Establishing whether the accused admits every element of the offence and the factual allegations on which the elements are founded

In Jacobs 1978 (1) SA 1176 (C) it was said that the questioning should ascertain that an accused who pleads guilty knows what the elements of the offence are and that he admits every one of them. Van der Merwe et al also contend that "the accused's understanding of the charge must be a cardinal factor in deciding whether his admissions are persuasive of guilt beyond a reasonable doubt".[35]

In conducting the questioning the court must explain the various elements of the offence in a language which the accused understands and the accused must admit each one of them.[1] It is insufficient, however, for the accused's answers merely to be a repetition of the elements of the offence;[2] in addition to admitting every element of the offence, the accused must admit the factual allegations on which the elements are based. The accused is not required to admit all the factual allegations contained in the charge sheet and the court may convict him as long as his admissions of facts cover all the elements of the offence.[3] The court therefore need not put every factual

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1. Phikwa 1978 (1) SA 397 (E) 398A.
2. Doud 1978 (2) SA 403 (O) 404.
3. Magabi 1985 (3) SA 810(T) 823E. The prosecutor may reject admissions which fail to correspond with the allegations contained in the charge sheet and the court must then enter a plea of not guilty.

allegation contained in the charge sheet to the accused,[1] but the questioning must reduce the elements of the charge to a factual basis.[2] The court may not make deductions from what the accused has said, to decide whether he admits a particular allegation.[3] Furthermore, incomplete admissions cannot be supplemented by argument.[4] If it becomes apparent that the accused may have a defence, the court is obliged to investigate it.[5] This duty does not, however, compel a court to examine all possible defences where they are not even suggested by the evidence.[6]

Presumptions, which per definition presume the existence of unproven facts, cannot be used in s 112(1)(b) proceedings. The task of the court is to determine the guilt of the accused on the basis of what the accused says and admits and this is incompatible with the operation of presumptions. Flemming J stated in Mossendu 1981 (1) SA 323 (O) that

> "Die Wetgewer het gewis nie bedoel dat 'n beskuldigde skuldig bevind kan word sonder 'n navraag omtrent 'n onontbeerlike feit waarheen 'n vermoede oënskynlik lei, maar sonder 'n geleentheid waartydens dit mag blyk dat die betrokke feit nie erken word nie".[326A]

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1. Magabi supra.
2. Van der Merwe et al 35. See Tito 1984 (4) SA 363 (CkSC) where the Ciskei Supreme Court debated the length to which a court should go to establish the factual basis of the accused's admission that he escaped from lawful custody. The minority decision of Rees AJ, which held that the court should have investigated the factual basis of the lawfulness of the custody, is, it is submitted, correct.
3. Londi 1985 (2) SA 248 (E) 250I.
4. Tsoali 1983 (1) PH H59 (O).
5. Tshumi 1978 (1) SA 129 (N).
6. Tito supra 364E; Booysen 1985 (2) SA 95 (C) 96J.

It was therefore held insufficient for a conviction of dealing in dagga, merely to establish that the accused was in or near a vehicle which transported dagga and then to rely on the presumption, contained in s 10(e) of Act 41 of 1971, to supply the remaining elements. Instead, the accused should be questioned specifically as to whether he actually dealt in dagga.

(ii) Establishing whether the accused's admissions are a truthful reflection of his views

The court's questioning should be directed towards discovering whether the plea of the accused and his admissions express his views truthfully. Questions which may tend not to establish the truth are therefore irregular. The asking of leading questions, the answers to which are either yes or no, may not elicit the truth since the answer may have been suggested in the question.[1] The practice of asking leading questions has therefore been consistently disapproved of by the Supreme Court.[2] It is also irregular for a prosecutor to relate the State's version of the case before the accused is questioned and for the court then merely to ask the accused whether he agrees with it. Such a procedure may influence the accused's response for he might adopt the suggestions made by the State.[3] The

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1. See Schmidt 282.
2. Mkize, Nene v The State 1981 (3) SA 585 (N) 586A; Moblabi 1981 (2) PH H109 (O); Mokoena 1982 (3) SA 976 (T); Absolon 1983 (1) PH H52 (C); Sof 1984 (1) PH H22 (O).
3. Sethole 1984 (3) SA 620 (O) 622.

accused should instead simply be invited to relate his account of the event.[1]

(iii) Establishing the reliability of the accused's admissions

For a conviction to be based on an accused's admissions, the court should be satisfied that such admissions are reliable proof of the accused's guilt.[2] Answers for which legal knowledge is a prerequisite cannot have much probative value if given by an undefended accused unversed in law.[3] It is therefore the duty of the court to avoid any 'legal' questions.[4] At times it could be difficult to elicit answers which would establish elements such as unlawfulness, knowledge of unlawfulness, negligence, dolus eventualis, and other legal concepts that sometimes baffle lawyers, let alone laymen.[5] The only solution to the problem is for the court to establish from the accused the factual basis of an admission pertaining to a legal concept. The court should then decide, on the basis of this information, whether the legal requirement has been met.

Where an admitted fact is not within the personal knowledge of the accused, such an admission cannot be a reliable

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1. Mkize v The State 1981 (3) SA 585 (N) 587; Chonco 1984 (2) PH H168 (N).
2. See Naidoo 1985 (2) SA 32 (N) 37G.
3. Finger 1981 (1) PH H65 (O); Mathe 1981 (1) PH H68 (NC).
4. Moblabi 1981 (2) PH H109 (O).
5. Cf P van Warmelo "Die Romeinse en Romeins-Hollandse Reg en Sommige Moderne Strafregbegrippe - 'n Pleidooi vir Eenvoud" (1984) 8 SACC 44.

indicator of that fact, and consequently the court can attach little value to it. In Chetty 1984 (1) SA 411 (C) the Court refused to accept the accused's admission that the drug he dealt in was a prohibited drug, since that could be established only by chemical analysis, which was beyond the accused's capability. The Court could therefore not base the conviction on the accused's admission since the offence was not one of dealing in a substance which the accused thought was prohibited, but one which was in fact proscribed. Although the accused might have had the necessary mens rea, the actus reus would be absent, as his admissions would be unreliable to establish the latter element of the offence. This requirement makes it difficult, if not impossible, for the accused to plead guilty to certain offences, the elements of which are not dependent on any action or knowledge on his part.[1] The Courts' approach to this problem has not, however, been uniform.[2]

The Natal Provincial Division in Ndlela et al 1984 (4) SA 131 (N) seemed to favour the view that a court should not accept an admission where the fact that the accused admits falls outside his personal knowledge,[3] but in Naidoo 1985 (2) SA 32 (N) a more pragmatic approach was followed whereby an admission would be accepted as admissible

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1. See Arendse 1985 (2) SA 103 (C).
2. See generally J van der Berg (1985) 9 SACC 163; G Barton (1980) 4 SACC 260 276.
3. For a similar approach in respect of a charge of possession of suspected stolen goods, see Shabalala 1982 (2) SA 123 (T); Hiemstra 778.

provided certain criteria are met. It was held that the court could be satisfied of the existence of a fact even if it was not within the accused's personal knowledge, so long as the probative force of those sources of information on which the accused based his admission, was sufficient to render such admission reliable.[1] In Naidoo the accused pleaded guilty to a charge of driving a motor vehicle with more than the legal limit of alcohol in his blood; he complemented his admission regarding his blood/alcohol level by handing in a certificate containing the results of a scientific analysis of a sample of his blood and gave further details of his alcohol consumption on the day in question.[2]

In Booysen 1985 (2) SA 95 (C) the Court accepted that the accused could admit possession of or dealing in a prohibited drug without indicating on what grounds such an admission is made.[3] The Court held that as long as the accused realizes the significance of making the admission, it is not necessary for the State to cover possible defences which the

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1. 40I. See also Zuma 1984 (1) PH H85 (N); Ndlela et al supra Leon J's minority judgment 132.
2. See also Chetty 1984 (1) SA 411 (C). Although the Court in Gresse 1985 (4) SA 401 (T) claimed to have accepted the decision in Naidoo, the acceptance of the plea of guilty without any further information from the accused, except that he drank beer (which he did not even regard as strong liquor!), does not, it is submitted, comply with the requirement that the accused's admission should be based on reliable sources. The decision is more in line with Booysen 1985 (2) SA 95 (C), see below.
3. 96G. See also Gresse 1985 (4) SA 401 (T) 407A; Sipiri 1979 (2) SA 1168 (NC).

accused did not raise.[96I] The Court thus rejected the view that there should be either a scientific analysis of the drug or cogent reasons why the accused believes it to be a prohibited one.

The approach in Booysen cannot be supported. The aim of the s 112(1)(b) procedure is to protect accused from mistaken pleas. It could not have been the intention of the Legislature that the accused should be convicted merely on his own belief in his guilt. The duty of the court is to establish inquisitorially whether there is an objective and reliable basis on which a conviction can be founded. The court cannot therefore take any admission at face value but must be convinced that it is reliable proof of the existence of a fact.

5.2.2.3 THE DUTY TO CHANGE A GUILTY PLEA TO NOT GUILTY

Concomitant with the duty of the court to establish whether the accused is in fact guilty, is the obligation under s 113 to change the guilty plea to one of not guilty if;

(a) there is any doubt whether the accused is guilty of the offence according to the law;

(b) satisfied that the accused does not admit an allegation in the charge;

(c) the accused has incorrectly admitted any allegation; or

(d) the accused has a valid defence to the charge.

The test to be applied in assessing whether the plea should be accepted does not vary from the standard of proof

required for conviction; the court must be convinced beyond reasonable doubt that the accused is guilty.[1] Any reasonable doubt as to the guilt of the accused would suffice for the change of plea. In Phikwa 1978 (1) SA 397 (E) the Court thus held that

> "Where there is room for any other reasonable interpretation of the accused's plea and his answers it is imperative that a plea of not guilty be entered and the matter clarified by the leading of evidence".[398G]

The duty to safeguard the accused from the consequences of a mistaken or incorrect plea prevails until the sentence is passed.[S 113] The court is thus obliged to set aside the conviction if any doubt arises regarding the accused's guilt during evidence in mitigation of sentence.[2] The change of plea may be entered by the court mero motu or on application by the accused.[3]

The duty to set aside a conviction based on a mistaken plea of guilty also rests on the regional court when it is called upon to sentence an accused who has been convicted in terms of s 112(1)(b) in the magistrates' court but an appropriate sentence would exceed the latter's jurisdiction.[S 114] If the regional court is satisfied that a plea of guilty or an

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1. Munshelele 1980 (2) SA 110 (V). See also Van der Merwe et al 35.
2. Du Plessis 1978 (2) SA 498 (C) 498D; Thomane 1979 (3) SA 1195 (O). See also Van der Merwe et al 53; A Caiger "Section 113: More Questions than Answers?" (1982) 45 THRHR 196.
3. See Van der Merwe et al 54; J van der Berg "Change of Plea: A Plea for Change" (1985) 9 SACC 279 for the controversy regarding different criteria when the accused applies for a change of plea.

admission was incorrectly recorded, or that the accused is not guilty of the offence, a plea of not guilty should be entered and the guilt of the accused be established by trial.[S 114(3)] An undefended accused would clearly benefit from this type of "review" by a regional court of the magistrate's decision to convict.[1]

In Loggerenberg 1984 (4) SA 41 (E), however, Mullins J held that the regional magistrate is restricted to the record of the proceedings in the magistrates' court and the accused has no right to re-open the question of whether the verdict should be guilty or not.[47I] Support for this was drawn from the provision of s 116 that an accused, after a plea of not guilty and a full trial in the magistrates' court, having been convicted and referred to the regional court for sentencing, cannot re-open the case in the latter. The judge said that the accused who has pleaded guilty should be in no better position than the accused who has been convicted after a full trial.

With respect, the Court's reasoning cannot be accepted. Firstly, the regional magistrate's power to change a plea should not be more restricted than that of the magistrate. The former merely performs the sentencing function of the latter. Since the magistrate is able to reopen the question of guilt after conviction but before sentence, regional magistrates should have the same power. As s 114 proceedings

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1. Cf DJL Kotze "Die Pleit van Skuldig: Beskerming teen Benadeling" (1978) 2 SACC 294 296.

are an extension of the procedure required by s 112, s 113 should be equally applicable to proceedings in terms of s 114.

Secondly, the judge's reference to s 116 does not offer support for his argument, but in fact points in the other direction. After a full trial and a conviction, the court cannot reverse its own conviction. By contrast, where no evidence has been led, the court is specifically instructed to change a plea if there is any doubt about the accused's guilt. This is a special safeguard which is not necessary after an accused's guilt has been established by evidence.

The consequence of a change of plea is that the prosecutor is called upon to lead evidence to prove the commission of the offence. The change of plea does not render the proceedings in terms of s 112(1)(b) a nullity. The proviso to s 113 holds that any allegation admitted by the accused up to the stage that the plea is changed, will stand as proof of that allegation.

5.2.2.4. SECTION 112(1)(b): CONCLUDING REMARKS

Sections 112 and 113 do not establish an infallible safety device that will invariably detect mistaken pleas. Too much of their efficacy is dependent on the manner and depth of the court's questioning.[1] It has also been observed that some magistrates may be too easily satisfied of the guilt of

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1. Kotze (1978) 2 SACC 294 300.

the accused.[1] A busy magistrate with a heavy court roll may exploit the time saving methods that the procedure contains without pursuing vigorously its protective aims. Furthermore, since the court is not obliged to ensure that the plea is voluntarily, the possibility of coerced and unduly influenced pleas cannot be excluded. On the whole, however, the conclusion must be that this procedure provides a significant device to prevent undefended accused from being wrongly convicted. The protective role that the defence lawyer plays before a guilty plea is entered is performed for the undefended accused by the judicial officer. The procedure thus establishes the important principle that, in the absence of a lawyer, the principles of a fair trial should be pursued through the active and inquisitorial participation of the judicial officer.

5.3. THE PLEA OF NOT GUILTY

By pleading not guilty, the accused places every allegation in dispute and burdens the State with the proof thereof. Section 115 makes provision for the active intervention of the court at this stage, in order to narrow down the issues in dispute.[2] The elimination of issues which are not in dispute clearly assists the State by lightening its burden to prove every allegation. Unlike the procedure under s 112(1)(b), s 115 is not aimed at the protection or

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1. RG Nairn "Section 112 of Act 51 of 1977: More Insights and Interpretations" (1978) 2 SACC 201.
2. Seleke 1980 (3) SA 745 (A) 754A.

assistance of the accused; on the contrary, it may well be to his prejudice, particularly where he is undefended.

5.3.1 NARROWING DOWN THE DISPUTE: THE INTERESTS INVOLVED

After a plea of not guilty the court may ask the accused whether he wishes to make a statement indicating the basis of his defence.[S 115(1)] If he chooses to do so, but his statement does not clearly indicate which allegations he puts in dispute, the court may question him in order to clarify his defence.[S 115(2)(a)] Even if the accused declines to make a statement, the court may question him as to the allegations in dispute.[S 115(2)(a) & (b)] If the accused does not dispute an allegation, the court must enquire from him whether that allegation may be recorded as a formal admission. If the accused consents to its formal recording, this is sufficient proof of the fact so admitted.[S 115(2)(b)]

The purpose of the court's intervention is to rationalize the contested criminal trial by identifying and isolating the factual and legal conflicts between the parties. The court takes the initiative to determine what issues are in dispute, much like a pre-trial conference presided over by a judicial officer in civil proceedings.[1] Since the accused's co-operation in narrowing down the dispute is voluntary (he retains his right to remain silent) he will

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1. See Act 32 of 1944 s 54 (1). See CF Eckard Grondtrekke van die Siviele Prosesreg in die Landdroshowe (1984) 249ff. Supreme Court Rules, rule 37.

participate if he believes it to be in his interest. The undefended accused, however, may co-operate with the court without assessing the consequences. It is therefore important to assess whether co-operation with the court may afford the accused any advantage.

In Moloyi 1978 (1) SA 516 (O) the early determination of disputed facts was mentioned as one of the objectives of the procedure.[519H] Such a determination, made at the accused's first court appearance, will clearly shorten the trial and save costs,[1] but most of the advantages derived from it accrue to the State. From the outset, the State can focus its attention and all its resources on the area of dispute and thus prepare fully for trial. The identification of the accused's defence also ensures that the prosecutor will not be surprised at the trial. Furthermore, if the procedure leads to the recording of admissions, this will ease the State's onus of proof.

Although a shortened trial may lessen the time spent by the accused in court, the early and final determination of the disputed facts carries considerable disadvantages for the accused. Firstly, the accused ties himself down to a specific defence from the outset.[2] In view of the fact that the accused can be called upon to plead at his first

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1. See Mayedwa 1978 (1) SA 509 (E) 511C.
2. Van der Merwe Handleiding (1980) 53; CF Klopper "The New Criminal Procedure Act in Practice" (1979) 11 CILSA 320 323.

court appearance, the disclosure of his defence may be ill-advised if he has not had the opportunity to consider it properly. Secondly, evidence which he later gives in court may conflict with the statement made at the outset of the trial, and this would damage his credibility as a witness. This may happen even to the most honest witness if there is a considerable time lapse between the initial pleadings and the trial.

The disclosure of his defence also holds no specific advantages for the accused. An exculpatory statement not repeated under oath has no evidential value,[1] while an incriminating statement can be used as evidence against the accused.[2] Where a formal admission has been made, the scope of the permissible range of cross-examination of State witnesses on that issue will be limited.[3] The State will know more about the defence case than the accused will know of the State case. Furthermore, the disclosure is not likely to lead to the early release of the accused. The Botha Commission concluded that the prima facie case on which the charge is based would not be impaired by the explanation of the accused alone, without an actual testing of the State witnesses.[Par 1.19] One possible advantage for the accused is that in the unlikely event of the prosecution alleging

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1. Malebo 1979 (2) SA 636 (BH); Van der Merwe et al 137 n 107. But contra Mogoregi 1978 (1) SA 13 (O); Moabisa 1983 (1) PH H82 (O).
2. Sesetse 1981 (3) SA 353 (A). See also PM Bekker "Vernuwing van die Suid-Afrikaanse Strafproses: Die Proses van Pleitverduideliking" (1978) 11 De Jure 200 298.
3. Klopper 1978 CILSA 320.

that the accused's evidence is a recent fabrication, the accused may be able to rely on his s 115 statement to dispel the allegation.[1] It has also been suggested that the undefended accused may gain some benefit from disclosing his defence as the court could then assist him in putting his defence to State witnesses.[2]

The accused, on the whole, is likely to gain little advantage from co-operating with the judicial officer.[3] Although defence lawyers tend to disclose their defence under the new procedure, they participate on such a limited scale that they cannot be prejudiced by it. They have ample time and skill to develop a considered response, present it at the commencement of the trial proper, and indicate only the basis of their defence.[4] The prejudicial impact of the court's enquiring function would therefore be felt primarily by undefended accused, who will mostly be unaware, firstly, of their right not to participate, and secondly, of the legal implications which may flow from their participation. In view of the real possibility that the undefended accused may be prejudiced by the procedure, it is important to determine how the judicial officer should take the interests of such accused into account when exercising this function.

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1. Van der Merwe et al 140.
2. Thomas 1978 (2) SA 408 (BSC) 409H.
3. Under the 1955 Code the accused could voluntarily disclose his defence (s 169(5)), but in practice this seldom occurred, Van der Merwe et al 51.
4. See par 6.3.4 (a) below.

5.3.2 THE COURT'S FUNCTION TO DETERMINE THE NATURE AND EXTENT OF THE DISPUTE

(a) THE DISCRETIONARY NATURE OF THE DISPUTE DETERMINATION

Once an accused has pleaded not guilty, s 115 becomes applicable.[1] Section 115(1) provides that the court may ask the accused the basis of his defence,[2] thus giving the court a discretion whether or not to conduct the enquiry. The discretion must be exercised judicially.[3] It has been accepted that after the court has changed a plea of guilty in terms of s 113, there is usually no need to enquire into the defence of the accused as this would be apparent from the court's questioning.[4] The principle seems to be that where the defence is clear, the purpose of, and thus the need for the questioning falls away. Questioning which is not aimed at establishing the basis of the accused's defence should therefore be regarded as irregular.

(b) DETERMINING THE BASIS OF THE ACCUSED'S DEFENCE AND PROTECTING HIS RIGHT TO REMAIN SILENT.

The aim of the court's intervention is to ascertain the basis of the accused's defence. It should be made clear to

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1. Mjoli 1981 (3) SA 1233 (A) 1238B.
2. The decision of Hiemstra CJ in Bepela 1978 (2) SA 22 (B) imposing a mandatory duty, has not been followed. See Herbst 1980 (3) SA 1026 (E) 1031. DJL Kotze (1980) 13 De Jure 416 420 interpreted Seleke 1980 (3) SA 745 (A) 755B as imposing a mandatory duty to question an accused. As Van der Merwe et al 80 correctly point out, it is mandatory to apply s 115, but the section does not make it mandatory to interrogate.
3. Herbst 1980 (3) SA 1026 (E) 1031E.
4. Ncube 1981 (3) SA 511 (T) 514C.

the accused that it is not an opportunity to place his version of the events before the court, but merely to give an indication of the basis of his defence. To ask the accused, for example, "What happened?" may lead to a full disclosure which may inadvertently undo his plea of not guilty.[1] Where the purpose of the procedure is not explicitly stated, then, the court commits an irregularity which should render the accused's statement inadmissible.

The court's power to enquire from an accused whether he wishes to disclose the basis of his defence has not curtailed in any way the accused's right to remain silent.[2] His refusal to disclose his defence merely places all the allegations in dispute.[3] After some prevarication in the law,[4] the full bench of the Cape Provincial Division in Evans 1981(4) SA 52 (C) imposed a duty on the judicial officer to inform the accused of his right to remain silent.[5] This decision subsequently received

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1. Nkosi 1984 (3) SA 345 (A) 353F-G; Mahlangu 1985 (4) SA 447 (W) 452A.
2. Evans 1981 (4) SA 52 (C) 55D, 56A; Hill 1981 (2) PH H152 (C).
3. Rakanang 1978 (1) SA 591 (NC) 593F.
4. Hiemstra CJ at first maintained that there was no duty on the court to inform the accused of his right to remain silent, see Thomas 1978 (2) SA 408 (BSC) 410; VG Hiemstra "Hervorming van die Strafprosesreg" 1977 TSAR 116 119. In Muzikayifani 1979 (2) SA 516 (N) 520B Law J declared it to be desirable that the accused be explicitly informed of his right to silence. For criticism see Van der Merwe Handleiding (1980) 95.
5. 58G. Previously there had been a number of calls by writers for such a duty: see RG Nairn "S 115 of Act 51 of 1977: The New Inquisition Clarified" (1978) 2 SACC 89 90; A St Q Skeen "Procedures following Pleas of Not Guilty in South Africa" (1980) 4 SACC 277 282 (a call for a statutory intervention); PM Bekker (1978) 11 De Jure 200 208.

appellate confirmation in Daniels 1983 (3) SA 275 (A).[1] In Evans Vivier J stressed the importance of explaining the right to the accused in such a fashion that he would be able to understand it.[59A-D] The precise wording was not prescribed but the warning given must be fully and meticulously recorded.[59B-C] Where an accused faces more than one charge, he should be informed of his right to remain silent in respect of each charge.[2]

The effect of a failure to inform the accused in this regard depends on the facts and circumstances of each case.[3] In Chilwan 1982 (1) PH H87 (C) the accused was not informed that he was not obliged to make a statement. Since the statement that he made was never again referred to, either during the trial or in the judgment, Vivier J held that the accused was not prejudiced by the omission and the conviction was confirmed. In Hill 1981 (2) PH H152 (C) the Court adopted a different approach for the more extreme case where a magistrate had told the accused that they were obliged to disclose their defence. The Court held that the accused were thereby denied a fundamental right - the right to remain silent. The denial of such a basic right amounted to a gross irregularity per se, resulting in the setting aside of the conviction. Most irregularities would probably fall between these extremes and their effects will depend upon the individual case.

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1. 299F. See also Hill 1981 (2) PH H152 (C).
2. Boullion CC244/1984 (D & C LD) unreported.
3. Evans 1981 (4) SA 52 (C).

The question then arises whether it is sufficient - in order to protect the undefended accused - to apprise him only of the existence of the right, without disclosing the material considerations which should be taken into account when exercising his choice. Can it be said that the accused exercises an informed choice if he is not made aware, for instance, that a statement under s 115 could only be used as evidence against him in subsequent proceedings? In Daniels 1983 (3) SA 275 (A) Van Winsen AJA regarded it as irregular if the accused is not informed that the formal admissions which he makes may, at a later stage, be used against him.[309E] Even though the judge referred only to the recording of formal admissions, it is submitted that the same principle is applicable to the making of a statement which contains informal admissions. Since these admissions have evidential value as well,[1] they can also be used against the accused. Similarly, in order to alleviate the accused's fears that reticence at this stage will be held against him,[2] it is submitted that he should be apprised of the fact that no negative inference may be drawn from his silence.[3]

The question arises as to the court's duty where the undefended accused, invited to disclose his defence, relates

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1. Sesetse 1981 (3) SA 353 (A).
2. As was suggested by Hiemstra CJ in M 1979 (4) SA 1044 (BH).
3. Cf JH van Rooyen "Some Doubts regarding Aspects of the 1973 Criminal Procedure Bill" 1976 De Rebus 207 209.

his whole story. Should the court actively intervene and terminate the accused's statement once it is clear what the basis of his defence is, or is it legitimate to allow him to ramble on and disclose more than what is necessary? On the one hand, the court will probably not be able to determine what the accused's defence is if a full factual account of the events is not given. On the other, by giving a full disclosure, the accused may inadvertently contradict his plea of not guilty.[1] As far as Hiemstra CJ was concerned in Thomas 1978 (2) SA 408 (BSC), it would be wrong to stop an accused when he goes beyond a mere explanation of his plea and only irrelevancies should be eliminated. This approach cannot be supported. The invitation should not be a trap for the accused to disclose the factual basis of his case.[2] It is submitted that as soon as the basis of the defence becomes apparent, the purpose of the enquiry is achieved. For the court to allow the accused to continue with his story is irregular, as no legitimate purpose is served thereby.

(c) CLARIFYING THE DEFENCE AND THE LIMITATIONS ON QUESTIONING

When the accused makes a statement, the court's power to question him is limited[3] to the purpose of clarifying [S

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1. Nkosi 1984 (3) SA 345 (A) 353F-G; Mahlangu 1985 (4) SA 447 (W) 452A.
2. See JR du Plessis "Some Decisions on Section 115 of the Criminal Procedure Act 1977" (1979) 96 SALJ 4 11.
3. Moloyi 1978 (1) 516 (O) 522.

115(2)(b)] the dispute if "it is not clear from his statement to what extent he denies or admits" the allegations in the charge.[S 115(2)(a)] The purpose of the questioning is to obtain certainty as to the accused's defence, and is not to disprove or discredit a defence that the accused has put forward.[1] Cross-examination of the accused to this effect is thus not allowed,[2] and the court is precluded from investigating the facts which are in dispute.[3] Questioning that goes beyond the purpose of determining the basis of the accused's defence would thus be irregular.[4]

In Mathogo 1978 (1) SA 425 (O) the court held that evidence elicited by irregular questioning should not be taken into account when assessing the guilt of the accused. It has also been held that extensive questioning may place the impartiality of the magistrate in doubt, and that this may per se constitute a gross irregularity.[5]

If the court deems it necessary to ask further questions for elucidation, it must inform the accused of this purpose.[6] Since the accused is entitled to refuse to answer any of the

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1. Mathogo 1978 (1) SA 425 (O) 426E; Simelane 1979 (2) PH H170 (T); Mahlangu 1985 (4) SA 447 (W) 453A.
2. Seleke 1980 (3) SA 745 (A) 754A; Govender 1984 (1) PH H24 (O).
3. Moloyi 1978 (1) SA 516 (O) 520E; Seleke supra 753A.
4. Muzikayifani 1979 (2) SA 516 (N) 517H.
5. Grootboom 1982 (1) PH H78 (E).
6. Evans 1981 (4) SA 52 (C) 55G; Mayedwa 1978 (1) SA 509 (E) 511E.

questions put to him,[1] the court must also inform him of this right.[2]

(d) MINIMIZING THE DISPUTE BY THE RECORDING OF ADMISSIONS

Section 115(2)(a) empowers the court to question the accused despite his refusal to disclose the basis of his defence, in order to establish which allegations are in dispute. If the accused does not dispute an allegation, then the court is obliged to enquire from him whether his reaction to this allegation may be recorded as a formal admission.

The court, by utilizing its power to determine the allegations in dispute, is thus able to circumvent the accused's decision not to disclose his defence. By determining whether the accused disagrees with each allegation, the court may, by a process of elimination, establish his defence. To avoid this questioning, it seems to be necessary for the accused to state that he disputes every allegation contained in the charge. To question the accused after this would be irregular as it would be a denial of his right to remain silent.[3] It is unlikely, however, that an undefended accused would assert his right in the correct manner and most accused would thus be exposed to a second round of questioning. Moreover, there is a strong probability that an accused will succumb to the questioning at this stage since his previous choice to

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1. Evans 1981 (4) SA 52 (C) 56A.
2. Evans supra 58G; Rakanang 1978 (1) SA 591 (NC) 593F.
3. Cf Hill 1981 (2) PH H152 (C).

remain silent was not respected and therefore appears to have been of no avail. It is clearly difficult for an accused to remain silent in the face of questions addressed to him and, as Malherbe AJ perceptively remarked, "an undefended accused will probably accede more readily to such a request emanating from the presiding officer than from somebody in a lesser position".[1] This provision may in practice effectively undermine the accused's right to remain silent. It should therefore be incumbent on the judicial officer to inform the accused once again that he need not answer these questions.

In Khumalo 1979 (3) SA 708 (T) the Court cautioned against the unjust use of this power. Where an undefended accused elects not to make a statement, where the nature and implications of admissions or denials he is expected to make would probably not be understood by him and where the area of dispute is limited, there is no valid reason for the court to insist that the accused should further limit the area of dispute.

If an accused does not dispute an allegation, the court is obliged to enquire from him whether it may be recorded as an admission.[S 115(2)(b)] If the accused consents, such admission would be sufficient proof of the fact so admitted.[S 115(2)(b); s 220] Through a series of formal admissions, covering all the allegations in the charge, the

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1. Govender 1984 (1) PH H24 (0).

foundation may in fact be laid for the accused's conviction, despite his plea of not guilty.[1] In such a situation the accused's attention must be drawn specifically to the discrepancy between his plea and the effect of the allegations he admits. If he persists, however, in his admissions, he may be convicted on the basis of them.[2]

When the undefended accused is asked whether he consents to the recording of an admission, he should be informed of the nature and consequence of this recording. The Appellate Division in Daniels 1983 (3) SA 275 (A) required that

> "an accused should be told that the effect of making a formal admission is to relieve the State of the necessity of proving the admitted fact by evidence; and that he is under no obligation to make any admission or to assist the State in proving the case against him. This is in accordance with the salutary rule of practice in South African courts which requires that an unrepresented accused should not, without his having been fully informed of his rights, be asked whether he makes a formal admission of a fact the onus of proving which is on the State".[3]

Van Winsen AJA added that an irregularity would be committed if the accused was not also apprised of the fact that the admissions could later be used against him, and that the effect of recording an admission is, as provided by s 220, that it will be sufficient proof of the fact admitted.[309D-E]

The judicial officer's failure to record the warning is also

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1. Talie 1979 (2) SA 1003 (C); Simelane 1979 (2) PH H170 (T).
2. Talie supra 1005A; Simelane supra.
3. 299H-300A. See also Van Winsen J's dictum 309D-H; Botha JA 315F-H.

a fatal irregularity which renders the formal admissions inadmissible. In Daniels the majority of the Court viewed the failure to record the warning as constituting an irregularity per se,[1] while it was suggested in the minority judgment that an incomplete recording may be rectified by evidence at the trial.[2] The majority's approach is preferable since it is more likely to produce compliance with the rule that the proceedings must be fully recorded and it also obviates the difficulty of establishing, after a lengthy period of time, whether the warning was in fact given.

The recording of formal admissions by an undefended accused involves the danger that he may wrongly or mistakenly admit the truth of an allegation. There are no safeguards, however, to prevent such an occurrence since the s 115 procedure, unlike s 112(1)(b), is not designed to, and in consequence cannot, determine the reliability of such an admission.[3] The court is not obliged to investigate whether the admission, formal or informal, has a sound factual basis. All that is required is the accused's intention that an admission be recorded as such. The court is not even obliged to satisfy itself that admissions are

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1. Per Nicholas AJA 300D; Van Winsen 310A. See also Mahlangu 1985 (4) SA 447 (W).
2. Per Botha JA 317D-E. See generally T Geldenhuys "'n Nuwe Perspektief op Artikel 115 van die Strafproseswet" (1985) 9 SACC 177.
3. Cf Snyman (1975) 8 CILSA 100 106.

made freely and voluntarily.[1]

The Supreme Court has on occasion given special attention to limiting the possible dangers associated with admissions made by undefended accused during a trial. In Mavundla 1976 (4) SA 731 (N) Didcott J required that a judicial officer must satisfy himself, before accepting such an admission, that the accused's decision has been taken in the full understanding of the meaning and effect of such an admission, and that he was under no misapprehension that he was obliged to supply the State or the court with it.[2] Furthermore, "extra caution is ... needed when an unrepresented accused offers to admit a fact unlikely in the nature of things to be within his own knowledge".[3] In Marshell 1978 (2) SA 742 (T) the Court held that an admission of an accused as to his age may be accepted only if it rests on reliable knowledge of the fact.[4]

The unquestioned acceptance of formal admissions was also questioned by Botha JA in Daniels.[318D-319A] Even if the accused does not dispute the truth of the admissions, he contended, it remains the duty of the court to assess all the evidence at the end of the trial to determine the guilt of the accused. The judge likened the formal admission to

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1. Daniels 1983 (3) SA 275 (A) 310A per Van Winsen AJA.
2. 732E. See also Sithole 1967 (2) PH H292 (N); D 1967 (2) SA 537 (N) 538A; M 1967 (1) SA 70 (N) 71D.
3. Mavundla supra 733A.
4. 743. See also Ndlovu 1978 (3) SA 533 (T) 535B; Sithole supra; M supra 71E.

the making of an extra-judicial confession. In the latter case it remains the duty of the court to be certain beyond reasonable doubt of the truth of the confession despite its admissibility and compliance with the provisions of s 209.[1] Without expressing a final opinion on the matter, the judge suggested that the same approach should be adopted in respect of admissions recorded in s 115 proceedings. It is submitted that the Court's approach places a question mark behind the central tenet of the adversary process, namely that the judicial officer may rely on the "formal truth". The court is not to regard itself as bound by what the parties agree is the truth but is obliged to determine, on the information before it, whether the material truth has been established. This approach is both justified and essential in proceedings against undefended accused.

5.3.3 SECTION 115: CONCLUDING REMARKS

The rules and principles which the Supreme Court has developed to make the execution of the judicial officer's function more equitable towards the undefended accused, do not in the end afford the accused much protection. Although he is informed of the right to remain silent, he need not be apprised of the material considerations that should be taken into account in deciding whether to co-operate. Although the court participates actively in the proceedings, this does not signify a departure from the adversary process. To the

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1. Cf Mbambo 1983 (2) SA 379 (A).

contrary, the procedure becomes more adversary as evidence is produced by consent through the recording of admissions, whether formal or informal, and not by the court searching for the truth through the examination of witnesses. The undefended accused's prejudice may correspondingly be increased because of his inability to play the role of a skilled adversary in the production of formal evidence. In contrast to the s 112(1)(b) procedure, then, the court's active role in s 115 is not of assistance to the undefended accused, but rather benefits the State. The procedure thus exacerbates the inequality which already exists between defended and undefended accused and tilts the scales of justice in favour of the State in the prosecution of the latter.

6. PLEA PROCEEDINGS - AN EMPIRICAL ANALYSIS

Because of the technical nature of the pleadings and the degree of artificiality in their expression, undefended accused face considerable difficulties in making sense of the procedure. In the sample the charge was usually framed in terms of the essential legal requirements of the offence, while the factual allegations on which the charge was based were kept to a minimum. The accused invariably remained uninformed not only about the charge itself, but also about his right to an opportunity to consider the charge and his plea.

6.1. INFORMING THE ACCUSED OF THE CHARGE

In Durban's lower courts the prosecutor usually read out the charge fully, including all references to acts and sections thereof. Presumptions applicable were mentioned - complete with reference to the relevant sections - especially in respect of possession of and dealing in drugs. How they operated was usually explained only after the accused had pleaded. Reference to competent verdicts was scarce. The charge generally contained very little information regarding its factual basis. The charge sheet was usually a roneoed form which left little space for particulars pertaining to the events in question. Reading out the various elements of an offence to the accused did not reveal the factual allegations which the accused had to meet. The charge sheet merely stated, for example, that the accused had in his

possession a prohibited dependence-producing drug, to wit a small quantity of dagga. Such a charge did not disclose the case of the State.[1] Obtaining information through the formal process of requesting further particulars was beyond the capabilities of the undefended accused. They were not informed about that right nor did they utilize it. The court seldom objected to the formulation of the charge; in the few isolated cases where it did, the charge sheets were found wanting because the legal requirements of the offence were incorrectly formulated. There was no insistence that the accused should be more fully informed of the factual allegations on which the charge was based.

Interpreters did not exhibit the same measure of formalism as the prosecutors, but conveyed to the accused only the bare essentials.[2] They related only the legal aspects of the charge, but without using the precise and sometimes incomprehensible language of the charge sheet. They thus conveyed to the accused only what was intelligible to him. Any reference to a section of an act was substituted by "the law", robbery with aggravating circumstances merely became robbery (Case A2 RC), a precise quantity of dagga expressed in grams became either a "little" or a "lot" (Case A45 DC), and difficult concepts such as "proof on the balance of probabilities" were omitted altogether (Case A76 DC). At times, however, this reductionist process led to the wrong translation of the charge. In Case A89 DC the accused was

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1. Cf McBarnet 83.
2. See also Monama op cit 22.

charged with the possession of property in regard to which there was a reasonable suspicion that it was stolen and he was unable to give a satisfactory account of his possession of it. The interpreter simplified the charge to: "You have been found in possession of stolen property", to which the accused's confused reply was: "I did not steal it."

In a large number of cases no charge was interpreted for the accused, and the interpreter simply asked the accused whether or not he was guilty. In Case A54 DC the prosecutor read out the following charge:

"The charge against the accused is that he contravened s 2(b) of Act 41 of 1971 read with s 10(3) in that on [date] at or near Warwick Avenue in the district of Durban he had wrongfully and unlawfully in his possession a prohibited dependence-producing substance, to wit a small quantity of dagga. How do you plead?
I (Zulu): Do you find yourself guilty or not?
A (Zulu): I do have a case against me.
I (English): I plead guilty.

This practice is a direct indictment of the technical nature of the plea proceedings and their lack of meaning for the undefended accused. If the interpreter perceived the charge as being so formalistic that conveying it to the accused would not contribute to the latter's understanding of it, then he made a very rational decision to omit the translation of the charge altogether. The charge disclosed no more than would have been known to the accused through his dealings with the police. On the other hand, had the prosecutor alleged that the police found in his pocket one stick of dagga, then the translation of that would have been more meaningful; the non-technical information would have

been comprehensible, and hence useful to the accused. By concentrating on the legalistic and hence formal aspects of the charge, the prosecution, the court and consequently the interpreter gave little effect to the accused's right to know the charge which he had to meet.

6.2 THE ACCUSED'S RIGHT TO AN OPPORTUNITY TO CONSIDER HIS PLEA

The majority of the accused in the magistrates' court were called upon to plead at their first appearance. No judicial officer informed an accused that he had the right to an opportunity to consider his position before pleading to the charge. Nor did any of the undefended accused decline to plead on this ground. One magistrate did enquire whether the accused was ready to proceed with the pleadings, but this was done in such a manner that the information was bereft of any benefit to the latter. Case 213 DC is an example of this practice.

Case 213 DC

At his first appearance in court, an English-speaking accused, who had been in custody, pleaded guilty to a charge of possession of dagga. Before the magistrate commenced to question him in terms of s 112(1)(b), the following questions were put to him:
M: Accused, are you ready to proceed?
A: I am guilty.
M: (raising his voice) Are you ready to proceed with the matter?
A: I do not understand.
M: Are there any reasons why this case must be remanded?
The accused shook his head and the magistrate proceeded to question him on his plea of guilty.

Extending the right to ask for a remand at this stage of the proceedings was of little value to the accused as he had

already made the most important decision of the proceedings by pleading guilty. This was the decision for which time, consideration and advice were most necessary. Furthermore, the explanation was given in such a way that it could not be utilized in any case by the accused. He clearly did not know of possible legal grounds on which he could have requested a remand, or, equally important, whether he could be released from custody for the duration of the adjournment. Unlike defended accused, the undefended, by virtue of their ignorance of their rights, were forced to plead at the earliest opportunity once the State had managed to formulate a charge.

6.3. PLEADING TO THE CHARGE

The prosecutors usually rounded off their reading of the charge sheet with the question: "Do you plead guilty or not guilty?" More than half of the undefended accused in the sample pleaded not guilty, indicating general resistance to the inevitable road to conviction. Only 43,4% of the accused in the sample pleaded guilty. Black males, particularly between the ages of 21 and 25 years, were the least inclined to plead guilty and only a third did not contest the charge. Choice of plea was not significantly related to legal representation.

6.3.1 TRANSLATING THE ACCUSED'S RESPONSE TO THE CHARGE

In many cases, the translation of the accused's response to the charge did not convey accurately the accused's

intention. Some interpreters, for instance, regarded it as their duty to convert that response into a plea where this had not been the import of what the accused said. In Case A3 RC, the translation of the accused's response into a neat legal plea resulted in the amplification and distortion of its original meaning.

Case A3 RC

The accused, a 22 year old Zulu male, was charged with house-breaking with the intention to steal and theft. The charge was fully translated to him.
A (Zulu): I did have the goods in my custody.
I (English): I understand the charge against me and plead guilty.

Not only was the translation inaccurate, but it also ascribed to the accused a knowledge of the legal requirements of the offence of housebreaking and the admission of facts not acknowledged. Similarly, in many cases additional comments, such as "guilty but I..." were never conveyed to the court.

These problems of interpretation may partly be due to the fact that a plea of guilty is a legal term, an equivalent of which has not been fully developed in the Zulu language. More important, however, is the interpreters' perception of their role at this stage as being to transform laymen's responses into a legal term. The pleading stage requires the simplification of the conflict to guilty or not guilty. This artificiality was not understood by most accused but the interpreter, conscious of the intended goal, adapted his role to facilitate its achievement.

6.3.2. THE COURT'S INQUISITORIAL DUTY TO ESTABLISH THE FACTUAL BASIS OF THE ACCUSED'S GUILTY PLEA

None of the undefended accused who pleaded guilty handed in a statement setting out the allegations they admitted and the court was thus called upon to question them in terms of s 112(1)(b). The rules governing the procedure, specifically designed to protect the accused against a mistaken guilty plea, are unambiguous - the magistrate may only convict an accused who has pleaded guilty if he is satisfied, on questioning him, that he is in fact guilty.

In the cases studied, judicial officers single-mindedly questioned accused to establish the factual basis for their pleas, giving little recognition to further protection of accused in regard to plea proceedings. They never informed accused of any of the consequences of a plea of guilty. Even the few accused who were charged with dealing in mandrax tablets were not warned that the direct consequence of a guilty plea and conviction would be a mandatory minimum sentence of five years' imprisonment. Nor did the magistrates ascertain whether guilty pleas were made freely and voluntarily and without undue influence.

The thoroughness with which the questioning was conducted varied according to the type of court. In the regional court, the judicial officers proceeded carefully to elicit from the accused the factual basis for their guilty pleas. They informed the accused of the purpose of the questioning and invited them in 77,8% of the cases to give their account

of the incident. They assiduously avoided leading questions and through comprehensive questioning invariably obtained a full account of the incident. In only 11,1% of the cases were five or less questions asked; more than ten questions were posed in 63,1% of the cases. The more serious the offence, the more intensive was the questioning.

In the magistrates' court the questioning of accused was more cursory. Little time was spent explaining the purpose of the questioning and the court frequently resorted to leading questions. In only 35% of the cases were the accused invited to relate the circumstances of the offence. Five or less questions established the guilt of 39,7% of the accused and in only 21,3% of the cases were more than ten questions asked. Magistrates faced with a large number of cases, particularly those dealing with the offence of possession of dagga, approached them in much the same way as the magistrate conducted the enquiry in Case 213 DC.

Case 213 DC

After the accused pleaded guilty to the possession of dagga, the magistrate proceeded as follows:
M: Were you in possession of one gram of dagga?
A: Yes.
M: Is dagga a prohibited dependence-producing drug?
A: I beg yours?
M: (getting irritated) Is dagga a prohibited dependence-producing drug?
A: (quickly) Yes.
M: Are you a holder of any licence or permit?
A: No.
The magistrate thereupon convicted the accused.

In only 16% of the cases of possession of dagga did the magistrate venture to elicit from the accused the facts of

the incident. Where the court was placed under time constraints, then, the desire for expeditious disposal of guilty pleas for minor offences led to the relaxation of the rules.

In the study by Bekker et al, more positive results were recorded.[7-8] In 62% of the cases where magistrates had to implement s 112(1)(b), they explained the section to the accused. The questioning of the accused was fairly extensive; in 28% of the cases 5 or less questions were asked; in 39%, 6 to 10 questions; and in 24%, 11 to 15 questions. Even where a few questions were asked, Bekker et al contended, this did not mean superficial questioning and they concluded that comprehensive questioning occurred in the majority of the cases.

The interpreters also attempted to establish from the accused the factual basis of their pleas. Individually they tried to extract information from the accused and to clarify ambiguities in answers given. Where the court, however, put leading questions, the interpreters followed this hasty approach as well. In case A34 RC the accused pleaded guilty to a charge of theft and after the regional magistrate had established the actus reus through a number of leading questions, he asked:

M: Did you know it was wrong?
I: Wanazi ukuthi ku-wrong? (Do you know it is wrong?)
The accused murmured a few words which were not an answer to the question. The interpreter in a high tone demanded in Zulu: "Yes or no?", to which the accused meekly replied, "yes".

6.3.3. CHANGING A GUILTY PLEA TO NOT GUILTY

In the cases observed, magistrates followed the provisions of s 113 scrupulously and changed guilty pleas if there was any doubt as to the accused's guilt, despite the extra work and time involved in the leading of evidence and even, at times, against the vociferous opposition of the accused themselves. The decision to change the plea did not appear to be significantly related to the extent of the questioning. Although the questioning by the magistrates was not as thorough as that of their brethren in the regional court, both courts changed 34,5% of the pleas of guilty to not guilty.[1] In respect of offences where the mens rea element is particularly specific, for example assault with the intention to do grievous bodily harm, theft and fraud, there was a significantly higher number of plea changes.

The prosecutors played no significant role in the process. They did not readily object when the accused's story varied from the State case or argue that his plea should therefore not be accepted. This resulted in a form of informal plea bargaining; if the accused's acknowledgement of his guilt did not accord with all the factual allegations contained in the charge, the prosecutor tended to accept his plea rather than incur the trouble of proving by evidence the exact extent of his guilt.

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1. Bekker et al (9-10) found a much lower percentage of changes of plea (16%); they attributed this to the fair comprehension that undefended accused had of the substantive criminal law.

With a clear and unambiguous duty imposed by statute and clear and explicit guidelines formulated by the Supreme Court, the lower courts on the whole executed their duties under s 112(1)(b) with certainty and a sense of direction. In the magistrates' court, high case loads led at times to the speedy and efficient disposal of cases without full observance of all the safeguards. Despite the pressures, however, some magistrates managed to follow the rules without adversely affecting their efficiency. The danger that some magistrates might be too easily satisfied about the guilt of the accused,[1] was only partially realized. Superficial questioning of some accused meant that no reliable base was established for a conviction, but where there was any doubt as to the accused's guilt, the courts without exception ordered a trial to establish the accused's guilt by evidence. One cannot, however, conclude that without informing the accused about the consequences of a guilty plea and questioning him about the voluntariness of his plea, the court was in a position to ascertain beyond reasonable doubt in all cases that the accused was in fact guilty of the alleged offence.

6.3.4. PLEADING NOT GUILTY

Over half of the undefended accused (56,6%) pleaded not guilty and it was thus incumbent on the State to prove their guilt. Once a plea of not guilty has been recorded, the

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1. Kotze (1978)) 2 SACC 294 300.

court may participate actively in the proceedings to establish the basis of the accused's defence and perhaps record formal admissions. In respect of the undefended accused, however, the court's role is inherently ambivalent. By establishing the defence of the accused, the court assists the prosecution in a number of ways. At the same time, however, the court must inform the accused that he need not co-operate by disclosing his defence. Should the accused decide not to disclose his defence, the prosecution is consequently denied those advantages. The court is thus empowered, on the one hand, to assist the prosecution while it is obliged, on the other, to protect the accused's right to remain silent.

How did the court resolve the ambivalent task of aiding the State and, at the same time, protecting the rights of the accused? Since the primary intended purpose of the procedure is to assist the State, it is not surprising that the courts advanced the interest of the State while de-emphasizing the accused's right to silence.

(a) DISCLOSING THE RIGHT TO REMAIN SILENT

Without exception all the judicial officers asked the accused who had pleaded not guilty whether they wished to disclose the basis of their defence. The invitation to the accused ranged from a formal repetition of the section, "Do you wish to disclose the basis of your defence?" to the more colloquial, "Do you want to tell the court why you're

pleading not guilty?".

The case law does not specify how the information of the right to remain silent should be conveyed, nor does it require that the accused be informed of the material considerations that should be taken into account when exercising his choice. In most cases (85,4%) the accused was informed that he had the right to remain silent,[1] but this entailed little more than mentioning the existence of the right. The way in which the information was conveyed, however, limited the possibility of assertion of the right. The court usually disclosed the right in the first sentence of its explanation and then went on to explain how to make the statement, pointing out that the basis and not the whole version of the defence should be divulged. The court would end off by asking: "Is there anything you want to say?" The right to silence, tucked in at the beginning of the explanation, would be lost in the explanation itself, which concentrated in any event on the making of a statement.[2]

Even if the accused was aware of the right, it remained meaningless to him as he was not informed about its significance; that a statement could be to his prejudice and that he was not obliged to assist the State in proving the case against him. The accused might be reluctant not to answer a question by the magistrate, if only out of

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1. Bekker et al (12) also reported a high measure of compliance (92%) with this requirement.
2. See Case 68 RC below.

deference for his position. He might fear that an uncooperative stance would not endear him to the person in whose hands his fate rested.

Some magistrates did give the accused some advice on how the choice should be exercised, but in most cases the advice encouraged accused to make statements. In not a single case was the accused informed that he would not be prejudiced at all if he remained silent.

Case 68 RC is a good example of firstly, how the right to remain silent is hidden in the general explanation of the procedure, and secondly, how the considerations that are disclosed encourage the accused to co-operate.

Case 68 RC

A male aged 21 pleaded not guilty to a charge of rape. The magistrate apprised him of his rights as follows:

> "Accused, you may if you wish make a statement indicating the basis of your defence. You are not obliged to say anything at all. On the other hand you may explain to the court what will be in dispute between yourself and the State case. That may serve a good purpose in that it may shorten the proceedings, and more importantly, it will place the court in a position where it could, if necessary, assist an unrepresented accused with his cross-examination of a State witness. The court may ask you questions regarding the basis of your defence. You are not obliged to answer these questions. The prosecutor, however, may ask you your reasons for refusing to answer these questions when he cross-examines you. Anything you wish to say?"

Ending off the explanation with a broad invitation to the accused, it was not surprising that the accused not only indicated the basis of his defence but told his full story to the court.

One magistrate routinely informed the accused that "this statement is not evidence but has evidential value". If an accused could understand this bit of information which, although legally correct, must patently be confusing for a layman, he might perceive it to be in his interest to tell his story, as it has some evidential value. The magistrate omitted, however, the more important piece of information, namely that it has evidential value only against the accused.

One magistrate, aware of the damaging effects which such a statement may have upon an accused's case, informed the latter that "what you say here can be used against you. If you tell a different story than what you tell at a later stage it can cast doubt on your credibility."[Case 276 DC] Again the information is correct, but again it encourages participation rather than silence. The accused might well imagine that remaining silent after such a warning would create the impression that he intends to tell a different story later.

The interpreters did not assist to make the process more comprehensible to the accused. Following the example of a number of magistrates, they seemed to view the explanation of rights as a mere formality, since most accused disclosed their defence in any event. The explanation was thus to be given as expeditiously as possible. One court observer, a Zulu-speaking law student, had great difficulty in following the translation of the explanation and remarked that the

interpreter "went off like a tape recorder singing a song".[Case A6 RC]

(b) THE ACCUSED'S DISCLOSURE OF THE BASIS OF HIS DEFENCE

It is therefore not surprising that the vast majority of the undefended accused (86,3%) decided to participate.[1] Most accused did not know what was required of them when they were requested to indicate the basis of their defence. The difficulty that the accused experienced in grasping the difference between indicating the basis of his defence and relating his full story is well illustrated by Case A42 DC.

Case A42 DC

M: Do you wish to disclose the basis of your defence?
I: (Zulu) Can you tell the court the reasons for your plea of not guilty?
A: (Zulu) I can narrate the incident.
I: (Zulu) They do not say narrate it. Do you have anything to say?
The accused thereupon started to narrate his story.
I: (Zulu) You may talk until sunset but this will not help you. Tell me why do you plead not guilty?
Eventually the interpreter gave up the attempt to extract only the basis of his defence and allowed the accused to relate his story.

The majority of the participating accused (85,2%) gave a full account of their version of the incident while the rest sufficed with what could be called a 'legal' defence. The statements were at times so detailed that one regional magistrate, when the accused elected to give evidence, merely asked the accused: "Do you want to add anything

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1. Bekker et al (11) reported that all the undefended accused who pleaded not guilty disclosed their defences.

further to your statement?" The accused indicated that that was his evidence.[Case 61 RC]

The court made frequent use of its power to put additional questions to the accused. Of those who gave a full statement, 37,3% were questioned further while more than half (53,8%) of the few who restricted their disclosure to a legal defence, faced further enquiries. The magistrates, although inclined in general not to waste time, asked significantly more questions in this regard than their brethren in the regional court. Although magistrates often said that they did not wish to hear the full story of the accused, few of them actually stopped the accused after the basis of his defence became apparent from his statement.

Interpreters, following the example set by some magistrates, frequently elicited independently further information from the accused. Case A35 DC illustrates this point.

Case A 35 DC

On a charge of contravening the Dangerous Weapons Act, the accused pleaded not guilty.
M: Do you wish to disclose the basis of your defence? You may remain silent.
I: (Zulu) You may state reasons for your plea but you need not tell me the whole story. You may say nothing if you like.
A: (Zulu) I did not point a firearm, it was a knife.
I: (Zulu) Is that all? Is there anything else?
The accused thereupon narrated the whole story which the interpreter translated until the magistrate eventually intervened when the accused got side-tracked by irrelevancies.

Even those accused who wished to remain silent were not left alone, as the court was empowered to question them despite

their refusal to disclose their defence. Case 50 RC illustrates how the court could successfully circumvent the accused's initial refusal by asking him whether he was placing every allegation in dispute.

Case 50 RC

On a charge of robbery the accused pleaded not guilty. After the regional magistrate informed the accused of his right to remain silent, he continued as follows:
M: Do you want to tell me the basis of your defence?
A: No.
M: I may still question you but you may remain silent. Were you in the cells in CR Swart Square.?
A: Yes.
M: Do you know the complainant?
A: Yes.
M: Did you take any money?
A: Yes, he gave it to me.

Despite the disclosure of his right to silence, it was made very difficult for the accused to refuse to answer a straightforward question by the court. Mere politeness or fear of the court may have caused him to respond readily. By acting in a manner sanctioned by the law, the court overcame the accused's initial refusal to co-operate and established his defence.

(c) RECORDING FORMAL ADMISSIONS

Little use was made of the provisions relating to the recording of formal admissions made in the course of a s 115 statement; this occurred in only 10,7% of the undefended cases. Even in cases where the accused did not deny an allegation and the court was by law obligated to ask the accused whether this could be recorded as a formal admission, this was frequently not done. Non-compliance with

this rule invokes no sanction and in the run of the mill cases in the magistrates' court formal admissions were of limited value. The advantage to be gained from these was not worth the trouble involved in explaining the significance of a formal admission and the accused's rights in respect thereof, particularly in view of the considerable evidential value which informal admissions in any event had.

(d) THE USE OF S 115 STATEMENTS

The advantages which the prosecution derived from an accused's s 115 statement were manifold. With the accused's case disclosed in full, the prosecution was assisted in the preparation of its case, even to the extent of being able to alter or reconstruct its case in view of the defence case.[1] The statement lightened the State's onus of proof where formal admissions were recorded or informal admissions made and could be used to attack the defence case. Any discrepancy between the accused's statement and his subsequent testimony was valuable material for attacking his credibility. Such discrepancies were most evident when there was a long time lapse between the plea proceedings and the testimony of the accused. In 11,1% of 72 cases where the accused testified prosecutors and even magistrates used the explanation of the plea to cross-examine the accused.

The accused, on the other hand, gained little advantage from their extensive statements. As the magistrate in Case 68 RC,

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1. Cf McBarnet 84.

quoted above, pointed out to the accused, the statement could be used by the court to assist the accused in his cross-examination. The fact that there is no obligation for the court to do so, may explain why this occurred in only three cases.

On the whole the value that the procedure had for the prosecution was evident and in their application of the section the judicial officers did little to prevent these benefits from accruing to the State. Moreover, it was the undefended accused who bore the full prejudicial impact of the procedure.

Bekker et al view the s 115 procedure favourably on the basis that it promotes the "whole hearted" participation of Black accused in the process.[11, 19] This is because of the coincidence of the s 115 procedure with Black customary procedure.[1] It is important to realize, however, that the similarity is one of form only as the effect of an accused's participation in the s 115 procedure is vastly different from that in customary procedure. In the latter procedure, with a free system of evidence, the accused's participation at any stage of the proceedings could advance his case. In the s 115 procedure, on the other hand, his participation generally cannot, and indeed is not designed to work for him. What he says is evidence, not in his

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1. 11. See also Verloren van Themaat (1964) 2 Codicillus 19 20.

favour, but only against him. The more he participates and the more information he divulges, the greater the possible prejudice. Because the s 115 proceedings correspond with Black customary procedure in form only, the dangers which are inherent in the procedure are compounded in respect of Black undefended accused, because the consequences of the procedure are so vastly different from what they expect. In essence the procedure remains a trap into which no lawyer would walk with open eyes, but into which the courts carefully and consistently lead the unsuspecting undefended accused.

(e) SECTION 115 AND DEFENCE LAWYERS

Lawyers differed quite markedly from the undefended accused in the way in which they approached the s 115 proceedings. Although the percentage of defended accused who participated was also very high (82,4%) and a third of them made formal admissions, there were a number of fundamental differences. Firstly, while most of the undefended accused disclosed their defence at their first court appearance, the defended accused usually did this on the day of the trial, sometimes a few weeks after their first appearance. There was usually no time lapse between the statement and the accused's testimony, thus minimizing the possibility of contradictions. Secondly, the defence disclosed by a lawyer was a well-considered and thoroughly prepared written statement, as provided for in s 115(3). Thirdly, and most

important of all, their statements gave only a very terse legal defence, providing the State with hardly any factual details of the defence case.

The common notion that silence is indicative of guilt, may explain the willingness of most lawyers to make a statement. In avoiding such a negative impression, they nevertheless participated only on a symbolic level. The statements were so terse that they added little to what the prosecutor already knew, but at the same time they conveyed the favourable impression that the accused was willing to co-operate and shorten the proceedings. Although no tangible advantage was gained by such a statement, the possibility that the client would be prejudiced by his disclosure was minimized. In dealing with s 115, then, the lawyers, aware of the dangers involved, co-operated in such a way that the State could not benefit from their participation.

7. CONCLUSION

Because the plea proceedings bear such crucial implications for the criminal trial, they have the potential to be extremely prejudicial to an undefended accused, who may not understand the purpose, meaning or consequences of the professionalized and artificial way in which a criminal trial commences. Little has been done, however, to limit the dangers for this accused and his informed and considered participation in the plea proceedings is neither encouraged by the law nor pursued in practice.

Since a full apprisal of the factual allegations that the accused has to meet, is dependent on the discretion of the court, it did not occur in practice. The interpreter, in translating the charge, conveyed to the accused only that which was comprehensible to the latter. An unintelligible or uninformative charge might consequently remain untranslated. The right to an opportunity to consider the plea (and the possibility of bail during that time), and the material considerations pertaining to the plea choice were not disclosed to the accused. The first information which an undefended accused received, usually at his first appearance in the magistrates' court, was the charge against him and the choice of pleading either guilty or not guilty forthwith. The accused's choice in the hurried and intimidating atmosphere of the courtroom might well be ill-considered, prompted by external pressures, or simply wrong. Furthermore, the interpreter, conscious that the aim of the plea proceedings is the simplification of an accused's response to the charge, often forced the accused's unstructured response incorrectly into the artificial mould of a guilty or not guilty plea.

In order to safeguard against mistaken guilty pleas, the court is obliged to determine inquisitorially the factual basis of the accused's plea. But this does not involve ascertaining whether the plea is tendered in full consideration of the consequences or whether it is voluntary. As the decision of whether there is a sufficient

factual basis for the plea, is in essence discretionary, disparate questioning practices were observed. Where, however, there was any doubt as to the accused's guilt, the plea was invariably changed to one of not guilty.

Where the accused pleads not guilty, the court is confronted with contradictory tasks; to assist the State by determining the basis of the accused's defence and, at the same time, to inform the latter of his right not to disclose such. The paradox is resolved in favour of the State since the disclosure of the right to silence means nothing to the accused; this is because there is no corresponding obligation to inform him that his participation will primarily assist the State case and be to his detriment. Undefended accused invariably disclose their cases in full as a result of the court's incomplete and hence misleading information. The prosecution is thereby assisted considerably in its task to prove the accused's guilt during the State case and to disprove his innocence during the defence case. Defended accused, conscious of these dangers, participate only on a symbolic level, disclosing little that can benefit their adversary.

The undefended accused, uninformed of any of his procedural rights before he is asked to plead, is ill-equipped to face this vital choice of pleading guilty or not guilty and the possibility of prejudice is substantial. Although the court's inquisitorial intervention after a plea of guilty

goes a long way to protect the accused, it remains an incomplete safeguard against ill-considered and coerced pleas. In respect of a plea of not guilty, the undefended accused benefitted little from the occasional obligatory information he received, since the additional explanations required to put him in a position to acquit himself as a competent adversary were not given. Where equal protection is sought by means of assistance designed to make the undefended accused a competent adversary, the assistance should clearly be thorough in order to achieve that purpose. Similarly inquisitorial intervention by the juducial officer cannot satisfactorily protect this accused where it is half-hearted. The undefended accused at present receives little benefit from inconsistent and inadequate attempts at each type of assistance. The plea proceedings thus remain formal, professionalized and hence prejudicial to the undefended accused.

CHAPTER SIX THE STATE CASE

Once the accused contests the charge against him, the presumption of innocence places the onus on the State to prove the accused's guilt beyond reasonable doubt by means of evidence. The production of evidence is firmly based on the adversary mode of procedure; it is expected that, through confrontation, the truth will emerge. The State must lead evidence to prove every allegation in dispute and the accused's task, in contesting the State case, is to show that the evidence is either inadmissible or unreliable. Because of the undefended accused's lack of forensic knowledge and skills, he may not be able to execute this task adequately. The establishment of the truth should nevertheless be pursued by the prosecutor and the court to compensate for the undefended accused's inability to play his part in the adversary contest.

1. THE PROSECUTOR'S DUTIES AS "MINISTER OF THE TRUTH"

The general duty of the prosecutor to pursue impartially the ideal of justice assumes a special significance in the trial of an undefended accused, as the fairness of the proceedings may depend much on the way in which the prosecutor conducts the State case.[1] The task of the public prosecutor is more comprehensive and demanding than that of a defence lawyer, since the former represents the State, the community at large and the interests of justice in general.[2] As

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1. See Kekwana 1978 (2) SA 172 (NC) 175A.
2. Riekert 1954 (4) SA 254 (SWA) 261C-E.

"minister of the truth"[1] he has a special duty to see that the truth emerges in court.[2] This general duty has been crystallized into two specific ones; firstly, to produce all relevant evidence to court, and secondly, to ensure that the evidence produced is truthful.

The duty of the prosecutor to produce all elucidating evidence available to him, has been well established in South African law. In Filanius 1916 TPD 415 it was said that the prosecutor should place before the court all material necessary for the investigation of the truth.[3] The rule 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.[4] In Van Rensburg 1963 (2) SA 343 (N) it was stressed, more specifically, that it is part of the duty of the prosecutor to bring to the notice of the court information in his possession which may be favourable to the accused.[5] This duty acquires special significance in respect of an undefended accused, who cannot be regarded as an adversary equal to the State.[6] Referring to the prosecution of juveniles, Didcott J said the following:

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1. See Gardiner and Lansdown South African Criminal Law and Procedure vol I 6th ed by CWH Lansdown, WG Hoal & AV Lansdown (1957) 384.
2. Riekert supra 261F-G.
3. 417. See also Heilbron 1922 TPD 99; Motshe 1960 (1) PH H84 (T).
4. Filanius supra 417.
5. 343. See also Takaendesa 1972 (4) SA 72 (RAD) 75A.
6. Cf Lansdown & Campbell 511.

> "He [the prosecutor] had a duty, it goes without saying, to bring to her [the court's] attention anything tending to exonerate or mitigate the conduct of a young child who had no legal assistance and relied on him to see that justice was done".[1]

The same duty applies equally, it is submitted, to all accused who cannot fend for themselves adequately.

In Filanius 1916 TPD 415 it was conceded that the prosecutor need not call a witness whom he believes to be untruthful, hostile or in league with the accused.[417] He should, however, place these witnesses at the disposal of the court or the accused if he does not call them.[2] But the prosecutor is not compelled to hand over the statements of the witnesses as they remain privileged documents.[3] In the Supreme Court, the practice has arisen whereby witnesses subpoenaed but not called by the State, or the statements of such witnesses, are handed over to the defence.[4]

If and when the prosecution makes such witnesses available, problems may arise in the case of the undefended accused who may have difficulty in utilizing this opportunity because of his illiteracy or lack of legal knowledge and skill. The most practical procedure, it is submitted, would be for the prosecutor to inform the court of favourable evidence either by handing in witnesses' statements or by giving sufficient information to the court for the latter to assess

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1. M 1982 (1) SA 240 (N) 244E.
2. 417. See also Lansdown & Campbell 512.
3. Steyn 1954 (1) SA 324 (A) 337A; B 1980 (2) SA 946 (A) 952; Kubeka 1982 (1) SA 534 (W) 540H.
4. See eg Thuntsi v Attorney-General, Northern Cape 1982 (4) SA 468 (NC).

their value for the accused. Where the witnesses could contribute to the elucidation of the truth, the court could have them called in pursuance of its duty to call witnesses if it "appears essential for the just decision of the case".[1] This would substitute the court's expertise for the possibly fatal incompetence of the undefended accused and make the rule requiring prosecutors to disclose all relevant information, meaningful for such accused.

The second duty of the prosecutor involves the disclosure of discrepancies between a State witness' evidence and his prior statement to the police, by making the latter available to the defence for the purposes of cross-examination.[2] The rationale underlying this rule is, according to Botha JA in Xaba 1983 (3) SA 717 (A), to provide a safeguard against the danger of an accused being convicted on the evidence of an unreliable witness.[3] The duty arises only when a serious discrepancy comes to light.[4] Whether the discrepancy is serious enough to warrant disclosure, depends upon the effect the disclosure will have on the cross-examination of the witness. In Xaba Botha JA held a discrepancy to be serious

> "whenever there is a real possibility that the probing of it by means of cross-examination could have an adverse effect on the assessment by the trial court of the witness' credibility and reliability. Such a real possibility is not created by a discrepancy of a minor or trivial nature".[729H]

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1. S 167 and 186. See further ch 7 par 3.
2. Hassim 1971 (4) SA 492 (N) 494B.
3. 729F-G. See also Twopenny 1981 (2) PH H179 (A).
4. Steyn 1954 (1) SA 324 (A); White 1962 (4) SA 153 (FSC); Twopenny 1981 (2) PH H179 (A); Xaba 1983 (3) SA 717 (A) 728H-729A.

If the prosecutor is in doubt as to whether the discrepancy is serious or trivial, he should be bound to disclose it. As Botha JA observed, no harm is done if it appears that the discrepancy was trivial, as little time would be wasted to establish this; if it was serious, however, a failure of justice would result from its non-disclosure.[730D]

Once again, problems arise due to the fact that the undefended accused may not be able to utilize a disclosure of discrepancies to his advantage. It has therefore been suggested that the prosecutor should, in the case of the undefended accused, disclose the serious discrepancies to the court.[1] Once the court is so informed, it should disclose to the accused the nature of the discrepancy and its relevance so as to enable him to question the witness about it. Should the accused be incapable of utilizing the opportunity adequately, it is submitted that the court should be obliged to take the matter further and to test the witness's credibility in view of the conflicting statements.

Since the witnesses' statements and other information in the police docket are not accessible to the accused until the proceedings (including any appeal) have been completed,[2] the decision whether a discrepancy is a serious one, and whether it will be disclosed, depends

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1. Xaba supra 730B.
2. Steyn 1954 (1) SA 324 (A); B 1980 (2) SA 946 (A); Kubeka 1982 (1) SA 534 (W) 539H. For criticism see C Norman-Scoble (1966) 83 SALJ 233, (1967) 84 SALJ 136.

solely upon the prosecutor's good judgment and sense of fairness.[1] The duty to disclose is therefore only an ethical one, as there is no way in which the court can ensure that the prosecutor does in fact comply with it.

It is submitted that the disclosure of the statements of all witnesses whom the State calls, to the court and the defence, is essential to give effect to the principle that the criminal trial must establish the truth. The main reason for such a disclosure is to establish in all cases the consistency and credibility of the witnesses' evidence. The prosecutor's ethical duty to evaluate the consistency of his witnesses' evidence and to disclose discrepancies, will be more thoroughly performed by a defence lawyer or by the court should the accused be undefended, since neither will be hampered by the prosecutor's conflict of interests in the matter.

The disclosure of the State case is not foreign to the adversary system; to the contrary, it has been an integral part thereof. Before 1977 most Supreme Court trials were preceded by preliminary examinations in which the evidence of each State witness was disclosed in full. Furthermore, where a witness, who did not give evidence at that examination, testified at the trial, it was customary to

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1. J van den Berg "Duty of the Prosecutors to Disclose Inconsistent Statements by State Witnesses - S v Xaba 1983 (3) SA 717 (A)" (1984) 8 SACC 204 207.

hand a copy of his police statement to the defence.[1] The Lansdown Commission found that the record of those proceedings enabled not only the defence but also the trial court (where the accused was unrepresented or poorly defended) to test the evidence of the State witnesses more carefully.[Par 321] In other jurisdictions the trend has been towards more and fuller disclosures of the State case. In guidelines issued by the British Attorney-General the prosecution has been directed to disclose the statements of all witnesses, including those who are not going to be called by the Crown, subject to certain limited exceptions, where those statements were not already in the possession of the defence before the committal proceedings.[2] The Canadian Law Reform Commission has similarly recommended that the defence be supplied with copies of the statements of witnesses.[3] If the need for full disclosure in defended cases is acknowledged, the case for such disclosure is far stronger where the accused is undefended and cannot independently test the veracity of witnesses' evidence.

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1. Steyn 1954 (1) SA 324 (A) 336A. See also Lansdown & Campbell 512.
2. Practice Notice [1982] 1 All ER 734-736.
3. Law Reform Commission of Canada Disclosure by the Prosecution (1984) 24.

2. THE ROLE OF THE COURT DURING THE STATE CASE

The prosecutor's duty as "minister of the truth" does not ensure that the evidence he presents to court is admissible or reliable. Since the undefended accused is not always able to exert control over the admission of evidence, or to test its credibility, the enforcement of the rules of evidence and the establishment of the truth may be largely dependent on the efforts of the judicial officer.

2.1. CONTROLLING THE ADMISSIBILITY OF THE STATE EVIDENCE

The prosecutor may only adduce "such evidence as may be admissible"[S 150(2)] and although there is no formal onus on the accused to object to the introduction of inadmissible evidence, the task of the defence lawyer in the adversary system is to ensure that the prosecutor abides by the rules of evidence, and to object if he does not. Due to the complexity and the unfamiliarity of the rules of evidence, the undefended accused is patently unable to perform a similar function. It is therefore the court's duty in this situation to control the production of evidence by the prosecution and prevent the admission of inadmissible evidence.[1] For instance, the court must stop improper leading questions[2] and intervene if the prosecutor attempts to disclose the accused's previous convictions.[3]

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1. Janke 1913 TPD 382. See also Nkosi 1957 (1) SA 495 (A) 500G.
2. Mhlanga 1955 (2) PH H151 (C).
3. Tyomb 1983 (1) PH H60 (O).

With the knowledge that the undefended accused is in no position to object to inadmissible evidence, the court cannot assume a passive role in this regard.

2.2. TESTING THE EVIDENCE OF STATE WITNESSES

The accepted way of establishing the truth in an adversary system is by means of cross-examination. This has been lauded as the best instrument to discover the truth[1] and is regarded as a skill which lawyers develop through years of experience.[2] Cross-examination is, however, a formidable task for the undefended accused and without the assistance of the judicial officer, it may be an impossible one. It is thus the court's duty to facilitate this accused's cross-examination of State witnesses by advising him of his rights and duties in this regard and assisting him in the exercise thereof. Less certain is whether the court should independently test the evidence of these witnesses where the accused has failed to do so himself.

2.2.1 INFORMING THE ACCUSED OF HIS RIGHT TO CROSS-EXAMINE

An accused has a right to cross-examine any witness called on behalf of the prosecution.[3] He must therefore be given the opportunity to exercise this right and a denial thereof will per se constitute a failure of justice.[4] When dealing

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1. Wigmore Evidence 5ed par 1367.
2. G Colman Cross-Examination (1970) 1.
3. S 166(1); Ndawo 1961 (1) SA 16 (N) 17; Mcolweni 1973 (3) SA 106 (E). This right also exists in relation to a witness who has been recalled by the prosecutor, Makaula 1961 (4) SA 600 (E).
4. Montse 1969 (1) PH H119 (N); Ndawo supra 17.

with an undefended accused, the court should invite the accused to cross-examine every witness. This is not, however, an absolute rule. In Hughes 1969 (1) PH H14 (N) the accused, with a record of seven previous convictions and facing a charge of rape, cross-examined the first three witnesses vigorously. When the district-surgeon testified, the magistrate inadvertently failed to invite the accused to cross-examine, and the accused did not ask for the opportunity. The Court held that in view of his previous convictions and behaviour in court, the accused knew full well that he had a right to cross-examine. The failure to invite him was thus not an irregularity. It is submitted that although such a conclusion may have been justified in casu, a court should not lightly assume that an undefended accused knows his rights and deliberately refrains from exercising them.

The usual time for the court to extend such an invitation is once the evidence-in-chief of the witness has been completed. In Magwaza 1976 (4) SA 282 (N), however, it was suggested that the accused should be apprised of the right at the commencement of the trial.[282 in fin] Much is to be said for the idea that the accused should be apprised of the purpose of cross-examination before a witness gives evidence, as this would enable him to listen purposefully to that evidence. It should still remain obligatory, though, to explain his right again after the evidence-in-chief has been completed.

For the undefended accused appearing for the first time in a court, the invitation to cross-examine may be incomprehensible.[1] To assist such an accused, Ferreira [42] has suggested that the following questions should be put to him: (a) Did you hear what the witness has said? (b) Do you deny or admit what he has said? If he denies it, he must be told to argue (stry) with the witness. If he admits the evidence he should be asked whether there is anything else which he wants the witness to say. Although this explanation is better than the usual "Do you have any questions?", it does not cover all the important aspects of cross-examination. In Sithole 1959 (2) PH H82 (N) a more comprehensive explanation was suggested:

> "It ought to be made very clear to him that he now has the opportunity of suggesting to the witness any aspect in which he, the accused, claims that the evidence is wrong, and any reason why he should give false evidence or incorrect evidence, eg, that the witness has some motive for giving false evidence against the accused. He should further be told that now is the opportunity to invite the witness to admit any fact not yet mentioned by him in his evidence which he desires to have on record and that he has the right to cross-examine the witness generally with regard to his credibility."

In Field 1967 (2) PH H308 (N) the Court opined that it is desirable that the accused be further informed that if he fails to question the witness, the court may, but will not necessarily, draw the inference that the evidence is not challenged and therefore impliedly accepted by the accused.[2] It is submitted that he should also be informed

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1. See Ferreira 42.
2. See also Ajam 1983 (1) PH H84 (C).

that if he fails to disclose his defence to the witness, it could be regarded as a recent fabrication.[1]

It is not clear whether the failure to give such a comprehensive explanation would lead to the setting aside of a conviction. It was said in Field that it was "competent" and "desirable" that the trial court should properly inform the accused as to the functions and purposes of cross-examination. It is submitted, however, that the failure to give a full explanation should be regarded as an irregularity leading to the setting aside of a conviction, as it directly affects the undefended accused's ability to participate in the production of evidence. If this accused is not informed of the purposes of cross-examination, and the consequences attached to a failure to carry it out, he will not be in a position to utilize the opportunity adequately.

An accused has the right to apply to court for the recall of a State witness for further cross-examination. As the need to recall a witness does not often present itself, there seems to be no general duty on the court to inform the accused of the right.[2] Where, however, it becomes apparent that there is such a need, it is incumbent on the judicial officer to notify the accused of this right accordingly.[3]

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1. Mngomezulu 1983 (1) SA 1152 (N) 1153G.
2. Shula 1924 TPD 449 449.
3. Mtetwa 1974 (4) SA 252 (D) 254C.

2.2.2 ACCOMMODATING THE UNDEFENDED ACCUSED'S INABILITY TO CROSS-EXAMINE.

Undefended accused usually lack the skills necessary to cross-examine a witness effectively, and their efforts have been described as "very often lengthy, tedious, repetitive, irrelevant and ineffectual".[1] In many instances the questions asked are few or none at all.[2] Even if the accused is given a full and correct explanation, the obstacles to utilizing the opportunity effectively remain immense. In the words of Didcott J:

> "It does not follow, however, that he understood what was really required of him, or that he had any idea of how to achieve it. One is not unaccustomed to trained lawyers, after all, to whom the art of cross-examination is a mystery, to whom it means little else than "putting" perfunctorily to the witness that he is not speaking the truth. More familiar still is the kind of performance one tends to get from laymen. Few have the wit to appreciate every point they should challenge or make, and to sort the wheat from the chaff in this respect. Few have the memories to store every detail of the evidence they hear, and not many more the literacy to note such as the trial progresses, or the means of doing so when it comes to that, the writing pads and ballpoint pens which judicial officers, prosecutors and defence counsel take for granted and without which each would soon be at sea. And scarcely any know how to set about the task when the moment arrives. So many records one sees on appeal and review show a layman doing his best, only to find himself pulled up time and again for assertions instead of questions, or for questions that are muddled or irrelevant, repetitive or argumentative, until eventually he tires of the effort".[3]

The Court has made some attempts to accommodate the undefended accused's inability to cross-examine

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1. Nkomo 1975 (3) SA 598 (N) 599G.
2. Sebatana 1983 (1) SA 809 (O) 812H.
3. Mngomezulu 1983 (1) SA 1152 (N) 1153B-E. See also Moggaza 1984 (3) SA 377 (C); Leeuwner 1972 (1) PH H51 (E).

professionally by not penalising him for his incompetence, by disallowing confessions inadvertently elicited by him and by allowing him the fullest opportunity to pursue his questioning.

Two important rules of cross-examination, predicated on the assumption that the examiner is a skilled lawyer, may operate unfairly in respect of the undefended accused. The first is that where an allegation is not placed in dispute during cross-examination, it can be regarded as admitted by the defence,[1] and the second that where the accused conceals his defence without giving the State witnesses an opportunity to comment on it, the court may take such concealment into account in later rejecting the accused's version "as a concoction brewed late in the day".[2] The Court has been reluctant, however, to apply these rules to the undefended accused,[3] as he cannot be expected to have the lawyer's insight into the purpose of cross-examination or an understanding of the rules regulating it.[4] It is therefore undesirable to draw the conclusion that the evidence of a witness is the truth simply because the

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1. Van Wyk 1977 (1) SA 412 (NC); Mngomezulu 1983 (1) SA 1152 (N) 1153G.
2. Mngomezulu supra 1153H; Swanepoel 1968 (1) PH H134 (GW). See also P 1974 (1) SA 581 (RA).
3. Mehlape 1963 (2) SA 24 (A) 34F; Petersen 1982 (1) PH H93 (A); Shasha 1972 (1) PH H17 (C); Sebatana 1983 (1) SA 809 (O) 813D-E; Khumalo 1966 (1) PH H220 (N).
4. Mvimbi 1982 (1) PH H76 (O); Mngomezulu supra 1153F.

accused has failed to cross-examine him.[1] Even if the accused has been duly warned of the consequences of a failure to contest the evidence of a witness, it is submitted that it still cannot be assumed that he appreciated the full and complex consequences of such a failure.

Another potentially prejudicial rule is that pertaining where a confession of the accused is revealed through his cross-examination of a witness. If an otherwise inadmissible confession of the accused is elicited from a State witness by an accused or his lawyer during cross-examination, such a confession will be admissible as long as it was a direct and fair answer to a question.[2] The rationale for this rule, Steenkamp J stated, is that accused or their lawyers are presumed to be right-thinking (regdenkend) and if they choose to elicit an inadmissible confession, then they must bear the consequences.[3] Aware that an undefended accused cannot be deemed to have the same legal knowledge as a lawyer, the judge added that in such a case the court must be satisfied that he fully appreciated the risk involved.[4] It is submitted that an undefended accused will seldom know or understand what a confession is, that admissibility

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1. Jawke 1957 (2) SA 187 (E) 190D; Qgatsa 1957 (2) SA 191 (E) 193-4.
2. Olifant 1982 (4) SA 52 (NC) 59C; Bosch 1949 (1) SA 548 (A) 533; Mokoena 1978 (1) SA 229 (O) 235F-G; Ncanga 1983 (2) PH H154 (O). But see Magagula 1981 (1) SA 771 (T) 778-780.
3. Olifant supra 59A.
4. 59D. See also Mokoena supra 235F-G; Ncanga supra.

criteria exist, and that by his own mistake it may be placed on record to his prejudice. To obviate an enquiry into all these aspects, it is submitted that the only satisfactory solution to this problem is simply to regard a confession so elicited as inadmissible in the case of an undefended accused.[1]

The Courts have also been prepared to make allowances for an undefended accused's lengthy, albeit ineffectual cross-examination, and a line of questioning should be halted only if it appears that the examiner is attempting to tire the witness unreasonably.[2] In general, the unjustified limitation of his cross-examination will constitute an irregularity which may lead to a failure of justice where uninterrupted cross-examination might have brought new evidence to light,[3] or where the court might be precluded from properly assessing the remaining evidence because of the irregularity.[4] The Court of review might be unable to say whether, on the evidence unaffected by the irregularity, the guilt of the accused was proved beyond reasonable doubt.

2.2.3 ASSISTING THE ACCUSED IN HIS CROSS-EXAMINATION

There have been tentative suggestions that the court should actively assist the undefended accused in his cross-examination where the latter fails to conduct it

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1. See Magagula 1981 (1) SA 771 (T) 778-780.
2. Moggaza 1984 (3) SA 377 (C) 385.
3. Ntshangela 1961 (4) SA 592 (A) 599B.
4. Mngogula 1979 (1) SA 525 (T).

competently. What the extent of the court's assistance should be, however, is not clear.

Miller J in Mngadi 1973 (4) SA 540 (N) regarded it as "proper and laudable to give assistance to an undefended accused person who has difficulty in formulating questions which need to be put to the witness".[541H] In Sebatana 1983 (1) SA 809 (O) Malherbe AJ contended that the court should go further than merely performing a subsidiary role by formulating the accused's questions. He said

> "dat die voorsittende beampte in 'n geval soos die onderhawige 'n plig het om die beskuldigde te help om sy verdediging by wyse van kruisverhoor voor die hof te plaas deur, bv, vir hom uitdruklik te vra of hy saamstem met elke wesentlike bewering wat teen hom gemaak is deur die Staatsgetuie. Op so 'n wyse behoort dit in die meeste gevalle gou duidelik te wees watter getuienis betwis word en kan die voorsittende beampte self die nodige vraag aan die Staatsgetuie stel of stelling aan hom maak. Dit sal minstens darem vir die beskuldigde die indruk skep dat hy billik behandel word gedurende die verhoor".[1]

Van Niekerk J in Dipholo 1983 (4) SA 757 (T), however, disagreed that there is a duty on the judicial officer to assist the accused to place his defence before court by means of cross-examination, but thought that it would be desirable for him to ask the accused expressly whether he agrees with the essential allegations made against him by the State witness.[760D] It has also been suggested that, where an accused has disclosed his defence in terms of s 115, the judicial officer may ensure that it is put to the

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1. 812H-813A. See also Kumalo 1961 (2) PH H220 (N); Van Wyk 1984 (2) PH H136 (C).

witnesses.[1]

It is submitted that from these cases three duties should be distilled. Firstly, the court is obliged to assist the accused in the formulation of questions where the latter experiences difficulties in doing so efficiently. Secondly, it must determine the facts in dispute by ascertaining from the accused the extent to which he disputes the witness' evidence. Thirdly, where the dispute is identified and localized, either as a result of the second duty, or the accused's s 115 statement, the court must assist in putting the accused's defence to the State witnesses.

2.2.4. QUESTIONING THE STATE WITNESSES

In recognizing and carrying out these duties, the court may render valuable assistance by reformulating the accused's questions and ensuring that he contests all the disputed aspects of the witness' evidence. The more difficult question to be addressed is whether the court should be duty-bound to test independently the credibility of the State witnesses' evidence where the accused fails to do so himself. The purpose of such a duty, which is in essence inquisitorial, would be to determine whether the State evidence provides a reliable basis for a possible conviction.

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1. See Thomas 1978 (2) SA 408 (BSC) 409H; Lansdown Report par 283. But see Shezi 1984 (2) SA 577 (N) where the magistrate's failure to assist the accused in this regard was not even commented upon by the Court on review.

The traditional approach has always been that the court should remain impartial and aloof from the contest and not actively participate in the questioning of witnesses.[1] This means, for instance, that the court should not infringe upon the domain of the prosecutor. In the words of Wylde CJ in Enslin v Truter (1852) 1 SC 207 "a nominal public prosecutor, with all his functions to be discharged by the Magistrate who is also to try the case, cannot legally exist".[215] The judicial officer may thus not assume the role of the prosecutor,[2] or direct the prosecutor as to how to conduct the prosecution in his court.[3] This does not, however, 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,[4] it would enjoy the right to ask questions, even though these may aid the State case.

In respect of court assistance to the undefended accused, the Court has been cautious in considering the imposition of an inquisitorial duty upon the judicial officer to test the reliability of State witnesses' evidence. The Appellate Division has recognized that a judicial officer, in the trial of an undefended accused, need not adhere strictly to the duty not to intervene in the proceedings and a greater

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1. See ch 7 below for a full discussion of the court's questioning of the accused and his witnesses.
2. Hepworth 1928 AD 265 270; Impey 1960 (4) SA 556 (E) 561; H 1962 (1) SA 197 (A) 205.
3. Mtembu 1965 (1) PH L7 (T). Contra see Ferreira 37.
4. See below ch 7 for a full discussion of the court's power in terms of s 167 and 186 to call witnesses.

latitude in the questioning of witnesses is allowed.[1] In Appel 1982 (1) PH H31 (A) the Appellate Division adopted an even more robust approach. Dealing with a case where the accused, both young, inexperienced and undefended, failed to question the complainant about her ability to identify them, the Court quoted with approval the following dictum from the unreported decision in Shekelete Mjufu v Rex November 1947 AD:

> "A bald statement that the accused is the person who committed the crime is not enough. Where the accused is an ignorant native who is unrepresented by counsel or an attorney and who is therefore unable himself to probe the evidence of identification and where the prosecutor has not done so, the Court should undertake this task as otherwise grave injustices may be done".

The Court thus accepted the principle that it is the duty of the judicial officer to ensure, before convicting an undefended accused who could not test the reliability of any witness, that the evidence is sufficiently credible to found a conviction. This obligation is a further expression of the court's overriding duty to see that justice is done,[2] complementing its inquisitorial power and duty to call witnesses if the interests of justice so demand.[3] Justice clearly requires that an accused should only be convicted on evidence the reliability of which has been tested. Participation in the testing of the State evidence would not compromise the court's impartiality. To

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1. Sigwahla 1967 (4) SA 566 (A) 568; Rall 1982 (1) SA 828 (A) 831G. See also Sebatana 1983 (1) SA 809 (O) 813A.
2. Hepworth 1928 AD 265. See also NC Steytler "Die Onverdedigde Beskuldigde: Die Inkwisatoriese Rol van die Voorsittende Beampte" (1982) 6 SACC 278 282.
3. S 167 and 186. See further ch 7 below.

the contrary, by 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.[1]

The court may find it difficult to execute this duty if confronted only with the bald statement of the witness. Its task may be facilitated by the accused's s 115 statement, which would indicate the area of dispute. Since consistency is one of the key factors in the determination of a witness' credibility,[2] it is essential that the witness' prior police statement be disclosed to the court. Without this statement the court will not be in a position to establish the witness' consistency and hence credibility. The duty of the prosecutor to disclose discrepancies would thus be performed by the court. Although the court's questioning will be no real substitute for the services of a defence lawyer, it would at the very least place the conviction on a sounder factual base.

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1. Steytler 1983 SACC 283. See also Sebatana 1983 (1) SA 809 (O) 813A.
2. R Eggleston Evidence, Proof and Probability (1983) 192. See further ch 8 below.

3. THE DISCHARGE OF THE ACCUSED AT THE END OF THE STATE CASE

Section 174 gives a court the power to acquit an accused at the close of the State case "if there is no evidence that the accused committed the offence." "No evidence" has been interpreted to mean "no evidence on which a reasonable man might convict".[1] The important question which arises is whether the court is obliged to discharge an accused if there is no prima facie case against him. The main argument against such a duty is that it is always open to an accused to close his case without leading any evidence. In Mkize 1960 (1) SA 276 (N) Burne AJ expressed this sentiment as follows:"If he chooses to effect self-immolation, or to commit forensic hara-kiri giving evidence incriminating himself, that is his own fault".[281G-H]

A lawyer would be able to determine, after a mature reflection on the evidence before court, whether there is sufficient evidence to sustain a conviction. The undefended accused, on the other hand, is not in a position to judge the strength of the evidence against him, and, because of his ignorance, may proceed to provide the incriminating evidence necessary to secure his conviction. It is thus important to establish first, whether there is a duty upon the court to discharge an accused in this situation, and

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1. Shein 1925 AD 7 9; Khanyapa 1979 (1) SA 824 (A) 838F. See also the decisions noted by A St Q Skeen "The Decision to Discharge an Accused at the Conclusion of the State Case: A Critical Analysis" (1985) 102 SALJ 286 287 n8.

secondly, whether the undefended accused is treated any differently from those assisted by legal practitioners at this stage of the trial.

3.1. A DUTY TO DISCHARGE?

There is a degree of uncertainty in the case law as to whether a duty to discharge ever arises. There have been a number of decisions which grant the judicial officer the right to refuse a discharge even though there is no evidence against the accused. In Kritzinger 1952 (2) SA 401 (W) it was said that the court has an absolute discretion whether or not to discharge and any attempt to fetter it should be deprecated.[1] It has been recognized, however, that the exercise of the discretion should be judicial.[2] In Ostilly 1977 (2) SA 104 (D) Kumleben J declared that if there is no evidence which might reasonably lead to a conviction, sound reasons must exist for refusing an application. These reasons, however, the judge felt, could not and should not be circumscribed.[106F] The possibility that evidence may emerge from the defence case has been regarded as justifying a refusal.[3] If, however, the possibility that evidence of accused or co-accused may supplement the State case, is so remote as to be fanciful or unreal, then it would not be a judicial exercise of discretion to refuse a discharge on

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1. 404B-C. See also Mkize 1960 (1) SA 276 (N) 276D-E.
2. Herholdt (3) 1956 (2) SA 722 (W) 723; Mpetha 1983 (4) SA 262 (C) 266 in fin.
3. Kritzinger supra 406A; Bouwer 1964 (3) SA 800 (O) 806; Shuping 1983 (2) SA 119 (B).

that ground alone.[1]

On the other hand, it was held in Mall (1) 1960 (1) SA 340 (N) that it would not be a judicial exercise of discretion to refuse a discharge in the expectation that the accused may be convicted "out of his own mouth or the mouth of a co-accused".[343A] Trollip J in Heller (2) 1964 (1) SA 520 (W) also doubted the correctness of the statement in Kritzinger that a court is entitled to refuse a discharge on the basis of a possibility that the State case may be strengthened by evidence produced by the defence. The Court held that the discretion, when a choice arose, should be exercised in favour of the accused and that his discharge should only be refused in exceptional circumstances.[2] Finally, in Peta 1982 (4) SA 863 (E) the Court for the first time imposed a duty on a judicial officer to discharge an accused, especially if he is undefended, if there is no evidence at all against him.[865B]

While it is still by no means certain whether a duty to discharge will be generally recognized in law, it is submitted that the approach in Peta is preferable in the trial of an undefended accused.[3] Section 174 is an expression of the principle that a person is presumed to be innocent until proved guilty. Should the State fail to

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1. Mpetha 1983 (4) SA 262 (C) 268G. Cf Bouwer 1964 (3) SA 800 (O) 806.
2. 542H. See also Herholdt (3) 1956 (2) SA 722 (W) 723.
3. See also Skeen (1985) 102 SALJ 286 287.

advance a prima facie case, the presumption should prevail; there is no reason to continue with the proceedings and the accused should accordingly be discharged. The argument that the accused himself may close his case after a discharge has been refused, cannot apply to an undefended accused. Furthermore, to expect the court to refuse a discharge because an accused may incriminate himself, in effect compromises the judicial officer by requiring him to decide what is best for the prosecution.

The imposition of a duty on the court to protect the accused against self-incrimination by unnecessarily testifying, is not incompatible with the judicial officer's numerous duties to protect the accused from unwittingly incriminating himself. Setting a trap for the accused runs counter to all the rules aimed at protecting the accused from his own ignorance. The position should be exactly the same where there are co-accused. If there is no evidence against the accused and the nexus between the accused and the offence is dependent on the evidence of a co-accused, the accused should be discharged. It is of course a different matter if the evidence of co-accused could provide the proof necessary for a conviction where a prima facie case already exists.

3.2. INFORMING THE ACCUSED OF HIS RIGHT TO APPLY FOR A DISCHARGE

The application for a discharge may be made by the prosecutor or the accused, or the court may raise the issue

mero motu.[1] For the reasons outlined above, it should be incumbent on the judicial officer to consider mero motu, at the end of the State case, whether the undefended accused is entitled to a discharge. If there is no evidence against such an accused, he should be discharged.[2] If no such duty is accepted, it is important that the accused should be informed of his right to apply for a discharge. The Court has been reluctant, however, to demand this of the judicial officer. In Ngcube 1976 (1) SA 341 (N) it was held that it is not incumbent on the judicial officer to inform the accused at the close of the State case of this right even if there is no evidence upon which a reasonable man may convict.[3] Howard J pointed out that if the court has already decided that there is sufficient evidence, then it would be a futile exercise to inform the accused.[4] This of course assumes that the court is obliged to apply its mind to the question, and there is little authority as yet to suggest that it is compelled to do so. It is submitted that the undefended accused should be informed of his right to apply for a discharge should the judicial officer not be bound to examine the issue mero motu in every case.

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1. Mkize 1960 (1) SA 276 (N) 280F; Godenschwieg 1985 (1) PH H54 (SWA).
2. Peta 1982 (4) SA 863 (E) 865B.
3. 344D. For contrary view see Mdodana 1978 (4) SA 46 (E) 47G-H.
4. 344. But see Hiemstra 319 for contrary view.

4. THE STATE CASE - AN EMPIRICAL ANALYSIS

4.1. THE PRODUCTION OF EVIDENCE BY THE PROSECUTOR.

In the presentation of evidence the inequality between the accused and the State was clearly visible. The State, with vast resources at its disposal to collect evidence and to subpoena witnesses, was routinely able to present a comprehensive case to the court.[1] In the sample a second witness was led in two thirds of the cases and a third witness in a third of the cases. Moreover, the prosecutors led the witnesses carefully in the presentation of a coherent account of the incident.

The prosecutor's impartial role to present all available evidence, even if it favours the accused, and to inform the court where a State witness deviates from his police statement, has been described as "existing largely in ideology".[2] Although the prosecutor, as an officer of the court, is exhorted to see that "justice is done", his duty is nevertheless defined by his role as an adversary.[3] His task is to argue the State's side of the case[4] and not to interfere on behalf of his less able opponent.[5] Even if he is intent on performing his impartial role by presenting any

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1. For a similar position in Australia, see R Douglas "Case Structures, Participation and Verdict in the Melbourne Magistrates' Courts" (1982) 15 Australian & New Zealand Journal of Criminology 195 200.
2. McBarnet 19.
3. LL Weinreb Denial of Justice (1977) 46.
4. McBarnet 20.
5. Weinreb op cit 46.

evidence favourable to the accused, his duty is likely to be undercut by the police docket. It has been shown that police investigations are usually aimed at proving a case, not at presenting an even-handed account of an incident.[1] The information in the police docket presented to the prosecutor is therefore unlikely to contain evidence favourable to the accused.

Hahlo has expressed confidence that South African prosecutors, unlike their American counterparts, "have always been deeply conscious of their duties as officers of the court, and where there has been a slip up, it has generally been due to neglect or carelessness rather than deliberate suppressio veri".[2] Van der Berg, a former State advocate, disagrees with this assessment and advances two main reasons why prosecutors routinely fail to carry out this duty.[3] Firstly, the dictates of efficiency lead to the following situations:

> "To many the presumption of innocence is no more than an irritating obstacle in the daily quest to dispose of the many cases on a congested court roll. It is, for instance, not uncommon for lower court prosecutors to have the accused's intended plea canvassed in the court cells, with broad hints that pleas of not guilty will result in a fortnight's remand in custody. This practice is not confined to the ruthless. If a prosecutor's need to complete his roll leads to such drastic covert measures, he is hardly likely to harbour a sense of fairness sufficient to compel him to disclose inconsistencies in his case that are known only to himself".[204]

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1. McBarnet 86.
2. HR Hahlo "The Role of the Prosecutor" (1963) 86 SALJ 334.
3. J van den Berg (1984) 8 SACC 204.

Secondly, the demands of crime control are emphasized by magistrates and judges alike when they criticize prosecutors for acting in the interests of an accused.[204] The influence of the magistrate in this regard will invariably prevail, as he is the prosecutor's administrative superior and negative comments on the latter's efficiency may affect the prosecutor's career. Efficiency, furthermore, is measured in the number of convictions a prosecutor achieves.[205] Acting within these constraints, full compliance with the duty - over which there are no external controls - seems unlikely.

Out of a total of 119 completed State cases, prosecutors in nine cases, all of them in the regional court, disclosed witnesses' conflicting police statements. They handed the statements to the court, whereupon the judicial officers questioned the witnesses extensively. None of the accused utilized the statements and in one case, after the regional magistrate had destroyed the credibility of the witness, the accused was discharged without even being afforded the opportunity to cross-examine the witness. No case was recorded where the prosecutor disclosed to the court the availability of a witness not called by the State, who could give evidence favourable to the accused.

Prosecutors in Durban clearly perceived the proceedings as party-centred and viewed the accused as an opponent or adversary, even if he was undefended and clearly not in a

position of equal strength. One prosecutor complained to the writer that he preferred defended cases since prosecuting undefended cases was "like stepping on bugs." His perception of his role was thus firmly based on the "battle" model of the trial,[1] rather than seeing his function as an impartial searcher for the truth.

4.2. THE COURT'S CONTROL OVER THE STATE EVIDENCE

The prosecutors in general adhered to the rules pertaining to the admissibility of evidence. Inadmissible confessions or hearsay evidence were seldom sought to be introduced, although leading questions were freely asked. On the whole, the court was infrequently required to control the evidence presented by the State. The accused never objected to any evidence and of the 119 first State witnesses observed, the court excluded evidence in only eight cases, the majority being for hearsay evidence. The court did little to curb leading questions. Interpreters, familiar with the basic rules of evidence pertaining to confessions and hearsay, played in some cases the role of the judicial officer by mero motu excluding inadmissible evidence. In Case A14 RC the interpreter interrupted a Black policeman's testimony with the advice, "Don't tell us what he reported to you, but what you did."

The treatment of rules of evidence in court illustrates how

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1. See J Griffiths "Ideology in Criminal Procedure or a Third "Model" of the Criminal Process" (1970) 79 Yale Law Review 359.

the structure of rules may facilitate either their enforcement or their breach. Since the basic rules relating to hearsay evidence are clear and since this evidence is in most instances inadmissible, prosecutors, judicial officers and even interpreters had little difficulty in identifying and excluding such evidence. On the other hand, there is no categorical prohibition against the use of leading questions, and their permissible use falls within the discretion of the court. This resulted in widely divergent practices with a disregard for the rule in many cases.

In respect of the translation of the State witnesses' evidence, the courts did not always exercise strict control to ensure the proper execution of the interpreters' function. One of the most serious defects in the interpreters' practice was their failure, almost without exception, to translate the questions put by prosecutors and the magistrates to English or Afrikaans-speaking witnesses. When such a witness was asked a question, he would answer back immediately. The interpreter, without being granted or himself demanding the opportunity to translate the question, would interpret only the answer of the witness. When a magistrate intervened during the examination-in-chief, this resulted in two conversations being conducted with the witness at the same time. The interpreter, not able to cope with the rapid verbal exchanges, would in the end give up translating the dialogue altogether.

In case A20 RC the regional magistrate, interjecting during the prosecutor's examination-in-chief, conducted a long dialogue with the district surgeon about a post mortem report, at such a speed that the interpreter could not translate a word of it. There followed a rapid exchange of questions and answers between the prosecutor and the same witness, also not interpreted. In the end the interpreter was totally confused, and consequently translated incorrectly the following exchange: The prosecutor asked the district surgeon whether the cause of death was the neck injury to the deceased. The latter replied: "This is probable when the neck has been twisted in an unnatural way". The interpreter's translation into Zulu was: "The neck, it is said, you twisted in an unnatural fashion", at which the accused immediately, and not without good cause, exclaimed: "I never did it! I deny that!"

The information which the accused eventually received in these cases was thus often a grossly distorted version of the English-speaking witness' testimony. The importance of this partial translation cannot be ignored because, as Rumpole of the Old Bailey wryly commented: "You know what we always say in Court? Listen to the questions. The questions are so much more important than the answers".[1] An answer unaccompanied by the question may be unintelligible and even misleading. The interpreters never stopped the witness, usually a White person in a position of some authority, from

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1. John Mortimer Rumpole for the Defence (1981) 120.

answering the question before it was translated. The magistrate never came to his assistance either, although it was blatantly obvious even to any non-Zulu speaker that the accused was hearing only half of what was said. With 57,1% of the first State witnesses being English or Afrikaans-speaking, the overall effect of this partial translation could have been grave indeed.

4.3. THE ACCUSED'S CROSS-EXAMINATION OF STATE WITNESSES

The criminal liability of most accused was dependent on the resolution of the disputed facts as the applicable principles of the substantive law were usually clear. It has been said that there exists a factual presumption of guilt against the accused despite the legal presumption of innocence.[1] Judicial officers know that statistically most accused will be found guilty[2] and are convinced that the police and the prosecutor would not waste their time if there was no case against an accused.[3] In the reality of the courtroom there is thus a burden on the accused to transform the legal presumption of innocence into a factual reality by proving that the decision of the police and prosecutor to prosecute, was wrong. In short, the accused must positively prove that the evidence of the witnesses is wrong or unreliable or insufficient. An accused escapes conviction if the evidence of the State witnesses, firstly,

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1. B Wootton Crime and Penal Policy (1978) 31.
2. Op cit 33.
3. Cf Goldstein (1959-60) 69 Yale LJ 1149 1163.

does not show the commission of an offence, secondly, is so poor, confused or contradictory during evidence-in-chief that it is per se unreliable, or thirdly, is shown during cross-examination to be false or unreliable.

In the sample the State case collapsed on a number of occasions due to its inherent weakness and not because of any prodding by the accused. In those instances the prosecutors did not hesitate to abandon the case. In the majority of cases, however, the State presented a prima facie case and cross-examination remained the only method, apart from the accused's own testimony, by which his guilt could be disproved.

The importance of cross-examination is extolled by Colman in the opening line of his handbook on cross-examination as follows: "Cross-examination, skillfully employed, is perhaps the most useful of all the instruments used in the administration of justice".[1] To use this instrument effectively is also one of the most exacting skills lawyers acquire through years of experience. The aims of cross-examination are twofold: in the words of Morris, "get what you can; destroy everything else".[2] The task of the cross-examiner is thus, firstly, to get favourable information from the witness, and secondly, to discredit the other evidence by showing it to be either false or unreliable. The

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1. George Colman Cross-examination (1970) 1.
2. Eric Morris Technique in Litigation (1985) 178.

court's duty to inform the undefended accused of his right to cross-examine, and of the purpose of cross-examination, and to assist him where he falters in the task, is therefore of extreme importance.

4.3.1 INFORMING THE ACCUSED OF HIS RIGHT TO CROSS-EXAMINE

The Supreme Court has not spelt out in a definitive manner what the explanation of the accused's right to cross-examine State witnesses should contain, nor is it clear what sanction will follow on a less than complete apprisal. In the absence of a clear directive, the court's explanations were not uniform. Most of the accused (82,9%) were told that they could question the witness if they disagreed with the latter's evidence; two thirds (69,4%) that they could elicit favourable information from the witness; 62,2% that if they did not contest the evidence it would be accepted as correct, and 65,8% were told to put their version to the witness, while only 31,5% were informed that they could also attack the witness' credibility. More than half of the accused (53,5%) were told of four or more of these five aspects of cross-examination, while only 15,2% received none of this information. The magistrates were less meticulous than their brethren in the regional court and a third of the accused in the magistrates' courts were not informed of any of these aspects. The magistrates often sufficed with the question: "Any questions?" [1]

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1. Bekker et al report that in only 24% of their cases did the court explain to the accused the purpose of cross-examination (24).

Some magistrates made a genuine attempt to make cross-examination more accessible to the undefended accused. One explained the purpose of cross-examination to the accused as soon as the first witness was called, "so that the accused can keep in mind points which he may wish to dispute".[Case 8 RC] Another magistrate explained the technique of cross-examination in layman's language: "You can ask the complainant questions to trip her up".[Case 162 DC]

Other magistrates' explanations of cross-examination could have had the effect of inhibiting questioning. One magistrate consistently explained "that the accused's questions would be recorded and used as evidence against him".[Case 228 DC] Although the information is strictly speaking correct, it is highly misleading in that it highlights only one of the consequences of cross-examination, indeed, only the negative side. It is not surprising that after such a caveat, the accused restricted himself to only three questions.

The formalistic and sometimes rushed explanation of rights given by the court, often rendered it incomprehensible to the accused. The same tendency was also observed in respect of the interpreters. In a number of cases their explanations were given so quickly that even the Zulu-speaking court observers could not follow them. Interpreters occasionally made a contribution to the accused's understanding of the nature of cross-examination. In one case the interpreter supplemented the terse information of the magistrate that

"you may cross-examine the witness", with the following advice: "You may leave it [questioning] now, but you will never get another time. They will think you agree with them".[Case A3 RC]

4.3.2. THE ACCUSED AS A CROSS-EXAMINER

The undefended accused's inability to participate in the adversary process was most dramatically illustrated by his failure to utilize adequately the opportunity to cross-examine State witnesses. He was structurally not in a position to perform the function of cross-examination. Firstly, he was not routinely told, before a witness commenced his evidence, that he should note every factual dispute. Secondly, as Didcott J commented in Mgomezulu 1983 (1) SA 1152 (N), few had the tools of the trade to cope with the demands of cross-examination. Few had the memory to remember all the details of the evidence, and less had the literacy to note such with pen and paper. Thirdly, as the "one shot" player, the accused was placed in an unfamiliar or even hostile environment and was under considerable stress because it was his case. The undefended accused's experience of the court proceedings was expressed in the response of a 20 year old Black accused, facing a charge of rape, when asked by the prosecutor "Why did you not ask the complainant whether she was your girlfriend?" He simply replied: "I forgot because I was frightened of the court."

A large portion of the accused did not utilize the

opportunity to cross-examine at all. A quarter (24,3%) of the accused declined to question the first witness and more than a third of the second and third state witnesses (36,7%) went by unchallenged. Of the accused who gave a detailed explanation for their plea of not guilty, 30% asked no questions, while of those who did not, only 14,3% let the first witness go by unquestioned. This may suggest that the s 115 procedure could have lulled the accused into a false sense of security; a confidence that he had in fact presented his side of the story to the court and therefore need not put it again to the witness.

When the undefended accused did 'cross-examine', this did not resemble the activity conducted by lawyers. 43,6% of the accused who attempted cross-examination put five or less questions to the first State witnesses while only 18,8% had more than 15 questions to ask. The average number of questions asked was 9,3 questions per witness.[1] Even fewer questions were put to second and third State witnesses. Accused were particularly reluctant to confront witnesses who were in a position of authority. It has been observed that to inform an accused that he can cross-examine a policeman will not give him the confidence to do so effectively.[2] Black accused seemed to have more confidence to confront a person speaking their own language. They

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1. Bekker et al (13) report an average of no more than seven questions per witness.
2. Sulman & Willis op cit 140.

engaged more often and at greater length in verbal combat with the latter than with English or Afrikaans-speaking witnesses.

The fact that the accused was fully informed about the purposes of cross-examination did not influence the accused's decision to cross-examine or the extent of the examination. It therefore did not matter whether the accused appeared in the regional or magistrates' court; he remained inarticulate and ineffective and often busied himself with irrelevancies. Few of the accused actually formulated questions; most of them (80%) merely started to relate their version of events, and magistrates and interpreters transformed this into a few perfunctory questions.[1] To convince the court of the unreliability of State witnesses' evidence, it is clearly insufficient for the accused merely to state his version to the witness. As McBarnet observes:

> "Approaching an opposition witness with direct denial and a clear statement of one's own case is not cross-examination in that it does not achieve the job cross-examination is fashioned for in the adversary trial. It does not search out weaknesses in an opponent's evidence or undermine credibility. On the contrary, it underlines the opposing case by giving the witness an easy opportunity to simply deny the defence. Professional cross-examination proceeds by different means - indirect questions and subtle questions on peripheral matters with crucial issues casually dropped in en route, by a series of questions leading the witness to a position which he cannot logically deny without discrediting his previous answers".[132-3]

The failure of undefended accused to conduct cross-

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1. Bekker et al (13) reported that 92% of the 'questions' in their sample consisted of a repetition of the accused's account rather than an attack on the credibility of the witness.

examination effectively was most evident when their efforts were contrasted with the combative tactics of the defence lawyers. In the defended cases not a single witness went by unexamined and considerable time was spent on each witness; only 20% of the first witnesses faced less than 15 questions and 46,6% had more than 50 questions put to them.

The judicial officer faced with inept cross-examination by undefended accused, can follow different, but often conflicting lines of action. He is allowed to assist the accused actively by formulating the accused's statements into questions. On the other hand, he may also remain passive and allow the accused to pursue his own questioning, however irrelevant it may be. He may assert his power to control cross-examination by keeping the accused to the formal rules by disallowing improper questions. As there is no clear principle or duty to assist the accused, (none, in any event, which would make a failure to assist an irregularity), the judicial officers approached the matter in different ways.

The various judicial responses to inept cross-examination are well illustrated by Case 23 RC.

Case 23 RC

On a charge of rape three males, aged 18, 19 and 22, denied all knowledge of the incident. During evidence-in-chief the regional magistrate cleared up with the complainant the question of identification of the accused. Accused no 1 put three questions to the complainant, disputing the identification and then said he had no further questions.

M: You have not disputed that you had sexual intercourse with her.
A: I have not.
M: You must put it to her.
A: I did not have sexual intercourse with you.
Complainant (C): You did.
(Pause)
A: No further questions.

Accused no 2 did not fare any better with his cross-examination which consisted of the following questions:

A2: Do you know me?
C: No.
A2: How can you say it was me?
C: You were there.
A: (pause) No further questions.

Accused no 3 was more vociferous. His eighth question was as follows:

A3: Do you have any documentary evidence who raped you?
M: Ridiculous question.
A3: Is this the first time you give evidence against a ...
M: Improper question.
A3: I have no further questions.

Most magistrates allowed the accused his first few questions, however irrelevant they were, as with accused no 2. Within a few minutes the accused would invariably have tired in the effort. Where the accused engaged in extensive questioning, however, the magistrate could, while preserving the appearance that the accused was allowed a free hand in his questioning, quickly terminate it by various techniques.

One technique was to enforce the normal rules of cross-examination. By emphasizing procedural correctness, as with accused no 3, the court could effectively terminate a prolonged cross-examination. A third of the accused were stopped during their cross-examination, the reason in half of the cases being that the question was irrelevant. The

accused were often reminded not to give evidence during questioning, but the neat distinction between putting one's version to a witness and giving evidence, was frequently not understood, and more often than not this intervention led to the accused's silence. One accused, charged with theft and the possession of dagga, was stopped by the magistrate after his fourth question, with the admonishment that he should not narrate his story, since he would later be given the opportunity to put forward his case. After this information, the accused discontinued his questioning.[Case 250 DC]

Where accused attempted to cross-examine more assertively, the court often curtailed their activities, usually on the vague ground of "improper" questioning, as happened to accused no 3 in Case 23 RC quoted above. The more questions the accused put, the greater was the likelihood that the court would interfere.[$P<.05$ $r=.41$] The accused was frequently caught in a double bind; if he was an ineffectual cross-examiner he achieved nothing, but he could not "play the role of the confident, punch pulling advocate" either.[1] In Case 11 RC, for example, a 19 year old male charged with rape, put the following question to the mother of the complainant: "Did you believe what the complainant told you?" The magistrate disallowed the question because it was "irrelevant". After this the accused had no further questions to ask. The question, both legitimate and pertinent if asked by a lawyer, was not permitted from a

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1. McBarnet 135.

combative undefended accused. Confronted with confusing and contradictory judicial instructions, admonishments and directions, the accused frequently opted for non-participation.

A second technique to curtail an accused's questioning was to exert some pressure on him to conduct his questioning in an expeditious manner. One magistrate was quick to ask the accused, as soon as there was a pause after an answer, "Any further questions?" The accused was then compelled to respond immediately to the question, which, at the same time, might have interrupted his train of thought in respect of a possible question. If he did not have a question ready - which was bound to happen as a result of the interruption - he would be forced to say no. By ostensibly allowing the accused a free hand in questioning, and even affirming his right, the magistrate effectively terminated the questioning.[1]

The same technique was frequently employed by interpreters acting independently of the court. One interpreter continually asked the accused after every question, "Have you finished?" By raising his voice and asking, "Do you still have other questions?", the interpreter often terminated the accused's attempts at cross-examination. The interpreter would also at times act as an informal screen

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1. This would be an example of the situational use of rules, as described by Carlen op cit.

for the accused's questions. In Case A17 RC the interpreter refused to translate a question: "You have asked that already, ask another question." In case A50 DC the accused said in Zulu during cross-examination: "The witness does not tell the truth." The interpreter omitted to translate that and merely asked the accused whether he had further questions. The response was in the negative and the court heard, "No further questions."

Some judicial officers extended a helping hand to the struggling accused by assisting him in the formulation of questions and ensuring that he put his defence to the witness. Such assistance, as accorded to accused no 1 in case 23 RC, above, was also in evidence in Case 81 RC.

Case 81 RC

An accused charged with rape was fully apprised of the purpose of cross-examination. His first question to the complainant was:

A: Is this the first time you tell a lie?
M: Improper question.

The magistrate then explained to the accused how to go about revealing a lie. Later on the prosecutor objected to a question on the ground that the witness could not answer as it was not in her knowledge.

M: The prosecutor's objection is valid but I am not going to stop your cross-examination as you are unrepresented.

The magistrate continued to assist the accused by dissecting his questions and putting them to the witness.

The ability of the magistrate to assist the accused in his cross-examination is limited by his structural position. He cannot go much further than dissecting and rephrasing the questions. But as McBarnet remarks, such assistance is not

an adequate substitute for professional cross-examination:

> "The questions take the form of a bland statement with no follow-up possible after a denial. A lawyer would never follow this course. The magistrate does not help the unrepresented defendant but only ensures that the defendant's amateur cross-examination both terminates and fails. The magistrate's help is no substitute for defence advocacy. Nor can it be: that is not his role as an independant arbiter. He does not know the defendant's version either and his questions would be coloured by the only version he has heard, the prosecution's".[133]

4.4. THE COURT'S QUESTIONING OF THE STATE WITNESSES

In observing its overriding duty to see that justice is done, the court may question State witnesses even if such questioning may favour the prosecution, provided that it does not take over the function of the prosecutor. There is thus no categorical prohibition against putting supplementary questions to the witness in respect of an element of the offence which the prosecutor has omitted. There is, however, no corresponding duty as yet to test the veracity or reliability of the witness' evidence.

In the sample most judicial officers participated in the proceedings by questioning the State witnesses. Seventy per cent questioned the first witness during evidence-in-chief, and on average asked ten questions per witness. The aim of the questioning was primarily to elucidate the evidence rather than to test it. Frequently judicial officers, through skilful questions, filled in fatal gaps in the evidence with facts which the prosecutor had failed to elicit. The impression one gained was that the court was not

amenable to the prospect of acquitting an accused person as a result of the prosecutor's inability to elicit the necessary information from a witness.

Many factors may influence the court's decision to elucidate, and thereby strengthen, the State case. One factor which was significantly related to the number of questions asked by the court, was the race of the accused. Witnesses testifying against a Black accused received more questions than others,[P<.01 r = ,38] particularly where the accused was in custody.[P<.05 r =,56] The court was also more likely to enter the arena in respect of the more serious offences.[P<.05 r =,52] Apart from the possibility of racial prejudice, the court's concern was that an accused charged with a serious offence (of which the bail decision was another indicator), should not be acquitted through inept prosecution. There was thus a limit to which the court allowed the adversary process to operate; it should not facilitate the acquittal of a "guilty" accused. The court did, however, intervene readily to test a witness' evidence where the prosecutor indicated that the witness might be unreliable by disclosing his conflicting police statement; the court tested the witness' evidence fully and asked on average 20 questions of such witnesses.

Half of the witnesses were also questioned during the accused's cross-examination, but on a more limited scale, and half of them did not receive more than two questions.

After the accused's cross-examination, 43,8% of them were asked additional questions with an average of 6,6 questions per witness. These questions too were on the whole directed towards elucidating and amplifying the evidence, rather than testing it.

In trying to determine the extent of the court's assistance to the accused, notes were made of occasions when judicial officers either helped with the formulation of questions, pointed out discrepancies in the evidence of witnesses, or in any other way rendered assistance. In 19,1% of the cases such assistance was recorded. Where the evidence of a State witness was palpably false, the court did not hesitate to question a witness thoroughly. In Case 13 RC, after the prosecutor disclosed the complainant's contradictory police statement, the regional magistrate questioned her extensively and the accused, without being given an opportunity to cross-examine her, was discharged. The court did not, however, routinely supplement the accused's lack of cross-examination with its own questioning. The converse was rather true; the less questions the accused asked, the less the court questioned the witness.[P <.19 r =,34] In the assistance rendered the racial factor was again evident. Only 15,8% of the Black accused were assisted whilst 40% of the rest received some form of help from the magistrate.[N=110 P<.05] The Black accused were assisted least where white witnesses or complainants testified, the most when there were Black witnesses.[P<.05 r =.37]

In dealing with the production of State evidence the court's obligation to see that justice should be done was performed primarily in favour of the State. To assist the State, which in this sample was competently represented, was a fairly easy task for the magistrates who, with years of experience on the bench and as prosecutors, were able to ask a few important questions to establish a prima facie case for the prosecution. The court's action on behalf of the accused was limited to assisting the accused to put his questions to the witnesses. It did not include testing the reliability of a witness' evidence mero motu, even if the accused failed to do this himself. Where the prosecutor, however, intimated to the court that the witness was unreliable by disclosing a previous inconsistent statement, the court did take the lead, questioning the witness extensively and with great success. The judicial officer therefore did not perform a fully inquisitorial role to establish independently the reliability of the State evidence.

4.5. DISCHARGING THE ACCUSED AT THE END OF THE STATE CASE

Undefended accused need not be informed of the right to apply for a discharge, and the accused in the sample were routinely left uninformed in this regard, consequently making no such applications. The discharge of an accused was thus entirely dependent on the discretionary intervention of the judicial officer or the prosecutor. In the sample the court took the initiative on a number of occasions and

independently raised the matter of discharge with the prosecutor. In the 119 cases where the State closed its case and a discharge was theoretically possible, magistrates raised the issue 17 times and prosecutors twice. In all, 18 accused were discharged. In half of these cases the State witnesses had been found to be unreliable. In three cases the magistrates refused the State's request for a remand in order to call further witnesses and the accused were accordingly discharged because of a lack of evidence. The remaining accused were discharged because the State evidence failed to establish all the elements of the offence. Where the State evidence could not justify a conviction at all, it was clearly in the interest of the court and the prosecutor to dispose of the matter as quickly as possible through a discharge, thus obviating any further waste of court time.

The accused played no significant role in laying the ground for their discharge. In the 15 cases where evidence was led, seven of the accused did not even cross-examine the witnesses, while the rest asked on average no more than nine questions. Their discharge was thus not occasioned by their efforts, but was due to the inability of the State to muster sufficient and reliable evidence.

Only one regional magistrate, working within the adversary mould, attempted to achieve the participation of the accused in the discharge decision. In Case 13 RC the prosecutor closed his case after the complainant had been totally discredited by him and the regional magistrate regarding her

conflicting statements. The two accused were not given the opportunity to cross-examine the complainant and were advised by the court as follows: "Accused, since you are unrepresented, the court feels that there is a duty to inform you that you may apply for a discharge at this stage if there is insufficient evidence against you." After a short conversation with the accused the interpreter said: "Both accused apply". The court thereupon acquitted them. The court's conduct, which seems excessively formalistic and artificial, is, nevertheless, a true reflection of the legal confusion pertaining to this aspect of the trial. The court, on the strength of some decisions, did not regard itself as duty-bound to discharge the accused although there was no prima facie case against him. It still viewed its position as that of an aloof arbiter who makes decisions only when called upon and so, correctly, informed the accused of his right to apply for a discharge. The court's behaviour here is also further evidence of the conflicting roles the judicial officer performs. After extensive questioning of the complainant, where he assumed a truly inquisitorial role, the magistrate reverted back to his traditional role in the adversary process when dealing with the discharge issue.

Faithful to the case law, the courts did not always discharge accused persons against whom there was no evidence. In a few cases involving more than one accused, where there was no prima facie case, the court did not

discharge the accused. The court thus accepted that the accused, placed on their defence and unable to assess the strength of the State case, would most likely decide to give evidence and might under cross-examination incriminate themselves and one another.

5. CONCLUSION

The State case - prepared and presented by a competent prosecutor - lays the ground for a possible conviction. Yet while in principle an accused should not be convicted on evidence the reliability of which has not been established, the mechanism designed for this purpose - cross-examination - is beyond the capacity of most undefended accused. In recognition of this accused's weak adversarial position, some legal provision has been made for assistance by the court and the prosecutor. The provision made, however, is quite ineffective to achieve its purpose. Where clear rules do exist, they usually set down incomplete or inadequate assistance; more often, though, rules have no absolute application either because of prevarication among the Courts or because they are not accompanied by effective sanctions for non-adherence.

The prosecutor's unenforceable duty to disclose evidence favourable to the accused is therefore superceded by the clearer duty to represent the State's interests in a combative manner. The court's control over the admissibility of the State evidence is confined to situations

unequivocally governed by the law. The absence of direct, clear and enforceable rules results in the judicial officer (and in consequence, the interpreter) rendering divergent types and degrees of assistance to the undefended accused in his cross-examination of the State witnesses. It also accounts for inconsistent discharge practices.

The measures available to protect the undefended accused at this stage of the trial encompass those designed to strengthen the accused as an adversary and those involving inquisitorial-type intervention by the judicial officer on the accused's behalf. In relation to cross-examination, it is submitted on the strength of the empirical evidence above that no degree of formal assistance will make the accused an effective cross-examiner. The degree of skill and articulateness required, means that advice alone cannot equip the accused to test the State case satisfactorily. The testing of the State evidence being pivotal to the outcome of the trial, this is an area where independent inquisitorial intervention by the court is the only means of achieving justice for the undefended accused.

CHAPTER SEVEN THE DEFENCE CASE

After the closure of the State case and if the accused is not discharged, there are a number of ways in which an accused may conduct his defence. He may close his case forthwith, or proceed to testify and/or call witnesses. The choice of the accused in this regard will normally depend on an assessment of the strength of the State case. The undefended accused will usually be unaware of the different avenues open to him and the considerations which should be taken into account in making such a decision. The court is entrusted with the responsibility to ensure that the undefended accused is not prejudiced in his defence by his ignorance. The court's primary task in this regard is thus to facilitate the accused's participation in the adversary proceedings by informing him of his rights and duties in respect of the production of evidence. It will be argued that the court also has a subsidiary duty to assist the undefended accused in the presentation of his defence.

1. ADVISING THE ACCUSED OF HIS RIGHTS AND DUTIES IN CONDUCTING HIS DEFENCE

It is incumbent on the judicial officer to apprise an undefended accused of the courses open to him for the conduct of his defence.[1] As the majority of accused may not be fluent in, or familiar with either of the official languages, the explanation of the accused's rights must be

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1. Vezi 1963 (1) SA 9 (N) 11C; Cele 1973 (1) PH H31 (N).

translated for the accused. The duty to give the explanation, however, remains that of the judicial officer; he may not delegate it to the interpreter.[1]

1.1 THE RIGHT TO TESTIFY OR TO REMAIN SILENT

Section 151(1)(a) provides that where the accused is not discharged in terms of s 174, the court "shall ask him whether he intends adducing any evidence on behalf of the defence...", and further "whether he himself intends to give evidence..."[S 151(1)(b)] The Court has made it clear that this enquiry is imperative[2] and that the accused's attention should specifically be drawn to the fact that he may testify.[3] The undefended accused should also be informed that he has the right to remain silent.[4] Merely to ask the accused whether he wishes to say anything is insufficient[5] and the explanation should expressly inform the accused that he is under no obligation to place his side of the case before the court.[6] Once the accused has decided not to testify, his decision should be respected and the judicial officer should not attempt to convince him to

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1. Mzo 1980 (1) SA 538 (C) 539E; Sithole 1967 (2) PH H293 (N); Beter TPD 11/1/63 reported in (1963) 26 THRHR 122.
2. Demaar 1922 CPD 96; Read 1924 TPD 718 719; Graan 1925 EDL 49; Swart 1926 NLR 486; Ndalaza 1930 EDL 417; Sibia 1947 (2) SA 50 (A) 54; Vezi 1963 (1) SA 9 (N) 11D; Moloyi 1978 (1) SA 516 (O) 522H; Motaung 1980 (4) SA 131 (T) 133.
3. Sibia supra 54; Vezi supra 11D.
4. Vezi supra 11D; Cele 1973 (1) PH H31 (N); Mdodana 1978 (4) SA 46 (E) 48C.
5. Mdodana supra 48C-D.
6. Mdodana supra 47G. Cf the explanations at s 115 proceedings, Evans 1981 (4) SA 52 (C).

change his mind.[1]

Mere knowledge of the choice does not, however, guarantee the considered and wise exercise thereof, since the undefended accused will invariably have no idea of the important considerations which should be taken into account in arriving at a decision. The court is therefore obliged to divulge some pertinent considerations in this regard to the accused.

Once the accused had been afforded the opportunity to make a statement in terms of s 115 indicating the basis of his defence, the Court soon realized the danger that an undefended accused may decline to testify on the mistaken belief that his statement was evidence and that there is no reason why it should be repeated.[2] This danger is further compounded where the accused is allowed to make an extensive explanation of plea.[3] In order to avert this danger, the accused must be informed that his s 115 statement was not evidence under oath and that if he wishes to put his side of the case to the court, he should give evidence under oath.[4] This duty has been extended to the situation where

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1. Klumalo 1972 (4) SA 500 (O) 501. See below for circumstances in which some attempt at persuasion should be made.
2. Moloyi 1978 (1) SA 516 (O) 523B; Dreyer 1978 (2) SA 182 (NC) 184A.
3. Moloyi supra 523B.
4. Dreyer supra 184B; Thomas 1978 (2) SA 408 (BSC) 409; Kekwana 1978 (2) SA 172 (NC) 176; Thela 1979 (3) SA 1018 (T) 1024B; Campher 1981 (2) PH H187 (C); Moloyi supra 523B (which regarded such a warning merely as "wenslik"); Benjamin 1983 (2) PH H198 (C); Brown 1984 (3) SA 399 (C) 401-H.

the accused, after a plea of guilty, makes an exculpatory statement during the magistrate's questioning and his plea is later changed to not guilty.[1] This accused may labour under the impression that he has already given his side of the story at the outset of the case and that it would therefore be unnecessary to repeat it.[2] On the same basis Grosskopf J in Mzo 1980 (1) SA 538 (C) was of the opinion that the accused should also be informed at this stage that any statements he made during his cross-examination of State witnesses were not evidence either.[539B]

The accused should be warned that should he choose to testify, he may be subjected to cross-examination by the prosecutor.[3] It is submitted that the accused should similarly be apprised of the possibility of questioning by the court. The new provision that he must testify first,[S 151(1)(b)(i)] should also be explained.

An important consideration to be taken into account by the accused in deciding whether or not to testify, is the strength of the State case. If there is no case to meet, then it would be foolish to testify, but where there is a prima facie case against the accused, there are compelling reasons why the accused should give evidence. The undefended accused is in no position to make an assessment of the evidence for the prosecution, and there is a real

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1. Afrika 1982 (3) SA 1066 (C) 1067H.
2. See Steytler (1982) 6 SACC 278 279.
3. Vezi 1963 (1) SA 9 (N) 11D; Ferreira 409.

possibility that he could err in either remaining silent when he should speak out, or testifying when there is no need. There have been a few cautious suggestions that the court should advise the accused in this regard.

In Mdodana 1978 (4) SA 46 (E), where there was no prima facie case for the accused to meet, Stewart J faulted the trial court for not indicating to the accused that

> "he was not under any obligation to place his side of the case before the court. Nor was it indicated to him that he was entitled to apply for his discharge and, if that was refused, to close his case without leading any evidence".[47G-H]

He added that "when explaining his position to him, a magistrate should be careful to ensure that an undefended accused, in an appropriate case, understands that he may close his case without leading evidence".[1] It is submitted that even if the accused in that case had been given this explanation, it would not have assisted him at all in making an informed decision. The question whether there is a case to meet can usually be answered only by means of a skilled legal practitioner's assessment of the State case; the undefended accused is usually not capable of this. With such scant advice as given above, he may well commit "forensic hara-kiri" during his testimony. The judicial officer, on the other hand, is fully capable of assessing the strength of the State case and ascertaining whether the closure of the accused's case would be followed by an acquittal. It is

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1. 48C. See also Beter TPD 11/1/9963 reported in (1963) 26 THRHR 122.

submitted that the only way to prevent the undefended accused from testifying unnecessarily is for the judicial officer to close the case on his behalf when it is clear that the State case will not succeed on its own.[1]

When the magistrate in Govender 1974 (2) PH H63 (N), however, closed the defence case for an undefended co-accused, it did not receive the approval of the Natal Provincial Division. In casu, after the first accused had testified, the second accused was acquitted without being asked whether he wished to give evidence. The first accused appealed against his conviction on the basis that the second accused was acquitted before he was afforded an opportunity to testify, thus denying the appellant the opportunity to cross-examine him. Van Heerden J regarded it as irregular for the magistrate to have closed the case of a co-accused as the latter was never afforded an opportunity to decide for himself whether he wanted to give evidence. As this irregularity was held to have been potentially prejudicial to the first accused, the latter's conviction was set aside. It is respectfully submitted that the decision is open to criticism. In principle there can be no objection to the court acting in favour of an undefended accused who is incapable of appreciating the various considerations involved in making a judicious decision. The appellant cannot be entitled as of right to an advantage - in this

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1. This assumes, of course, that the more preferable path - discharge mero motu - has not been followed.

instance the cross-examination of the co-accused - which in effect involves unfairly exploiting a co-accused's ignorance. If the co-accused had been represented and had closed his case, the appellant could not have claimed that he was irregularly deprived of an advantage to which he was entitled.

When there is a prima facie case to meet, the important considerations involved in an accused's decision whether to testify, were succinctly set out by Holmes JA in Letsoko 1964 (4) SA 768 (A):

> "Generally, in regard to an accused's failure to testify, a useful, practical distinction can be drawn between situations in which the State's case is (i) the direct testimony of a witness or witnesses, and (ii) circumstantial evidence. In (i), if the testimony is wholly credible or non-credible, no problem arises, for in the former case the accused's failure to contradict the credible evidence must inevitably result in the prima facie proof becoming conclusive proof, and, in the latter case, it would be irrelevant: there could then be no prima facie proof and the accused's silence could not make or restore the State's case. It is only when the State's evidence, although amounting to prima facie proof, creates some doubt about its credibility that the accused's silence becomes important, and may be decisive, for his failure to contradict the State's evidence may then resolve the doubt about its credibility in the State's favour".[776C-D]

An undefended accused may have difficulty in weighing up these complex considerations and where he has chosen not to testify, the Courts have been reluctant to attach too much weight to the omission,[1] emphasizing the need for the "greatest caution in drawing inferences adverse to an

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1. Volschenk 1948 (2) PH H155 (T); Mhlati 1976 (2) SA 426 (Tk) 427E-G.

untutored person for his failure to give evidence".[1] Despite this benevolent but passive approach, it would none the less be in the interests of the accused for him to be informed of the particular considerations which are relevant in deciding whether to give evidence. If there is a strong prima facie case against him, or if his silence would resolve any doubt that may exist as to his guilt,[2] the court should inform him that should he remain silent, he will be convicted on the evidence before court. More than this the court cannot, and should not do, as the accused's right to remain silent should still be respected. By outlining the relevant factors, the court will enable the accused to make a more informed choice. An ill-informed choice is no choice at all; mere lip service would be paid to the procedural rights of the undefended accused.[3]

Where an accused wishes to testify, he must do so before any other defence witnesses are called, although the court has the discretion, on good cause shown, to allow otherwise at the outset of the defence case.[4] The purpose of this provision is to prevent the accused from tailoring his evidence to that of his witnesses.[5] If an accused, who at first declined to give evidence, changes his mind, the court "may draw such inference from the accused's conduct as may

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1. Voqwane 1965 (2) PH H175 (SR) per Young J.
2. Cf Letsoko 1964 (4) SA 768 (A).
3. Cf Hlongwane 1982 (4) SA 321 (N) 323D.
4. S 151(1)(b)(i). See Nene 1979 (2) SA 521 (D); Swanepoel 1980 (2) SA 81 (NC).
5. Hiemstra 314.

be reasonable in the circumstances".[S 151(1)(b)(ii)] It is submitted that it is incumbent on the court to inform the undefended accused of these provisions. Should this accused change his mind and elect to testify after his witnesses, the court should be cautious in drawing inferences from this fact. Lawyer-like assessment of the defence case cannot readily be ascribed to an undefended accused.

1.2. THE RIGHT TO CALL WITNESSES

Informing an accused of his right to call witnesses has been described as one of the most important aspects of the court's duty to explain to an accused his procedural rights.[1] Although s 151(1)(a) requires only that the accused should be asked whether he intends to adduce evidence, the Court has interpreted this provision in favour of the accused by insisting that the accused must be asked whether he wishes to give evidence himself and, separately, whether he wishes to call any other witnesses.[2] This has been done, according to Schreiner JA in Sibia 1947 (2) SA 50 (A), in consideration of the fact that the accused may be an "ignorant person unacquainted with court procedure".[54]

The adequacy of explaining the right by merely asking the

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1. Hlongwane 1982 (4) SA 321 (N) 323C.
2. Sibia 1947 (2) SA 50 (A) 54; District Commandant SAP v Murray 1924 AD 13; Read 1924 TPD 718 719; Fish 1934 (1) PH H54 (C); Nyambirikira 1943 SR 183; Simon 1948 (2) SA 925 (SR).

accused "Do you have any witnesses you wish to call?", is open to doubt. Didcott J noted in Hlongwane 1982 (4) SA 321 (N) that "to let him know of that right, yet not how to exercise it when he has no idea and starts running into trouble, is not much use".[323D] It has been argued elsewhere that the information which the undefended accused routinely receives in respect of both the right to call witnesses and how to call them, is inadequate.[1] An undefended accused, ignorant of his right to compel the attendance of witnesses, may well assume that the question, "Do you have any witnesses to call?", refers only to persons who would voluntarily attend court to testify on his behalf. Prospective witnesses may thus be drawn primarily from his own circle of friends or family. Ironically, the personal bond which causes these type of witnesses to attend court and testify for the defence, may undermine their credibility. The accused's misconception may thus prevent him from calling other innocent bystanders whose independent evidence might be of greater value.

It is submitted that in a proper explanation of this right the court should widen the parameters of the accused's vision of possible witnesses for the defence. The following explanation is suggested: "Are there any persons who have seen the incident who may assist your case? If such witnesses are unwilling to come to court, you may ask the

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1. NC Steytler "The Calling of Witnesses by Undefended Accused and the Right to Subpoena" (1983) 7 SACC 74.

court to compel them to attend. They need not be friends or relatives. If they are independent witnesses their evidence will carry great weight".

It is equally important that an accused should be informed as to how he can enforce his right of calling a witness. An accused may secure the attendance of a witness in a lower court by means of a subpoena prepared by him and issued by the clerk of the court.[1] The subpoena must be delivered to the messenger of the court or any other person authorized to serve a subpoena in the area where the witness resides.[Rule 64(2)] The accused must deposit with a prescribed officer of the court a sum of money sufficient to cover the cost of serving the subpoena.[S 179(3)] If the witness resides outside the magisterial district the accused must pay a further amount to cover the witness' transport costs.[S 181]

If the accused can convince the "prescribed officer" that he is unable to pay the necessary "costs and fees" and that the witness is necessary and material for his defence, then that officer must subpoena the witness free of charge.[2] If the clerk of the court, as the "prescribed officer", refuses to subpoena such a witness, the accused may appeal to a magistrate for a decision on the matter.[S 179(3)(b)]

The practical implementation of this formal procedure is

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1. S 179(1); Magistrates' Court Rules rule 64 (1).
2. S 179(3)(a). For similar provision for calling a prisoner as a witness, see Prisons Act 8 of 1958 s 87(4).

fraught with obstacles for an undefended accused.[1] He may encounter difficulties, firstly, in obtaining a subpoena form from the appropriate official, secondly, in locating the messenger of the court for the service of the subpoena, (the latter's office is usually not situated at the magistrates' courts) and thirdly, in being able to afford the money to cover the cost of service and possible transport fees. If unable to raise the money for the latter, the accused must return to the clerk of the court or the magistrate to apply for the free service of the subpoena.[S 179(3)]

The position of accused in custody is even more precarious; these accused would find it more difficult to get even friends or family to court and no specific legal provisions are made to assist them in locating, contacting or subpoenaing witnesses.[2]

Provision has been made for the situation where the court is aware that the accused has encountered difficulties in getting his witness to court; here it is obliged to inform the accused of his right to subpoena witnesses in terms of s 179 and to explain how this can be done.[3] Yet even if the accused is so informed, he will encounter the difficulties inherent in the complex procedure outlined above. These practical problems have led prosecutors and judicial

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1. Steytler 1983 SACC 74 77.
2. Cf Mr Justice AJ Milne's description of the prison barrier to justice (1984 SALJ 681).
3. Hlongwane 1982 (4) SA 321 (N) 323B.

officers to develop informal methods of assisting the undefended accused - usually by subpoenaing a witness on his behalf. If the accused is in custody, it is common practice for the investigating officer to subpoena the defence witnesses at the instance of the court. If this officer cannot trace a witness, he should testify in court to that effect and the prosecutor and the accused should be given an opportunity to question him in this regard.[1]

To leave the matter to the informal discretion of court personnel is not, however, satisfactory, as there are no safeguards that they will routinely exercise this discretion properly. A less cumbersome and more streamlined legal procedure should be created to ensure that all accused benefit from easy access to the legal process.

Within the confines of the present provisions, the following procedure is suggested: The court should inform the accused that he may secure the attendance of any witness by depositing a sum of money with the clerk of the court to cover the cost of the service of the subpoena and possible transport expenses. The subpoena will be served free of charge on proof of his indigence and the necessity and materiality of the witness. The court should then, without delay, decide on the accused's indigence and on the necessity for the witness. It should be the duty of the clerk of the court to provide the subpoena form, issue the

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1. Ajam 1983 (1) PH H84 (C).

subpoena and ensure that the messenger receives it together with the required sum of money (where the accused has not been found to be indigent).

1.3. RECORDING THE EXPLANATION OF RIGHTS

It is essential that it should appear on the record that the accused was apprised of his rights at the close of the State case.[1] If the record does not reflect that all the procedural steps have been followed, it will be impossible for the Court on review to assess whether the proceedings were in accordance with justice.[2] The effect of a failure to record the explanation of rights has not been unequivocally determined. In Motaung 1980 (4) SA 131 (T) it was held that such an omission from the record does not constitute an irregularity resulting in a failure of justice (and the setting aside of the proceedings), provided that the rights were in fact explained. Where, however, it cannot be affirmed that the rights were disclosed, or that the omission has not prejudiced the accused, an appeal against the conviction will be allowed.[3]

Where the record does not disclose the details of the explanation of rights, the practice adopted by reviewing judges of calling on the trial magistrate to declare whether the accused was fully apprised of his rights, is clearly

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1. Puwana 1913 EDL 81; Graan 1925 EDL 49; Read 1924 TPD 718 719; Dreyer 1978 (2) SA 182 (NC) 184.
2. Mdodana 1978 (4) SA 46 (E) 48A-B.
3. Sibia 1947 (2) SA 50 (A) 54.

unsatisfactory. It places the magistrate in a difficult position, as it is not easy to recall exactly what was said in a case completed a month ago, and there is an unhealthy invitation to state that everything was done according to the book. In recent cases, however, no or inadequate recording has been regarded as an irregularity per se and convictions have not been confirmed on the basis of an incomplete record.[1] The latter practice is preferable as it provides a measure for ensuring that procedural rights are correctly explained in all cases.

1.4 THE OPERATION OF PRESUMPTIONS

The use of rebuttable presumptions to facilitate the proof of essential elements of an offence, can be justified only if the accused is aware of their operation and how they can be rebutted. No such knowledge can, however, be ascribed to the undefended accused. To protect this accused, the Supreme Court has burdened the judicial officer with the duty to apprise him of the operation of any presumptions where the prosecution intends to rely on such.[2] The judicial officer

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1. Vlotman 1981 (2) PH H175 (C); Daniels 1983 (3) SA 275 (A) 300D per Nicholas AJA.
2. See eg, Stock Theft Act ch 48 s 5(1) - Lebang 1965 (3) SA 774 (SR) 775C. Dangerous Weapons Act 71 of 1968 s 2(1) - Mthalane 1968 (4) SA 257 (N) 258A; Nabo 1968 (4) SA 699 (E) 701G; Mzopo 1975 (2) PH H164 (N); Magwaza 1976 (4) SA 281 (N) 282E-F. Act 23 of 1963 s 11(3) - Siebert 1972 (1) SA 351 (NC) 353A; Cross 1971 (2) SA 356 (RA); Setenane 1985 (1) PH H46 (O). Act 51 of 1977 s 245 - Andrews 1982 (2) SA 269 (NC) 272B. Act 51 of 1977 s 55 (1), 72(2)(b), 170(1), 188(1) - Du Plessis 1970 (2) SA 562 (E); Bkenlele 1983 (1) SA 515 (O). Act 44 of 1958 s 7(3)(e) - Shonyeke 1981 (2) PH H119 (SWA). Act 41 0f 1971 s 10 - Lango 1962 (1) SA 107 (N) 107G; continued on the next page -

should ensure the accused's comprehension of the presumption by explaining it in clear and simple language.[1] The accused must be alerted to the dangers contained in presumptions and to the manner in which he can seek to avert them.[2] He should further be informed that the presumption can be rebutted by evidence either from himself or other witnesses.[3] He should be advised that a bald statement refuting the conclusion which the presumption produces, would be insufficient,[4] as would be his explanation of plea or the version he put to the witness in cross-examination; evidence under oath will have to be produced.[5]

Should the court mention to the accused possible defences by means of which a presumption could be rebutted? In Magwaza 1976 (4) SA 281 (N) Fannin J did not approve of the argument that such additional information should be divulged. In casu the accused was charged with the possession of a dangerous weapon and could escape liability if he could prove that such possession was not for an

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Shangase 1972 (2) SA 410 (N) 432E; Green 1972 (3) SA 533 (O) 533H. Ord 11 of 1955 s 17bis - Mtembu 1968 (2) PH H298 (N). Act 39 of 1930 s 11(1) - Mkize 1966 (4) SA 280 (N) 282D; Chetty 1975 (3) SA 980 (N) 982E; Khumalo 1979 (4) SA 480 (T) 483H.

1. Brown 1984 (3) SA 399 (C) 401H-I. See also Van der Westhuizen 1975 (2) PH H254 (E).
2. Shangase 1972 (2) SA 410 (N) 432E.
3. Nabo 1968 (4) SA 699 (E) 701G; Maleka 1970 (2) SA 63 (O) 65G; Maloyi 1984 (1) PH H101 (N); Bkenlele 1983 (1) SA 515 (O) 518D; Mokheseng 1981 (1) PH H40 (O).
4. Cross 1971 (2) SA 356 (RA).
5. Kekwana 1978 (2) SA 172 (NC) 175.

unlawful purpose.[1] Although the judge conceded that unlawfulness is not an easy concept to explain to an ignorant person,[282D] he discouraged judicial officers from mentioning specific examples of lawful possession:

> "In the present type of case, where there is or may be a statutory onus upon the accused, a very heavy responsibility is cast upon a judicial officer presiding at the trial, for it is his responsibility to ensure that the accused is fully aware of the provisions of the Act, and is fully aware of the nature of the defence which, if he wishes to escape conviction, he should put before the court....I do not think that it is necessary that the presiding officer should tell the accused that he can escape guilt by satisfying the court that he intended to use the weapon in self-defence, or indeed that he should suggest to the accused any other means whereby he can show that he did not intend to use the weapon unlawfully".[2]

If the trusted teaching technique of giving examples to explain abstract concepts is assiduously avoided, however, the judicial officer's task of explaining the concept of unlawfulness is made extremely difficult. The fear that an accused would "adopt" a defence if given examples of lawful purposes, should not override the principle that the accused should be given a comprehensible explanation. Admittedly, the possibility exists that the accused could adopt a defence so mentioned, but a bold statement asserting a defence is not sufficient to rebut a presumption,[3] and the accused would still be open to cross-examination by the prosecutor and questioning by the court. The suggestion that an accused will escape conviction if he happens to stumble on an acceptable "lawful purpose", cannot, it is submitted,

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1. Dangerous Weapons Act 71 of 1968 s 2(1).
2. 282E-G. See also Mtembu 1968 (2) PH H298 (N).
3. Kekwana 1978 (2) SA 172 (NC) 175.

be regarded as valid. Judicial officers should therefore not be discouraged from providing a thorough, understandable explanation which includes examples of how a presumption may be rebutted.

The explanation of a presumption does not always ensure that the accused understands what is expected of him, or that he is able to communicate a rebuttal effectively. The following advice of Van den Heever J in Siebert 1972 (1) SA 351 (NC) is instructive in this regard:

> "[W]aar 'n arbeider sonder die voordeel van regshulp wel onder eed getuig, maar nie sy storie ver genoeg neem nie, sou dit billiker wees dat die hof deur middel van gepaste vrae pols of hy dit inderdaad verder kan voer".[353B]

The court's duty is thus not limited to an advisory capacity; the accused should be actively assisted when it is apparent that he experiences some difficulty in presenting his rebuttal of a presumption lucidly.

The effect of an omission to inform the accused of the operation of a presumption, will depend on whether he has been prejudiced by it.[1] Where the State relies on a presumption for the proof of an essential element of an offence, then an omission to inform the accused thereof would be fatal for the conviction.[2] Conversely, where the prosecution does not rely on the presumption, the conviction

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1. Andrews 1982 (2) SA 269 (NC) 272B; Setenane 1985 (1) PH H461 (O); Ntuli 1967 (3) SA 721 (N) 722G.
2. Andrews supra 272G; Williams 1975 (2) PH H142 (C); Khumalo 1979 (4) SA 480 (T) 483H. But see contra Lango 1962 (1) SA 107 (N).

will not be affected.[1] It should also be noted in this regard that even where an explanation is given, but it is more confusing than illuminating, little value will be attached to the accused's answers that he understood the explanation and the case will be regarded as if he was not duly warned.[2]

The explanation should be recorded verbatim.[3] Where it does not appear on the record that the explanation was given and there is some doubt whether it was, the conviction should be set aside and the matter referred back to the trial court for a proper warning to be administered.[4]

2. ASSISTING THE ACCUSED IN THE PRESENTATION OF HIS DEFENCE

When undefended accused are called upon to present their defence, most are faced with an unfamiliar and daunting task. They seldom understand the legal procedure and their role in it sufficiently to be able to present the lucid and comprehensive cases submitted by skilled lawyers. In view of the difficulties experienced by undefended accused in this regard, the court should routinely assist them in the presentation of their defence and strict adherence to formal rules of procedure should not be demanded in their case.

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1. Moeketsi v Die Staat 1965 (2) PH H157 (O).
2. Brown 1984 (3) SA 399 (C) 401D.
3. Nabo 1968 (4) SA 699 (E) 701H.
4. Lebang 1965 (3) SA 774 (SR).

2.1. THE TESTIMONY OF THE ACCUSED

2.1.1. TESTIFYING FROM THE WITNESS BOX

On occasions, unsophisticated accused have shown a reluctance to enter the witness box, although intent on testifying. The phenomenon has been ascribed by a Rhodesian Court[1] to the perception that the witness box is the camp of the opposing faction since the latter testified from there. The accused supposes that his entering it would signify either a capitulation to the enemy or a weakening of his opposition. According to Munnik CJ in Mhlati 1976 (2) SA 426 (Tk) there exists also among many unsophisticated Xhosa witnesses a genuine fear of going into the witness box as they believe it to be bewitched.[427C]

It has been accepted by the Rhodesian Court that there is no requirement that the accused should testify from the witness box and accordingly he may be allowed to give his evidence from the dock.[2] Although it is the practice in South Africa for the accused to give evidence from the witness box, he ought to be allowed to do so from the dock if he so requests.[3] In dealing with such accused persons, it is submitted that there is no room for rules that reflect form rather than the essence of proceedings. Local perceptions and beliefs should be allowed to dictate to some extent the

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1. Francis 1956 (2) PH H166 (SR).
2. Francis supra; Finiasi 1963 (2) PH H152 (SR); Herbert 1965 (2) SA 385 (SR); Jonathan 1971 (1) SA 402 (RA).
3. Mhlati 1976 (2) SA 426 (Tk) 427C; Tsane 1978 (4) SA 161 (O).

outer trappings of the trial, and the judicial officer should be sensitive to such considerations and accommodate them where necessary.

2.1.2. PRESENTING HIS EVIDENCE-IN-CHIEF

The undefended accused, perhaps uneducated and/or inarticulate, confronted by the unfamiliar and formal atmosphere of the court, may find it difficult to relate his version of the event in a coherent and logical manner. He may not confine himself to the incident in question, but may include antecedent events which appear to the court to be irrelevant. The court is obliged, however, to allow the accused his day in court and give him the necessary leeway to tell his story in his own way. Yet where the accused omits cardinal aspects of the defence - perhaps facts already intimated in his explanation of plea or cross-examination of State witnesses - it should be the court's duty to draw his attention to these and, through questions, to prompt him to relate his version more comprehensively.[1] The emphasis of the court should be upon eliciting from the accused as much evidence in favour of the defence case as possible.

2.1.3. CONTROLLING THE PROSECUTOR'S CROSS-EXAMINATION

When cross-examined by the prosecutor, undefended accused are particularly vulnerable as they may be unaware of their

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1. See Tengeni 1967 (1) PH H193 (O); Rall 1982 (1) SA 828 (A) 831G.

right to refuse to answer questions which would introduce inadmissible evidence, or to object to the manner in which questions are put. Even if aware of these rights, they would invariably lack the knowledge and skills necessary to exercise them. It should therefore be incumbent on the court to protect the accused's rights by exercising the necessary control over the prosecutor's questioning. The court must disallow questions which tend to elicit the accused's previous convictions or evidence of bad character.[1] In Dozereli 1983 (3) SA 259 (C) Lategan J held that the magistrate's failure to restrain the prosecutor from questioning the accused regarding his previous convictions, resulted in an infringement of a basic right of the accused which per se constituted a gross irregularity, warranting the setting aside of the conviction.[261A]

The court should also ensure that the prosecutor's cross-examination of the accused is fair. In Petersen 1982 (1) PH H93 (A) it was remarked that the presiding judicial officer in casu could and should have stopped the prosecutor when "his zeal outran his discretion". Even if the accused is represented, the court should prevent rude and unreasonable cross-examination.[2] In Gidi 1984 (4) SA 537 (C) Rose-Innes J said that if an accused is undefended, the court's duty to ensure that the cross-examination is fair, should be

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1. Hlela 1981 (2) PH H193 (O); Dozereli 1983 (3) SA 259 (C) 260.
2. Omar 1982 (2) SA 357 (N) 359A; Vaduvela 1974 (1) PH H(S)63 (N).

all the more assiduously observed.[540I] In casu the Court held that the first accused did not have a fair trial as he was not allowed a full opportunity to state his case because of the haranguing, badgering and hectoring of the prosecutor. The second accused, who declined to give evidence, did not have a fair trial either. The Court found that it was likely that he had refrained from giving evidence after he saw how "an accused would be intimidated, insulted, harassed and overborne in the court should he venture into the witness box".[543G] Both convictions were thus set aside. The principle is clear; by failing to curtail such questioning by the prosecutor, the court failed in its duty to assist the two accused in the presentation of their defence. Instead of facilitating the production of evidence, the court committed an irregularity by allowing conduct on the part of the prosecutor which inhibited it.

2.1.4. THE RE-EXAMINATION OF THE ACCUSED

Because an undefended accused is not able to re-examine himself, Ferreira has suggested that the court should put questions to clear up aspects which have been muddled during the cross-examination.[415] It is submitted that this should be recognized as part and parcel of the judicial officer's overriding duty to see that the accused puts his case as clearly as possible before the court.[1]

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1. See Williams 1968 (1) PH L5 (C).

2.2. WITNESSES FOR THE DEFENCE

It is a fundamental principle of justice that an accused should be given ample opportunity to place his case before court and to call witnesses who may give relevant evidence.[1] A court should be particularly careful when refusing to allow an undefended accused to call a witness and should first be assured that the witness cannot possibly give relevant evidence.[2] The accused should be given the fullest opportunity to trace material witnesses. The mere fact that court officials could not trace a material witness during a short adjournment, did not allow the magistrate in Pillay 1967 (1) PH H189 (N) to deny the accused any further opportunity to attempt the same. Where an undefended accused encounters difficulties in bringing a witness to court, it is the duty of the court to assist the accused by subpoenaing the witness in terms of its own powers to call witnesses.[3]

While a State witness is entitled to witness fees unless the court directs otherwise,[4] a witness for the defence will receive fees covering travelling and transport expenses[5] only if the court makes such an order.[S 191(2)] Ferreira suggests that the court may order the payment of expenses if the accused is indigent or has been acquitted.[164] It is

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1. Tembani 1970 (4) SA 395 (E) 396E.
2. Tembani supra 396F; Selemana 1975 (4) SA 908 (T) 909A.
3. S 186. Hlongwane 1982 (4) SA 321 (N) 323.
4. S 191(1). See Hiemstra 393.
5. Government Notice No R653 in Regulation Gazette No 2972 of 28 March 1980 reg 3.

submitted that the court should bring these provisions to the notice of the undefended accused at the conclusion of the proceedings and not wait for the unlikely event of the latter making such an application.

2.3 THE COURT'S QUESTIONING OF THE ACCUSED AND DEFENCE WITNESSES

The court's duty to remain impartial has been viewed as the major obstacle to its active participation in the proceedings.[1] Impartiality entails the judicial officer remaining detached and objective in his assessment and adjudication of the issues contested before him by the parties concerned.[2] Active participation in the trial, it is said, may lead to a dimunition in objectivity,[3] and the following dictum in Yuill [1945] 1 All ER 183 has often been quoted to highlight this danger: "If the judicial officer descends into the arena he is liable to have his vision clouded by the dust of the conflict".[4] Furthermore, in line with the principle that justice must not only be done but also be seen to be done, the Courts have stressed that the judicial officer should appear impartial, particularly in the eyes of the accused;[5] the court should not be seen to be

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1. De Villiers 1984 (1) SA 519 (O) 574G. See also Jacobs 1970 (2) PH H152 (C).
2. Rall 1982 (1) SA 828 (A) 832; Sigwahla 1967 (4) SA 566 (A) 568H; Roopsingh 1956 (4) SA 510 (A) 514.
3. Van Niekerk 1981 (3) SA 787 (T) 794.
4. 189. See also Roopsingh supra 514; Walsh 1961 (2) PH F72 (N).
5. Sigwahla supra 568H; Rall supra 832A; Skhwebelo 1982 (1) PH H60 (O); De Villiers supra 546; Calata 1984 (1) PH H20 (E).

siding with the prosecution.[1]

What then is the correct role for the court in questioning the accused and his witnesses? The answer lies in the distinction between formal and material truth. The 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.[2] 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.[3]

The judicial officer's power to question the accused and his witnesses is accordingly restricted to elucidating or clarifying th evidence presented. In Rall 1982 (1) SA 828 (A), in the court a quo, Didcott J defined his role as trial judge inquisitorially, declaring himself "not a referee in a game who is here merely to blow the whistle." He elaborated: "I am here to discover the truth of the matter".[830G-H] The Appellate Division, however, rejected the view that the

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1. Wood 1964 (3) SA 103 (O) 105G.
2. Hermann (1978) 2 SACC 3.
3. See Yuill [1945] 1 All ER 183 185; Saib v R 1946 (2) PH H191 (A); Wood supra 105; H 1962 (1) SA 197 (A) 205.

court's power to question is so extensive.[1] Acknowledging the well known dictum in Hepworth 1928 AD 265 that the judge is an administrator of justice, not merely an umpire to see that the rules are obeyed, Trollip AJA in Rall formulated the court's power to question witnesses as follows:

> "Inter alia a Judge is therefore entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seems to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case".[831C-D]

The court's power to "elicit and elucidate the truth more fully" is thus seen to be subsidiary, complementing the parties' efforts in searching for the truth.

A number of guidelines have been formulated to limit the court's questioning of the accused and his witnesses to its circumscribed purpose.[2] The proper time to question witnesses is after the litigants have completed their questioning.[3] Although leading questions are not per se proscribed,[4] they are not acceptable when asked in a persistent and pressing manner.[5] Nor is a judicial officer entitled to put such questions to a witness if the answers are calculated to be to his prejudice.[6] Cross-

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1. 832H. See A St Q Skeen "Descending into the Arena" (1982) 6 SACC 180.
2. See Rall supra 831H-832H.
3. Meyer 1972 (3) SA 480 (A) 483.
4. Rall supra 831C-E; A 1952 (3) SA 212 (A) 222.
5. Baartman 1960 (3) SA 535 (A) 541F.
6. Laubscher 1926 AD 276; Masinyana 1958 (1) SA 616 (A) 621D. See also Beattie 1967 (2) PH H318 (O).

examination is not permissible.[1] The manner in which questions are asked is often more important than the number and nature of the questions;[2] the questioning should not intimidate or disconcert the witness to the extent that it unduly influences the quality or nature of his replies, affects his demeanour or credibility,[3] or prevents him from conveying his evidence.[4]

The undefended accused in the witness box, it was said in Tengeni 1967 (1) PH H193 (O), deserves more accommodating treatment than the ordinary witness. It has been stressed that the court must be particularly careful in these cases to preserve an attitude of impartiality[5] and should not assume the role of the prosecutor.[6] The court faces a dilemma where, through the inept cross-examination of the prosecutor, the defence of an accused may not be properly tested. The problem has been raised,[7] but no decision has ever suggested that the court should examine the accused or his witnesses in order to fulfil the prosecutor's function in this regard.

The principles guiding the court's questioning entail in general a prohibition against an inquisitorial search for

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1. Walsh 1961 (2) PH F72 (N); Taylor 1968 (2) PH H388 (N); Titus 1974 (2) PH H(S)95 (C); Van Niekerk 1981 (3) SA 787 (T) 794.
2. De Villiers 1984 (1) SA 519 (O) 545; Skhwebelo 1982 (1) PH H60 (O).
3. Rall 1982 (1) 828 (A) 832G.
4. De Villiers supra 548.
5. Eshumael 1973 (2) PH H83 (RA).
6. H 1962 (1) SA 197 (A) 195.
7. Titus supra.

the truth, particularly where the accused is undefended. Any questioning of this accused should be directed at eliciting or elucidating his defence, not testing its veracity. The primary aim of the questioning is to assist the undefended accused. In Rall it was said that the judge "should and ordinarily would assist him to put his defence adequately, if necessary by the Judge himself questioning prosecution witnesses as well as the accused and his witnesses".[1]

It has been argued above that it should be the proper duty of the court to test the reliability of the evidence of the State witnesses where the accused is unable to do so himself. If the court's role is defined as an inquisitorial one in respect of State witnesses, does consistency and fairness require that this applies equally to the undefended accused and his witnesses? It is submitted that the answer to this question should be in the negative. The recommended adaptations to the court's role in respect of State witnesses are necessitated by the undefended accused's inability to play his role in the adversary system in the testing of the State evidence. The undefended accused is consistently at a disadvantage in this regard in relation to the State, which is represented by a legal practitioner, well-qualified to test the defence evidence. 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

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1. 831G. See also Sigwahla 1982 (1) SA 566 (A) 568F-H; Du Preez 1972 (2) SA 519 (A); Williams 1968 (1) PH L5 (C).

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. These considerations do not apply to the examination of the accused or his witnesses. Since the State is represented by a competent adversary, there is no need for the court to deviate from its established role.

3. THE CALLING OF WITNESSES BY THE COURT

Section 167 empowers the court to examine any person, other than the accused, who has been subpoenaed to attend or who happens to be attending the proceedings, and to recall any witness, including the accused, who has testified. The court is obliged to follow such a course of action if it "appears ... essential to the just decision of the case". Section 186 empowers the court to subpoena, at its discretion, any other person, excluding the accused,[1] as a witness and once again, it is duty-bound to do so if this is "essential for the just decision of the case".

The court has a wide discretion to call witnesses,[2] but this power should be exercised judicially.[3] Only if it is used for a legally acceptable purpose can there be said to be a judicial exercise of the discretion. In Hepworth 1928 AD 265 Curlewis JA said that the power was to be used "so that an innocent person be not convicted or a guilty person get free by reason, inter alia, of some omission, mistake or technicality".[4] The court may thus assist the prosecution by calling a witness who has been omitted by mistake or is necessary in order to rectify some technical deficiency.[5]

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1. Moepane 1958 (3) SA 649 (E).
2. Siko 1959 (2) PH H174 (A); Olyn 1984 (2) SA 75 (NC) 78H; Impey 1960 (4) SA 556 (E) 561 ("the widest possible discretion"); B 1980 (2) SA 946 (A) 953.
3. Gani 1958 (1) SA 102 (A) 108; Siko supra.
4. 277. See also Evans 1924 CPD 232 233; Omar 1935 AD 230; Impey supra 561.
5. See Hepworth supra 277; Van Schoor 1941 CPD 392; Jonas 1920 EDL 26; Mgotywa 1958 (1) SA 99 (E); Beck 1949 (2) SA 626 (N); Singh 1948 (3) SA 554 (N) 557; Kemp 1973 (1) PH H(S)29 (C).

The power may not, however, be used to perform the function of the prosecution,[1] particularly when there is no evidence whatsoever against the accused.[2] The court may exercise its power to elucidate issues,[3] but not to rebut a defence such as an alibi.[4] The power may also be used to assist the accused.[5] In respect of undefended accused, it has been held that if the court notices that he experiences difficulty in getting a witness to court, it should subpoena the witness on his behalf.[6]

The judicial officer must examine the witness himself,[7] and should allow questioning by the parties; he should specifically invite the undefended accused's participation. After calling a witness, the court should afford both parties an opportunity to lead further evidence[8] and where the accused is undefended, he should be invited to do so.[9] It is extremely difficult, it was held in Soni 1973 (1) PH H(S)20 (N), to ascertain in cases where no such invitation was extended, whether there has been prejudice to the accused, and in such circumstances he should receive the benefit of the doubt and

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1. Hepworth 1928 AD 265 270; Impey 1960 (4) SA 556 (E) 562.
2. Naidoo 1934 NPD 393; Hlalele 1978 (1) PH H20 (O); Jada 1985 (2) SA 182 (E) 184G; Contra see Singh 1943 NPD 232.
3. Hepworth supra 270; Hlalele 1978 (1) PH H20 (O).
4. Impey supra 562.
5. Lucas 1968 (2) SA 592 (E); Hlalele supra.
6. Hlongwane 1982 (4) SA 321 (N) 323E.
7. Du Preez 1972 (2) SA 519 (SWA) 522.
8. Du Preez supra 522; Benjamin 1983 (2) PH H198 (C); Johnson 1939 AD 241; Lubbe 1966 (2) SA 70 (O) 72; Nea Hellas (Pty) Ltd and Theo 1935 TPD 262 265; Molifante 1966 (1) PH H116 (O).
9. Soni 1973 (1) PH H(S)20 (N).

the conviction should be set aside.[1]

The principles formulated in respect of the court's power to question witnesses, are a useful guide for the exercise of the court's discretion in this regard. The power is to be exercised within the confines of the adversary process; the court is not to use its power to perform the function of the prosecution. However, in respect of the undefended accused, who cannot fulfil the role of a true adversary, the court should use its power actively to assist the latter in the presentation of his defence. It should therefore be incumbent on the court to call such witnesses who, in its opinion, may favour the accused. If the court has no access to information regarding such potential witnesses, its use of the power to call witnesses would be severely restricted. It has been argued above[2] that it should be the duty of the prosecutor to hand over to the court statements of witnesses favourable to the accused who have not been called by the State. The court would then be in a position to assess their value and, where necessary, call these witnesses.

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1. See also Johnson 1939 AD 241; Nea Hellas (Pty) Ltd and Theo 1935 TPD 262 265.
2. See ch 6 par 1.

4. THE DEFENCE CASE - AN EMPIRICAL ANALYSIS

At the end of the State case, the undefended accused is thrust onto the centre stage of the courtroom drama. The opportunity to present his defence offers him the most important occasion for proving his innocence, as he has invariably been unable to discredit the State case due to his inadequate cross-examination. To compensate for his lack of knowledge and skills, the court is obliged to advise him about his rights and duties in presenting his defence. To assist him actively in the presentation of his defence, however, remains in the domain of the court's discretion.

4.1. ADVISING THE ACCUSED REGARDING HIS RIGHTS AND DUTIES

The Code and the case law have spelt out clearly the various rights and duties which the court has to disclose to the accused. In the survey it was found that the court substantially complied with these rules. Every accused was informed of his right to testify, 91,9% of the right to call witnesses, and 78,8% of the right to remain silent. Most of the accused (85%) were informed that their s 115 statement was not regarded as evidence. Where a presumption was operative, the court usually explained it, and the same applied to competent verdicts. The court explained the rights personally and did not delegate this duty to the interpreter. The translation of these rights to the Zulu speaking accused was also fairly accurate.[1]

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1. Strict compliance with these legal provisions is also reported by Bekker *et al* (14).

Only the rights and duties that the court was legally bound to explain, were disclosed. There was no explanation of the court process by which witnesses could be subpoenaed, or of the possibility of having material and essential witnesses subpoenaed free of charge for indigent accused. Where a duty was not firmly established in the case law, for example the duty to inform the accused that he will be cross-examined by the prosecutor should he testify (as suggested in Vezi 1963 (1) SA 9 (N)), there was no compliance.

Apart from reminding the accused that his s 115 statement was not evidence, other considerations essential to making an informed decision were not routinely divulged. In a few isolated instances, however, the court went beyond the call of duty to assist the accused to make an informed decision. In case 15 RC, for example, the regional magistrate stressed the importance of giving evidence in that particular case.

The State established a prima facie case against two accused for the theft of a film projector. At the end of the State case the regional magistrate gave a full explanation of their rights, and continued as follows:
M: You may state your case now.
A1: No.
M: (repeated the explanation and added) The court cannot attach much credibility to that [s 115] statement.
A: I have a witness.
M: I'll ask accused number two. Think the matter over.
A2: No evidence.
M: Do you realize what the implications are. (He thereupon repeated the evidence of the key state witness) Your denial is not good enough.

No case was encountered, however, where the court strongly advised the accused that he should close his case because there was no case to meet. In the end the majority of the

accused - 72 of 92 who presented their defence - decided to testify.

4.2. THE ACCUSED'S PRESENTATION OF HIS DEFENCE

Bennett and Feldman contend that one of the central determinants of the outcome of contested trials is the participants' storytelling ability.[1] The credibility of evidence - and consequently the verdict - hinges on the way it is presented to court. This involves the party's capacity to produce a coherent and reasonable account of the events in question. The coherence and reasonableness of evidence are not, however, absolute qualities, but are defined according to the social and cultural context. Thus a person from an educationally deprived background or from a different class, cultural or race group to that of the judicial officer, may not be able to present an account that is coherent and reasonable in the latter's eyes. These differences may, however, be mitigated by a defence lawyer, who usually has much in common with the judicial officer in terms of the abovementioned demographic factors. He may bridge the differences by restructuring the accused's version into a story which is intelligible to the court. Both prosecution and defence lawyers play an important role as communication facilitators to ensure that the complainant's and accused's stories are lucidly presented to the court. In the preparation for trial the accused's

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1. WL Bennett & MS Feldman Reconstructing Reality in the Courtroom (1981).

version is moulded into a logical form and during the trial the lawyer seeks to lead the accused to relate his story in a precise, orderly fashion to the court. The undefended accused, on the other hand, has great difficulty in presenting his defence in the same manner without assistance or guidance.[1] His inability to communicate his evidence in an effective manner may be further compounded by fear, confusion or inarticulateness.[2]

In South Africa Hansson has explored the relationship between the difficulties experienced in the comprehension of evidence and the evaluation of such as credible.[3] She examined the extent to which class differences led to comprehension problems which, in turn, would affect the credibility of a witness and in the end the chances of conviction. A number of undefended cases were selected in which the witnesses shared Afrikaans as a first language but came from different social classes according to their race - White or Coloured. The comprehensibility and credibility assessments of 'common users' of language were compared with the credibility assessments of the magistrates who presided over those cases. The 'common users' were students with the same white middle class background as the magistrates.

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1. Cf McBarnet 127.
2. S Dell Silence in Court (1969); Sulman & Willis op cit 139; McBarnet 127.
3. D Hansson Structural Ambiguity of Evidence as a Determinant of Evidence Credibility: A Comparative Study of the Evaluation of Different Groups in the Administration of Justice (1984) Report to the HSRC's Inquiry into Intergroup Relations.

The results showed that the evidence given by Coloured witnesses was more difficult to understand than that given by White witnesses.[27] The comprehensibility of the evidence was dependent on the structure in which the evidence was presented. The structure or framework of a testimony (or story) was formed during the witness' evidence-in-chief and it remained crucial to the coherence of the rest of his evidence.[30] It was found that Coloured witnesses were less able than White witnesses to structure their evidence in a manner that "conforms to the ideal schema of a coherent narrative".[30] The rules determining the ideal narrative schema in a South African court are particular to people of a western, White, middle class background.

There was a high probability that magistrates' judgments of the credibility of testimony would be lower when the evidence was found to be not readily comprehensible. Where the evidence-in-chief was difficult to understand due to its poor structure, it was more likely to be evaluated as lacking in credibility than evidence which was well-structured and therefore comprehensible.[33] Hansson thus concluded that

> "the findings point to the structure and comprehensibility of testimony as a likely source of systematic bias that may operate to the disadvantage of Coloured court participants by increasing the probability of a judgment of incredible and therefore guilty".[34]

The effect of such class differences was mitigated by the assistance of a legal practitioner. This meant that the

undefended accused was doubly discriminated against, not only *vis a vis* the prosecution, but also *vis a vis* defended accused. The complainant and other State witnesses had the advantage of being led by the prosecutor, who would attempt to present their evidence in a coherent way. The accused, on the other hand, was left unguided in the presentation of his evidence. To ameliorate the communication in court, Hansson suggested, *inter alia*, the greater use of legal representation and the appointment of assessors belonging to the same class or racial group as the accused.

If, as in the Hansson study, class divisions within the same language group can have a marked effect on the communication process, then differences in language as well as in class and culture, would have an even more profound influence. In our sample the accused, mostly Black and Zulu-speaking, had to tell their story, unassisted, to White judicial officers. The judicial officers allowed the accused to tell their story in their own way, but few attempted to elucidate it afterwards. Only a third of the accused were asked questions (on average not more than three) for the sake of greater clarity. The accused's "inarticulateness", then, may well have stood in the way of laying a sound foundation for what was perhaps a truthful account.

The Zulu-speaking accused had additional problems in communicating his story through the medium of an interpreter. Apart from the inherent difficulties

associated with communicating effectively across social barriers, there are numerous obstacles in the way of a correct translation of the accused's evidence. The interpreter hears the story piecemeal and is thus not in a position to appreciate the significance of small details and nuances in the light of the full story; he may consequently omit these in the translation. It was found that complex statements containing numerous small details and subtleties of meaning were often simplified. A statement expressing an uncertainty, for example, might be transformed into a bald and positive assertion. Because of the social, cultural and linguistic barriers between the majority of the accused and the bench, then, many accused may have failed to establish the all important framework for a coherent and credible story during evidence-in-chief.

4.3. TESTING THE ACCUSED'S EVIDENCE

The prosecutors utilized their opportunity to cross-examine the accused in true adversary style and combatively subjected them to extensive questioning. On average they asked 33,9 questions of each accused,[1] and more than 50 questions were put to 22,2% of the accused. The prosecutors were in a very powerful position to cross-examine the accused effectively as they had a host of information available through which the accused's consistency, and hence

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1. The study of Bekker et al (14) shows a remarkable similarity to this sample, reporting an average of 34 questions per accused.

credibility, could be tested. A prosecutor may have at his disposal the accused's statement to the police, his s 115 statement, his cross-examination of State witnesses, and finally, his evidence under oath. The accused's various statements were usually given at different times, resulting often in discrepancies which were not necessarily the result of the fabrication of evidence. Furthermore, the prosecutor also used as material for cross-examination the accused's conduct of his case, inter alia, why he failed to make a statement to the police or to the court, why he failed to cross-examine, to put certain facts in dispute or to put his defence to a witness.

In 6,9% of the cases the accused's police statement was used against him; his explanation of plea in 11,1% and his failure to cross-examine in 25,0%. The consistency of the accused's evidence was thoroughly scrutinized. In Case 23 RC the accused, charged with rape, was cross-examined at length on his failure to cross-examine and for not disclosing more information in his s 115 statement. Although the court was precluded from holding the accused's failure to cross-examine against him, the prosecutor was free to make full use of it in cross-examination and thereby tarnish the accused's credibility. The court exercised little restraining power over the conduct of the prosecutors' cross-examination and on only five occasions were their questions disallowed.

During the cross-examination of 41,7% of the accused, the

court joined in, asking on average 6,6 questions. After cross-examination 59,7% of the accused were subjected to a further 9,8 questions (average) from the bench.[1] There was little evidence that the questioning by the court was aimed at assisting the accused to put their defence before the court and it usually amounted to a testing of the accused's version. The judicial officer was undoubtedly in a most favourable position to cross-examine the accused. He had, in addition to the prosecutor's armament of the accused's different statements and conduct, the latter's cross-examination of the accused. With years of experience the judicial officer could with ease pick out discrepancies in the evidence of the accused. The view expressed by magistrates in their evidence to the Hoexter Commission - that the low level of experience of prosecutors virtually forced them to undertake the cross-examination of witnesses[2] - was evident in the behaviour of some magistrates. In the few cases where the prosecutors did not show the necessary skill, the court entered the arena readily. Even where the level of experience and competence of the prosecutors was high, as in the regional court, judicial officers still participated in the questioning, usually going beyond the elucidation and clarification of the accused's evidence. The court's examination, then, was an integral part of the process of testing the defence evidence.

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1. Bekker et al (14) report 13 questions per accused.
2. Hoexter Report Part II par 4.3.4.

In translating the cross-examination of the accused, furthermore, some interpreters exhibited a pro-prosecution bias. Throughout their translation of the accused's testimony, they commented negatively on his credibility, sometimes subtly, often blatantly. The conduct of an interpreter in Case A23 RC represented an extreme version of this practice. A Black accused, aged 25, faced a charge of rape. When he was cross-examined by the prosecutor, the interpreter commented directly on the proceedings through the manner of his translation of the questions and answers. When the prosecutor asked a good question (according to the interpreter), the latter would smile, turn to the accused, intensify the atmosphere by moving closer and then pounce the question on the accused. When the accused attempted to answer, he would, with great mimicry, hold his hand to his ear, then smile broadly, bemused by the stupidity of the answer, and translate it in a belittling fashion. At times he would even burst out laughing at the accused's answers. Both the prosecutor and the regional magistrate enjoyed the interpreter's antics and seemed to accept his assessment of the credibility of the witness. Not only was the interpreter translating; he was giving his <u>interpretation</u> of the <u>value</u> of the evidence as well.

It is not improbable that judicial officers, aware of the communication difficulties which linguistic and cultural differences produce, may rely on the interpreter for an "authoritative" judgment upon which to base their assessment

of the credibility of Zulu-speaking witnesses. The interpreter, bridging the language barrier, and perhaps also mediating the cultural divide, would become the 'common user' guide for the White magistrate. The interpreters were not, however, always detached and impartial observers. They were part of the State machinery and some exhibited a definite pro-prosecution bias which made the objectivity of such assessments dubious.

Re-examination offers a defended accused the opportunity to undo some of the damage done during cross-examination by rectifying wrong impressions created thereby. The undefended accused could also utilize this opportunity to effect the purpose of re-examination. They were not told, however, what the purpose of re-examination was, and were merely asked whether they wanted "to add anything". Such an explanation of this right was not of much assistance to an accused who had just given evidence; only one accused utilized the opportunity, but in a manner which did not correspond with the intended purpose of re-examination. The undefended accused were thus effectively deprived of this opportunity to mitigate the harshness of the adversary mode of testing evidence.

4.4. CALLING DEFENCE WITNESSES

Of the 92 accused who presented their defences, only 14 called a witness and a further three presented a third witness. None of the awaiting-trial prisoners called a

witness for their defence. The small number of defence witnesses called could well be the result of the legal and practical difficulties involved in bringing them to court. Firstly, the accused were not informed about the right to subpoena a witness, nor about the provisions regarding the free issue of a subpoena for material and essential witnesses should they be indigent. Secondly, even if the undefended accused was aware that he could subpoena a witness, the procedure by which it was to be executed was a daunting, if not impossible, task.[1]

The first step was to obtain a subpoena form. Since it was not generally known where such a form could be purchased, it was decided to investigate whether assistance could be obtained at the magistrates' court. The clerk of the court seemed an appropriate official to approach. There were, however, no signs to direct one towards the correct office. When it was eventually located on the first floor, a subpoena form was requested, but the clerk's initial response was that the office did not provide such a service to an accused and she did not know where the form could be purchased. Eventually she relented and referred the writer to the process clerk of the prosecutor's office. From that official on the seventh floor, the quest was directed to the typing pool on the second floor. A form could not, however, be obtained without the authority of the process clerk. This meant another journey to the process clerk, back to the

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1. See Steytler (1983) 7 SACC 74.

typist to collect the form, to return yet again to the process clerk to have the form rubber-stamped for issue. The difficulty experienced in obtaining a subpoena was no doubt due to the fact that none of these officials had previously encountered an accused in search of a subpoena. The second step was to serve the subpoena. In Durban there are two separate offices for messengers of the court serving different sections of the magisterial district. Both these offices are more than a kilometre away from the magistrates' court and a kilometre apart from one another. The correct messenger's office had to be traced. If the witness resided outside the magisterial district of the city (as does a large section of the city's work force), a further problem would be encountered in locating the correct messenger for the particular area. The last step was to pay the required amount for the subpoena and the service.

In a few cases the court subpoenaed witnesses on behalf of the accused where it was apparent that he encountered problems in securing their presence at court. The rule in Hlongwane 1982 (4) SA 321 (N) did not, however, imply that the accused should be routinely informed of the methods by which he could bring a witness to court and it remained incumbent on him to draw the court's attention to his plight before assistance could be expected.

4.5 LEADING DEFENCE WITNESSES

The accused often experienced great difficulty in presenting

his witnesses' evidence in the correct adversarial manner. When a witness was called, the court routinely asked, "What do you want your witness to say?" Although this may sound to an undefended accused like an invitation to ask leading questions, the court did not relax the strictures of that rule of evidence. In Case 23 RC the accused, charged with rape, attempted to lead his witness after a similar invitation. He was stopped and told by the magistrate "You are not allowed to put leading questions. Phrase your questions in such a way that his answers are his and not yours." The accused's confused reply was: "Who should first put questions to the witness?" The court's answer was simply: "You". The accused was consistently left alone to attempt to extract the required information from his witness in the accepted adversary manner. As with his own evidence, the presentation of the witness' testimony was not structured or coherent. The judicial officers did not perceive it as their task to lead the defence witness. The insistence on the correct legal procedure in the presentation of the defence evidence frequently restricted, rather than facilitated, the production of evidence.

4.6. WITNESSES CALLED BY THE COURT

The court used its power to recall or call witnesses sparingly. Courts more readily recalled witnesses still present at court and did so on five occasions. Only once did a magistrate call his own witness to elucidate a factual dispute and that was in a defended case. The availability

of "material and essential" witnesses not called by either party was seldom apparent from the evidence presented in court. Moreover, the prosecutor did not disclose to the court or the accused the police statements of witnesses who were not called but who might give evidence favourable to the accused. The court, unaware of the existence of such possible witnesses, was mostly precluded from adopting a more inquisitorial approach to the production of evidence.

5. CONCLUSION

The handicaps suffered by the undefended accused in an adversary framework are most vividly illustrated at this stage of the trial where he is called upon to become the central actor in the proceedings. Required to produce and lead evidence in support of his plea of not guilty, this accused faces numerous obstacles, the most serious being his lack of legal knowledge and his inability to communicate his defence effectively due to the differences of language, culture and class between him and the judicial officer. Yet the legal provisions aimed at facilitating his fullest participation in the production of evidence are insufficient to realize this objective. While clear rules require the judicial officer to advise the accused of his basic rights and duties in relation to the production of evidence - resulting in substantial compliance with this duty - the disclosure of considerations pertinent to the exercise of such rights and duties is invariably left to the court's

discretion. The court's duty to assist the accused in the presentation of his defence is ill-defined and on the whole discretionary and court practice in this respect is accordingly erratic. The court's active participation in the production of evidence at this stage is limited to the elucidation of witnesses' answers but the absence of any definite limit for questioning directed towards probing the defence evidence means that the latter is not only thoroughly tested by the prosecutor but also regularly scrutinized by the judicial officer. The inadequacy of the legal protection of the undefended accused in his presentation of the defence case means that he will routinely fail to meet the challenge of his adversary.

CHAPTER EIGHT THE ADDRESS ON THE MERITS AND JUDGMENT

1. THE ADDRESS ON THE MERITS

The final act of participation in determining the accused's criminal liability is the address by each party on the merits of the case.[S 175(1)] This part of the proceedings is the supreme instance where the lawyer is called upon to exhibit his skills in the analysis of facts and the marshalling of legal argument. This opportunity to influence the court's decision is not, however, designed to accommodate laymen uninstructed in the law and lacking the skills of advocacy. To redress the disadvantages that the undefended accused may suffer due to his incapacity at this stage of the trial, both the prosecutor and the court should offer him some assistance.

1.1 THE PROSECUTOR'S ADDRESS TO THE COURT

The prosecutor, in accordance with his duty as "minister of the truth", need not argue for a conviction where he is convinced that a case has not been made out against the accused.[1] Even if the case against the accused is convincing, Ferreira suggests that the prosecutor may still comment on any factors favouring the accused.[416] Although the court is not bound to follow a prosecutor's attitude towards conviction,[2] it will take serious cognizance thereof. The prosecutor can thus play an important role in

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1. Ferreira 417.
2. See eg Sitlu 1971 (2) SA 238 (N).

assisting the undefended accused, who is seldom able to utilize this opportunity to advance any argument on the facts or law.

1.2 ADVISING THE ACCUSED REGARDING HIS RIGHT TO ADDRESS THE COURT

It is trite law that the accused or his legal advisor should be given the opportunity to address the court on the merits.[1] In earlier decisions convictions were maintained despite the court's failure to afford the accused the opportunity to address, as long as he was not prejudiced thereby.[2] In Mutambanengwe 1976 (2) SA 434 (RA) it was held that if the evidence of the State is overwhelming and the accused's evidence is so bad that no argument could persuade the court to acquit the accused, the failure to give the accused the opportunity to address the court on the merits does not warrant the setting aside of the conviction. In Mabote 1983 (1) SA 745 (O), however, the Court regarded the right to participate in the proceedings at this stage as a fundamental principle, the denial of which per se is a gross irregularity, irrespective of the prospects of success.[3] The latter approach is preferable as the recognition of the right to participate in the

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1. O'Connel v Attorney-General and Magistrate, Pretoria 1930 TPD 9; Malherbe 1931 OPD 99; Gwmanda 1960 (2) PH H242 (N); Msibe 1945 (2) PH H194 (O); Bresler 1967 (2) SA 451 (A).
2. Pillay 1947 (3) SA 254 (T); Kaleni (2) 1959 (4) SA 543 (E); Phike 1953 (1) SA 591 (O).
3. 746G. See also Louw 1965 (1) PH H77 (O); Malherbe supra 100; Breakfast 1970 (2) SA 611 (E).

decisionmaking process should not be dependent on the judicial officer's assessment of the strength of the State case. Apart from the fact that participation in the proceedings should be regarded as one of the basic principles of a fair trial, the discretionary enforcement of the rule cannot exclude the possibility of prejudice because "when the magistrate weighed up the case against him [the accused] something which might have told in his favour was not in the scale".[1]

Although the Code does not require that the court must enquire whether the parties wish to address the court, it was held in Parmanand 1954 (3) SA 833 (A) that the judicial officer should make such an enquiry and record the response. The failure of the court to conduct such an enquiry has not always been regarded as an irregularity.[2] In Cooper 1926 AD 54 the Court distinguished between denying the accused the opportunity and failing to ask him whether he wished to utilize the opportunity. In the latter case, the Court held, there was no irregularity where an undefended accused, who had a string of previous convictions and must have known his rights, did not ask the court for an opportunity to address it on the merits.[3] Although it may be argued that there is an onus on lawyers to assert their

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1. Yeni 1955 (2) PH H221 (N). See also Malherbe 1931 OPD 99 100.
2. See Mutambanengwe 1976 (2) SA 434 (RA).
3. See also Kamffer 1965 (3) SA 96 (T) 99C.

right to address if the court fails to invite them,[1] this is not a tenable position in respect of the undefended accused. Failure to disclose the right to him amounts, in effect, to a denial of the opportunity.

It may be contended that because undefended accused routinely fail to advance any argument at this stage of the trial, there is no justification for vigorously asserting their right. In Yeni 1955 (2) PH H221 (N) Broome JP described the undefended accused's efforts in this regard as follows:

> "Few undefended accused appreciate the difference between evidence and argument and in my own experience, when they return to the dock after giving evidence, they nearly always feel that they have said all that they want to say; indeed it is usually quite difficult to get them to understand that they are entitled to address the court and they hardly ever do so".[2]

There are, nevertheless, cogent reasons for protecting the accused's right. Firstly, during his address, the accused could mention further information that might be relevant for a just decision by the court and in the case of an accused who chose not to testify, this would be a valuable opportunity to state his case.[3] Although the information so conveyed may not carry much weight, it still has evidential value.[4] Secondly, if the prosecutor addresses the court, the audi alteram partem rule demands that the accused should be granted the same opportunity.

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1. See Sitlu 1971 (2) SA 238 (N).
2. See also Mutambanengwe 1976 (2) SA 434 (RA) 438.
3. See Yeni 1955 (2) PH H221 (N).
4. See Van der Merwe et al 138.

If it is recognized as important to extend the invitation to the undefended accused, the question arises as to what the content of such an invitation should be? Simply to ask: "Do you have anything to say before judgment?" does not assist the accused much as it does not explain the purpose of the address and will invariably result in a repetition of his evidence or his silence. It may be to little avail, on the other hand, to attempt to transform the accused into a lawyer by giving him an extensive explanation of the intricacies of advocacy. Yet, if the accused is apprised of the basic purposes of the address, his participation may be more constructive. It is submitted that the following explanation may be useful to an undefended accused:

> "You have heard the State witnesses and you have presented your side. You have now the opportunity to say why the State witnesses should not be believed, for example, if they have contradicted themselves, or each other, or if they have reason to lie to the court.
>
> You have been charged with the crime X. The essential elements are the following....Do you wish to argue that any of them have not been proved?
>
> The purpose of the address is not to repeat your version but for you to comment on the whole case".

If the court is duty-bound to facilitate the undefended accused's participation in the process, it should not pay lip-service to a right by merely mentioning its existence; it should endeavour to render the right accessible by making it intelligible to, and hence exercisable by the accused.

2. JUDGMENT

In arriving at its judgment the court is bound by the rule that the State bears the onus of proving the accused's guilt beyond reasonable doubt.[1] Although the State evidence may be reliable and credible, the court is bound to acquit the accused if there exists a reasonable possibility that his evidence may be true.[2] The rationale underlying the imposition of a more onerous duty on the State is that "in the search for the truth, it is better that guilty men should go free than that an innocent man should be punished".[3] The court should thus convict an accused only when there are valid reasons why the evidence for the State is true above reasonable doubt and the evidence for the accused is beyond reasonable doubt false.[4]

Where there is a conflict between the evidence of the State witnesses and that of the defence, the court is to assess the credibility of the witnesses' evidence in terms of its reliability, consistency and probability.[5] Having reached its decision as to why the evidence of a witness should be rejected or accepted, the court must state its reasons: "If the reasons are, because of inherent probabilities, or because of contradictions in the evidence of the witness, or

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1. Sigwahla 1967 (4) SA 566 (A) 569.
2. Kubeka 1982 (1) SA 534 (W) 537G; Mgoma 1962 (2) SA 209 (N) 211.
3. Kubeka supra 538F.
4. Mabaso 1978 (3) SA 5 (O) 8F.
5. See Singh 1975 (1) SA 227 (N) 228F-G; Guess 1976 (4) SA 715 (A) 718.

because of his being contradicted by more trustworthy witnesses, the Court expects the Magistrate to say so".[1] In delivering its judgment the court is obliged to communicate its findings and the reasons for them to the accused.[2] Where 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.

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1. Schoonwinkel v Swart's Trustee 1911 TPD 387 401. Quoted with approval in Guess 1976 (4) SA 715 (A) 718.
2. Immelman 1978 (3) SA 726 (A) 729A.

3. THE ADDRESS ON THE MERITS AND JUDGMENT - AN EMPIRICAL ANALYSIS

3.1. THE ADDRESS ON THE MERITS

The address on the merits signified the formalization of the adversary process of evidence production. The evidence, the presentation of which had already been selective, was then summed up. This allowed "further editing, abstraction, and imputation of meaning to be imposed" on what individual witnesses had said.[1] This was the final act of constructing a coherent and understandable story out of all the bits and pieces of evidence. At the same time incoherence, contradictions and unreliability of the opposing side's evidence would be highlighted. In the hands of a skilled legal practitioner, the address played an important role in securing either a conviction or an acquittal. The undefended accused's inability to master this art placed him at a disadvantage vís a vís both a skilled prosecutor and other defended accused.

3.1.1. THE PROSECUTOR'S ADDRESS

The prosecutors were not obliged to ask for a conviction and could abandon the State case simply by "leaving the decision in the hands of the court". In 21,7% of the 92 contested cases the prosecutors did not ask or argue for a conviction, being convinced that there was no case against the accused. In 43% of the cases where a conviction was sought, the

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1. McBarnet 24.

prosecutors advanced full arguments in support of a conviction. In the magistrates' court the majority of the prosecutors were content with merely asking for a conviction, while in the regional court the prosecutors participated more actively. Their addresses consisted primarily of an analysis of the evidence, as argument on legal principles was usually unnecessary. They analysed the evidence in detail, emphasizing the weaknesses of the defence witnesses and the coherence and credibility of the State case.

3.1.2. THE ACCUSED'S ADDRESS

The accused were in most instances (91,3%) invited to address the court on the merits. The judicial officers' explanation of the right did not, however, facilitate the accused's comprehension of the purpose of the address. The apprisal, when correctly put, was simply, "Are there any reasons why the court should find you not guilty?", while the usual invitation was worded: "Do you have anything to say before judgment?" The prosecutor's address, which preceded that of the accused, often did not contribute much to the latter's understanding of the purpose of the activity. In a number of cases the interpreter omitted to translate the argument of the prosecutor. In Case A76 DC the prosecutor gave a detailed argument in support of a conviction but all that the accused heard was that "the prosecutor wants the court to find you guilty." This practice was widespread, forcing the court in some instances

to instruct the interpreter to translate the address.[1]

Forty per cent of the accused had nothing to say on the merits. The rest made some attempt, usually consisting of a repetition of the evidence which they had given earlier. On a number of occasions, the accused started to bring mitigating factors to the court's attention. This reaction was quite understandable if one considers the confusing information the accused received from the court and the interpreter in this regard. Case A18 RC will serve as an illustration.

Case A18 RC

M: Anything to say before the court pronounces judgment?
I: (Zulu) Anything to say before the end of the matter?
A: (Zulu) I ask the court to impose a light sentence and I will never be found in error again.

Because of the inadequate explanation by the court of the purpose of an address on the merits and, consequently, a misleading translation, the accused quite understandably assumed that the end of the matter meant the imposition of a sentence. This confusion resulted in his "admission" of guilt, whether real or merely for a show of contrition. The effect of such an "admission" could have been disastrous. If the court harboured any doubts about the accused's guilt, then such an admission would have provided the necessary confirmation and conviction would inevitably follow. The court's explanation, instead of assisting the accused, had the potential to prejudice him.

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1. Bekker et al (15) note that only 42% of the addresses delivered by the prosecutor were related to the accused.

3.2. THE JUDGMENT

In the theory of criminal procedure, the odds are stacked against the prosecution obtaining a conviction; it must prove the guilt of the accused beyond reasonable doubt, while the accused will escape liability if there is merely a reasonable possibility that the defence evidence is true. In practice, however, the court is convinced beyond reasonable doubt of the accused's guilt in the majority of cases.[1] Why, then, in contested cases where the court is confronted with conflicting versions of a single event, does it usually accept the State evidence as credible and reject that of the accused as false? The obvious answer - that most accused are in fact guilty - is not entirely convincing in view of the adversary manner in which evidence is presented to court. The evidence on which the court bases its decision is on the whole both presented and evaluated by the prosecutor and the accused. The evidence which the court finds credible, it will be argued, depends more on the way the evidence is presented and probed than on any inherent quality attached to it. As the undefended accused is disadvantaged in his ability to probe the State evidence adequately and to present his own case lucidly, the defence case is less likely to be regarded as credible than the State case which

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1. McBarnet 2. For conviction rate in contested cases in magistrates' courts in England see eg AE Bottoms & JD McClean The Defendents in the Criminal Process (1976) 106 (72,5% convicted); Julie Vennard Contested Trials in Magistrates' Courts (1981) (75% convicted); Vennard "The Outcome of Contested Cases" in D Moxon (ed) Managing Criminal Justice (1985) 126 131 (70% convicted). In Australia see Douglas op cit 202.

is well presented and generally remains untested.

3.2.1. THE ASSESSMENT OF EVIDENCE

The credibility of a witness - and thus the value to be attached to his evidence - is assessed by the court in terms of its consistency, reliability and probability.[1] The consistency of a witness includes the inherent consistency of his evidence, consistency with other witnesses, and consistency with undisputed facts. The ability of a witness to give reliable evidence includes the consideration of physical or mental defects which would render the evidence unreliable or biased against the other party, and other factors which would affect the witness' powers of observation. The inherent probability of the witness' story is determined by its own internal logic and correspondence with common sense perceptions.[2]

It is submitted that in terms of all three criteria the undefended accused's evidence is more likely to be found wanting than that of the State witnesses. Firstly, in the study the undefended accused's evidence was tested more thoroughly for consistency. His consistency was checked by the prosecutor and the court with reference to up to four different statements he might have made - his statement to the police, his s 115 statement, his cross-examination of State

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1. R Eggleston Evidence, Proof and Probability (1983) 192-93.
2. Eggleston op cit 192-93. See also Vennard op cit (1981) & (1985).

witnesses, and his evidence-in-chief - all of which were likely to have been recorded at different times. Furthermore, his conduct in respect of those statements or opportunities to make them - his decision not to give a s 115 statement, or omitting information from it; his decision not to cross-examine or the paucity of his testing - became part of the evidential material against which his consistency was measured. On the other hand, the consistency of the State witness' evidence was to be tested without any of the above aids. The principal potential sources for evaluating his consistency would be his prior police statement or the charge sheet containing detailed factual allegations based on his police statement. Due to the privileged nature of the police statement it was protected from the routine scrutiny of the accused and the court. The charge sheet was equally unhelpful as it usually contained too little information with which the complainant's evidence in court could be compared.

Because of the extensive scrutiny to which the consistency of an accused's evidence was exposed if numerous statements were made, it was the practice of defence lawyers to limit the sources of possible comparison. Accused represented from the commencement of the proceedings were not encumbered with previous statements since they were usually advised to remain silent and leave the talking to their lawyers. The undefended accused, on the other hand, unaware of the dangers involved, often made numerous statements, thus

ensuring that their consistency would be thoroughly checked.

The consistency, reliability and probability of evidence are tested primarily by means of the cross-examination of witnesses. In defended cases the State evidence was thoroughly tested. In undefended cases, in contrast, the State witnesses were not, and could not be, examined adequately. Nor did the court attempt to compensate for the accused's lack of ability in cross-examination. The accused's testimony, on the other hand, was subjected to the cross-examination of the prosecutor and the court, who accomplished this with professional skill. A rough indication of the extent to which (a) the prosecution and (b) the defence evidence was tested, can be obtained by comparing the number of questions which were put to the various witnesses by the court, the prosecutor and the accused in their respective questioning and cross-examination. Table 8.1 sets out the number of questions asked of the first State witness (usually the complainant or principal witness) and the accused respectively.

Table 8.1: Mean number of questions put to the first State witness and the accused

First State witness (FSW) (n = 119)					Accused (ACC) testifying (n = 72)		
No. of FSW	Mean no. ques.	Mean no. ques. to 119 FSW	COURT'S questions during:		No. of ACC	Mean no. ques.	Mean no. ques. to 72 ACC
84	10,0	7,0	(a)	evidence-in-chief	26	3,8	1,3
44	4,1	1,2	(b)	cross-examination	30	6,6	2,8
42	6,6	2,3	(c)	after cross-examination	43	9,9	5,9
	20,7	10,5	Total mean of questions by COURT			20,3	10,0
Questions put by ACCUSED to first State witness:					Questions put by PROSECUTOR to accused:		
85	9,3	7,0	in cross-examination		72	33,9	33,9
	30,0	17,5	Total mean of questions put to FSW and ACC			54,2	43,9

From this table it is clear that the State witnesses' evidence was not tested as thoroughly as that of the accused. A quarter of the first State witnesses were not questioned at all by the accused. When the accused did question the witnesses, it did not achieve the aims of cross-examination; the nine questions asked per witness did not adequately test the consistency, reliability or probability of the witnesses' evidence. The accused's evidence, however, was thoroughly probed by two professionals, the prosecutor and the court. Every accused had to face the prosecutor's searching questions and the

majority's evidence was further tested by the court. Although the court asked the State witnesses and the accused an equal number of questions, the purposes of the questions differed. With regard to the first State witness the aim was primarily to elicit information; with regard to the accused it was to test his evidence. Apart from those cases where the prosecutor indicated to the court that the evidence of the complainant was contradictory, and the court assisted in discrediting the witness, the questions asked by the court of State witnesses were generally designed to supplement the case for the prosecution.

The third criterion, probability, is also closely linked to the way evidence is presented. As pointed out above, the undefended accused, usually from a different linguistic, cultural and class background to that of the judicial officer, could not easily give an account which was coherent and understandable to the court. Unable to overcome these cultural differences and his own inarticulateness, the comprehensibility, and hence the probability of his evidence, could not match that of the prosecution. More than half of the State witnesses, on the other hand, were English-speaking and the prosecutor could, through the leading of witnesses, present a coherent, understandable, and thus probable version to the court.

The evidence on which the court based its verdict did not, in the words of McBarnet, consist of "self-evident absolutes. [It was] the end product of a process which organizes and selects available facts and constructs cases for and against in the courtroom".[83] More particularly, it was a product of the adversary system; the prosecutor's skilful handling of his combative adversary role resulted in a sound State case, logically and coherently presented, and the thorough probing of the opposing evidence. Conversely, the incomplete and sometimes unintelligible evidence presented for the defence, and the absence of effective challenge to the State case, was directly attributable to the inability of an unrepresented layman to perform a role designed for a professional.

With such an imbalance between the parties and between their respective evidence, the substantially untested evidence of the State was invariably sufficient to prove the accused's guilt "beyond reasonable doubt" and thus found a conviction. The State's heavy onus of proof did not pose a serious obstacle in the way of convicting undefended accused.

3.2.2. THE VERDICT

Apart from the 18 accused who were discharged at the end of the State case, a further 25 of the 92 who contested charges were acquitted. Of the 25 acquitted the prosecutor had asked for the conviction of only seven (he thus succeeded in 90,5% of the cases where he asked for a conviction - 74 requests

resulting in 67 convictions). In the other 17 cases, the prosecutors were convinced that there was no case against the accused even to warrant an argument and left the matter in the hands of the court. The prosecutors abandoned these cases primarily because of inherent weaknesses in the State evidence combined, in some instances, with a credible defence case. Because there is no rule compelling a discharge at the end of the State case even where there is no case at all against an accused, there was no scope to eliminate cases that were weak at that stage. In these cases the accused played no part in exposing the inadequacies in the State case and thus in securing their own acquittal. In the magistrates' court they put on average no more than 6 questions to the first State witness, while in the regional court the average was 13,5 questions. Where a strong case was made out during the State case, the accused seldom convinced the court of his innocence through the presentation of his defence.

As most acquittals of undefended accused occurred despite their inability to participate effectively, either in testing the State witnesses or presenting their defence lucidly, it was hypothesized that the acquittal rate in defended cases, where skilful lawyers participated, would be much greater.

3.2.3. THE EFFECT OF LEGAL REPRESENTATION ON THE JUDGMENT

Caution should be exercised in attaching too much

significance to court statistics as an illustration of the value of legal representation because the benefits of legal assistance are not always apparent from the case records or court observation. Some of the important aspects of the defence lawyers' task are conducted before the case comes to trial; their efforts to have charges withdrawn, to arrange bail, or to engage in plea bargaining, are not recorded or visible in court. A case is submitted to trial when the State is most confident of a conviction and these cases test the skills of a lawyer to the utmost.[1] This may explain why no or slight associations have been found by some researchers,[2] while others have demonstrated a strong correlation.[3]

In the present study it was clear that when a defended accused was put on trial, the State witnesses' evidence-in-chief at least disclosed a prima facie case against the

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1. Cf Mileski op cit 492.
2. Feeley 132, 143; GR Wheeler "The Benefits of Legal Representation in Misdemeanor Courts" (1983) 19 Criminal Law Bulletin 221 226; Zander op cit table 9; J Ryan "Adjudication and Sentencing in a Misdemeanor Court: The Outcome is the Punishment" in J Alfini (ed) Misdemeanor Courts: Policy Concerns and Research Perspectives 93 111 (as quoted by Wheeler op cit); RG Hann Decisionmaking in the Canadian Criminal Court System: A Systems Analysis (1973) 409.
3. J Katz "Municipal Courts - Another Urban Ill" (1968) 20 Case Western Reserve LR 105; T Vinson & R Homel "Legal Representation and Outcome: A Progress Report on the Relation between Legal Representation and the Findings of Courts of Petty Sessions throughout New South Wales" (1973) 47 Australian LJ 132 133; Cashman op cit 204; M Slabbert "Social-political Factors influencing Access to and Effect of Legal Representation" in Olmesdahl & Steytler 89 92; D Hutchinson "Juvenile Justice" in Olmesdahl & Steytler 236 252.

accused. A discharge or an acquittal could then be obtained only if it was shown that the State witnesses were not credible or the defence case was reasonably possibly true. Making a comparison between the outcomes of defended and undefended cases in the present sample could, however, be misleading, as the sample does not represent a finite group. Because of these shortcomings the investigation was repeated with a finite sample. In the original sample legal representation had no significant effect on the outcome of cases. This is reflected in table 8.2.

TABLE 8.2: Outcome of contested cases by legal representation

	Defended cases	Undefended cases
Contested cases	14*	110**
Discharge	0	18 (16,5%)
Acquittal	7 (50,0%)	25 (22,0%)
Conviction	7 (50,0%)	67 (61,5%)

* Including one change of plea
** Including 13 changes of plea
(r=.07 p=,409)

To select a finite sample, all the records of the cases completed in the month of March 1984 in four magistrates' courts were analysed and the effect that representation had on (a) the pleas of the accused, and (b) conviction rate in respect of the pleas, was examined. A total of 212 cases were recorded. Table 8.3 sets out the pleas of the accused and table 8.4 the conviction rate.

Table 8.3: Pleas by legal representation (second sample)

Plea	Defended	Undefended
Guilty	5 (23,8%)	96 (50,2%)
Not guilty	16 (76,2%)	95 (49,8%)
Total	21	191

(r=.15 p=.02)

Table 8.4: Outcome of contested cases by legal representation (second sample)

	Defended	Undefended
Contested cases	16	111*
Discharge	7 (43,7%)	25 (22,5%)
Acquittal	8 (50,0%)	19 (17,1%)
Conviction	1 (6,3%)	67 (60,4%)

* Including 16 changes of guilty pleas to not guilty (r=.36 p<.001)

From the above statistics it is clear that legal representation bore a marked relationship to the acquittal rate. Although 40% of the undefended accused who pleaded not guilty were discharged or acquitted, these acquittals resulted predominantly from the inherent weakness of the State case rather than from the accused's efforts at testing the State evidence or presenting his defence. The 25 accused discharged at the end of the State case did little to demonstrate the unreliability of the State witnesses' evidence and the discharges were initiated by the court or the prosecutor. The same can be said of the acquittal of the 19 undefended accused. In 12 of these cases the prosecutors did not ask for a conviction. Where they did request a conviction, they were successful in 90,5% of the cases (74

requests resulting in 67 convictions). In contrast, most of the defended accused were discharged or acquitted against the opposition of the prosecutor. The failure of the State case and the discharge of the accused was as a result of the active participation of the defence lawyers, who tested the State evidence thoroughly. In the undefended cases the State case collapsed because of the blatant weaknesses which were apparent without the probing of the accused. This is an indication that in the latter cases there was no early screening out of cases where a conviction was improbable. Undefended accused thus did not enjoy the early withdrawal of charges which legal practitioners often secure. In defended cases acquittals were also obtained despite the prosecutor's opposition and in only three of the eight cases did the latter not argue for a conviction.

Legal representation thus had a significant effect on the acquittal rate. The active role played by defence lawyers in testing State witnesses and presenting a lucid defence case, was instrumental in the court's rejection of the State evidence and acceptance of the accused's version as reasonably possibly true. The undefended accused failed in both respects; he was incapable of exposing weaknesses in the State case and of presenting his defence coherently.

3.2.4. EXPLAINING THE JUDGMENT

The judicial officers gave reasons for their decisions in

all but three of the cases.[1] Whether the reasons were fully and comprehensibly communicated to the accused, however, was sometimes open to doubt. In some cases the impression was gained that it was not so much the court's intention to communicate the reasons to the accused, as to complete the record correctly. This attitude was particularly pronounced when the judgment had to be translated to the accused. The interpreters were not always given the opportunity to translate properly, and were often compelled to interpret simultaneously with the court's delivery of its judgment. They were not given a chance to catch up with what was being said and did not seek to remedy this by interrupting the court's speech.

4. CONCLUSION

In the judgment the merits of the State and defence case are assessed. The parties may, in the exercise of their right to address the court on the merits, assist the court in its deliberations. For an undefended accused, however, the right has little value. Firstly, he seldom receives an adequate explanation as to the purpose of the address. Secondly, even if he understands what the address entails, his incompetence in testing the State case and his inarticulateness in presenting his own, means that he will have little favourable material on which to build a convincing argument.

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1. This was much higher than the 46% reported by Bekker et al 16.

The evidence upon which the court bases its judgment - usually untested State evidence and a thoroughly tested defence case - is determined by the relative capacities of the adversaries. The final verdict not only reflects the undefended accused's failure to acquit himself as a competent adversary, but, more importantly, is a function of the court process; despite the breakdown of the adversary system, the only alternative solution - a more activist approach by the judicial officer - is not pursued.

CHAPTER NINE POST-CONVICTION PROCEEDINGS

1. THE SENTENCING PROCESS

The imposition of a sentence differs fundamentally from the settlement of factual or legal disputes, the usual business of a court of law. Schmidt views the sentencing act as more of an administrative than a judicial act.[65] There is no disputed fact or legal principle which the court is called upon to settle and neither the State nor the accused can "prove" a "correct" sentence. Instead, the court is required to determine the sentence which will most effectively meet the various purposes of sentencing. The determination of an appropriate sentence is thus the responsibility of the court and not that of the accused or the prosecutor.[1] The adversary mode of dispute resolution is therefore not the most suitable method of arriving at a suitable sentence and, consequently, no onus rests on either the accused to prove mitigating factors, or the prosecutor to prove aggravating factors.[2]

In arriving at an appropriate sentence it is trite law that the court must take into consideration a triad of factors including the offence, the offender and the interests of the community.[3] The court can pass a considered sentence only if

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1. Taylor 1972 (2) SA 307 (C) 311F. See also Seleke 1976 (1) SA 678 (T) 690F.
2. Du Toit 50, 86, 147. See also Von Zell (2) 1953 (4) SA 552 (A) 561.
3. Zinn 1969 (2) SA 537 (A). See generally JR Lund "Discretion, Principles and Precedent in Sentencing" (1979) 3 SACC 203.

it has at its disposal sufficient information regarding these factors.[1] The absence of such information will not only restrict the exercise of the court's discretion,[2] but the sentence will be no more than a "hazardous guess".[3] The court must therefore participate actively in the process by conducting an enquiry in order to obtain all relevant information.[4] In defended cases, the active participation is usually curtailed because the legally qualified representatives of each party invariably submit full information in support of their respective views as to an appropriate sentence. Where the accused is undefended, however, he may fail to inform the court of favourable factors of his own accord and the court must endeavour to obtain his fullest participation by informing him of his right to advance mitigating factors. Should the accused fail to provide sufficient information, it remains the duty of the court to establish such factors inquisitorially before determining a sentence.

1.1. INFORMING THE ACCUSED OF HIS RIGHT TO ADVANCE MITIGATING FACTORS

After initial doubt as to whether the accused had a right to lead evidence or address the court,[5] the Appellate

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1. Tsiyane 1981 (2) PH H108 (O); Lekometsa 1981 (2) PH H114 (O).
2. Sithole 1969 (4) SA 286 (N) 287.
3. Maxaku, Williams 1973 (4) SA 248 (C) 256A.
4. See s 274 (1) and s 112(3).
5. See Wright 1955 (1) PH H98 (O); Chinayi 1956 (1) PH H65 (SR); Bresler 1967 (2) SA 451 (A) 456; Booysen 1974 (1) SA 333 (C) 334.

Division held unequivocally in 1975 that the accused had such a right, derived not from statute, but from usage in practice.[1] In order to afford the undefended accused the opportunity of participating in the sentencing process, the court is under a duty to invite him to advance mitigating factors.[2] It is further incumbent on the court to explain fully how such factors can be adduced. In Malaza 1980 (2) PH H186 (A) the Appellate Division set aside a death sentence where the trial judge, although giving the accused an opportunity to address the court in mitigation, had not informed him that he could adduce evidence. While Trengrove JA said that where an accused faces a serious charge, he should be properly informed of his rights in respect of mitigation, it is submitted that the principle is applicable to all cases. It should be fully explained to the accused how he can advance mitigating factors - either by giving evidence or making a statement from the dock,[3] or by calling witnesses. It is equally important - although not obligatory - that the accused be informed of the purpose of the enquiry;[4] he should be told what is meant by mitigation. Only if the accused understands what the enquiry is about, will he be able to participate meaningfully in the process.

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1. Leso 1975 (3) SA 694 (A) 695H. See s 274(2). See also Sithole 1967 (2) PH H292 (N). But see Louw 1978 (1) SA 459 (C) 460A where s 274(2) was regarded as the basis for such a duty.
2. Sithole 1969 (4) SA 286 (N) 289; Nakasal 1984 (1) SA 392 (SWA) 395G; Du Toit 163.
3. But see Du Toit's argument (138ff) that the accused cannot make an unsworn statement at all.
4. Nakasal supra 395G; Awaseb 1984 (1) PH H49 (SWA).

Where the death penalty is a competent sentence it has been held that, in the interests of justice, the accused should be apprised of that fact.[1] The ratio for the rule, it is submitted, is to impress upon the accused the seriousness of the matter and the need for him to participate in the process by advancing mitigating factors. This salutary principle has the same relevance for accused convicted of non-capital offences, wherever their liberty is likely to be infringed upon and it is submitted that it should be incumbent on the court to inform an accused where a sentence of imprisonment is likely.

1.2. ESTABLISHING THE ACCUSED'S PERSONAL CIRCUMSTANCES

Where the accused, despite the advice offered, fails to inform the court sufficiently or at all about his personal circumstances, it nevertheless remains the court's duty to establish these before imposing a sentence.[2] The need for an enquiry for this purpose is particularly acute where the accused is convicted following a plea of guilty,[S 112(1)(b)] as the court will be less informed about both the accused and the surrounding circumstances of the offence than after a full trial.[3] In

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1. Leso 1975 (3) SA 694 (A) 695.
2. Maxaku, Williams 1973 (4) SA 248 (C) 255G; Mantusse 1973 (3) SA 223 (T) 224; Phakati 1978 (4) SA 477 (T) 479; Ncube 1979 (2) PH H169 (T); Tsiyane 1981 (2) PH H108 (O); Lekometsa 1981 (2) PH H114 (O); Mokoena 1982 (3) SA 967 (T) 968H; Nakasal 1984 (1) SA 392 (SWA) 395G; Kahmene 1983 (1) PH H1 (SWA).
3. Sikhindi 1978 (1) SA 1072 (N) 1072; Balepile 1979 (1) SA 702 (NC); Serumula 1978 (4) SA 811 (NC).

Tsiyane 1981 (2) PH H108 (O) Malberbe AJ remarked that the time saved by the s 112(1)(b) procedure could be utilized fruitfully to consider the question of a suitable sentence. Although s 112(3) merely states that a court is permitted to hear evidence for the purpose of determining an appropriate sentence, this has not denigrated the already established duty of the court to enquire.[1]

1.2.1. QUESTIONING THE ACCUSED

The principal sources of information regarding the accused's personal circumstances would be the accused himself and witnesses called either by him or by the court. Where the accused decides to participate, the court may question him. The accused cannot be compelled to testify or to make a statement where he has clearly expressed his intention to remain silent.[2] However, the court is not prohibited from questioning the accused in the dock where the latter fails to say anything.[3] Although the questioning of the accused where he does not venture a statement may appear to conflict with his right to remain silent, this is in fact not so. Firstly, the accused's non-participation may be more indicative of his inability to grasp the purpose of mitigation or his own inarticulateness than an expression of his right to remain silent. Secondly, since the basis of this right is the protection of the accused against self-

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1. Phakati 1978 (4) SA 477 (T) 479. See also Sikhindi 1978 (1) SA 1072 (N).
2. Sithole 1969 (4) SA 286 (N) 287.
3. Mokoena 1982 (3) SA 967 (T); Komsana 1978 (2) PH H233 (E). Contra Sithole supra 287.

incrimination, the prohibition need not apply where the purpose of the questioning is to elicit information favourable to the accused. Nevertheless, it is submitted that the accused retains his right to silence also in respect of sentencing, and should be informed of it. If he indicates expressly that he wishes to remain silent, the court should desist from questioning. A thorough explanation of the purpose of the court's enquiry will, no doubt, obtain the accused's co-operation in most cases.

The procedure which the court should adopt in order to inform itself concerning a proper sentence, Botha JA said in Jabavu 1969 (2) SA 466 (A), must be determined largely by considerations of fairness to the accused.[1] To the extent that the procedure is unfair, the proceedings will be held to be irregular.[2] What is fair to the undefended accused? An answer, sound in principle and simple in practice, would be that the accused should be given the same opportunities as a defended accused. As a defence lawyer's objective in the mitigation process is to submit those personal circumstances which could be to his client's advantage, the purpose of the court's questioning should be no different. The questioning of the accused should thus be aimed at the establishment of mitigating factors and the opportunity should not be used to elicit aggravating factors.[3] The

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1. 472. See also Kiewiets 1977 (3) SA 882 (E) 883B; Nakasal 1984 (1) SA 392 (SWA) 395G.
2. Jabavu supra 472.
3. Kiewiets supra 883B. See also Steytler (1982) 6 SACC 278 280.

object of the enquiry is thus to discover the personal circumstances of an accused.[1] It has been suggested that the court should enquire, inter alia, whether the accused is a worthy citizen, whether he is in fixed employment, what he earns, his standard of education, whether married or not, his family circumstances, the number of dependents, and his age.[2] Where details of the offence are relevant, the court may also establish these from the accused.[3]

1.2.2. THE COURT CALLING WITNESSES

The court may call its own witnesses for the purposes of sentencing.[4] In terms of sections 186 and 167 the court's discretionary power in this regard may become a duty where it is essential for the just decision of the case. It is in the court's discretion to call on probation officers to submit pre-sentence reports on accused persons. There is no duty on the court to obtain the invaluable assistance of such a report although with regard to juveniles, it has been stated that it is the practice of the courts to do so.[5] With due regard for the limited resources of the probation services, such a practice should be extended as far as possible to undefended offenders who face possible prison

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1. See Maxaku, Williams 1973 (4) SA 248 (C) 255G; Ncube 1979 (2) PH H169 (T); Hlohlogane 1981 (2) PH H47 (O); Mokoena 1982 (3) SA 967 (T) 969.
2. Mantusse 1973 (3) SA 223 (T) 224; Maxaku, Williams supra 254. See also Nkabinde 1981 (1) PH H71 (O).
3. Mokoena supra 969; Mantusse supra 224.
4. Olyn 1984 (2) SA 75 (NC) 78H. See also Du Toit 161.
5. Adams 1971 (4) SA 125 (C) 127F; Yibe 1964 (3) SA 502 (E); H 1978 (4) SA 345 (E); Khulu 1975 (2) SA 518 (N).

sentences, particularly when they are young adults. Such an offender, where there is still the potential for reform, will benefit from a probation officer's report containing a comprehensive personal assessment coupled with a motivated recommendation for the imposition of a constructive non-custodial sentence.

1.3. THE PROSECUTOR ADVANCING MITIGATING FACTORS KNOWN TO HIM

The prosecutor can play an important role in assisting an undefended accused in the mitigation process. As part of his right and duty to participate in the sentencing process by producing relevant information and argument,[1] he must, as "minister of the truth", bring to the court's notice any information which may favour the accused.[2] As the police docket is a privileged document, the duty is an ethical one and compliance with it will again depend on the prosecutor's sense of justice.[3]

1.4 IMPOSING SPECIFIC TYPES OF SENTENCES

1.4.1. A FINE

Since the aim of the imposition of a fine is to punish an accused without resorting to imprisonment,[4] the court should not defeat that objective by imposing a fine which

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1. S 274(2). See also Motehen 1949 (2) SA 547 (A) 550; Viljoen Report par 5.2.14.
2. See Du Toit 144.
3. See ch 6 above for the prosecutor's "duty" to disclose during the trial information favourable to the accused.
4. Ockhuis 1972 (2) PH H156 (C).

the accused cannot pay.[1] While it is not an absolute rule that the amount of the fine should be within the accused's means,[2] an attempt should be made to keep it within reasonable bounds in relation to the accused's financial position.[3] A fine should therefore not be imposed where the court is aware that it is utterly beyond the means of the accused to pay it.[4] Where the accused, particularly when he is undefended, fails to advance sufficient information regarding his financial position, it is the court's duty to ascertain this where it intends to impose a fine.[5] A "purposeful enquiry" should be conducted into the accused's means;[6] the court ought not to speculate on the accused's ability to pay a fine when the matter can easily be investigated.[7] The view in Rice 1959 (1) SA 138 (SR) that it is sufficient to take judicial notice of the rough average earnings of a class of people,[139C] cannot be supported. The court should enquire about the type of work the accused does, his income,[8] the possibility of his

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1. Nhlapo 1954 (4) SA 56 (T) 58; Radebe 1981 (2) PH H115 (O); Sithole 1979 (2) SA 67 (A) 69G.
2. Jansen 1972 (3) SA 86 (C) 87.
3. Jansen supra 86; Ockhuis 1972 (2) PH H156 (C); Letoba 1909 EDL 138; Frans 1924 TPD 419; Nyati 1973 (1) SA 553 (R) 554A; Sithole supra 69G.
4. Sithole supra 69G. See also Chabaka 1981 (2) PH H159 (O).
5. Nhlapo 1954 (2) SA 56 (T); Taurayi 1963 (3) SA 109 (SR) 114; Apollos 1971 (3) SA 265 (C); Jansen supra 87; Ndamase 1973 (3) SA 614 (E) 614G; Komsana 1978 (2) PH H233 (E); Radebe supra; Sithole supra 69H; Joggams 1984 (2) PH H149 (C). See also Du Toit 304ff.
6. Sithole supra 69H.
7. Ndamase supra 614H.
8. Jansen supra 87.

raising money from other sources,[1] and of his paying the fine in instalments.[2] With regard to the latter prospect, the court should take the initiative and explain to the undefended accused that, in appropriate circumstances, the court would allow him to pay a fine by way of instalments.[3]

1.4.2. COMPULSORY SENTENCES IN THE ABSENCE OF MITIGATING CIRCUMSTANCES

A number of statutory offences are subject to compulsory penalties if no mitigating circumstances are present.[4] The undefended accused, unaware of the possibility of escaping a compulsory sentence, will be severely prejudiced if he is not informed thereof. The court, in conducting an enquiry before imposing such a sentence, should assist this accused firstly, by inviting his participation to advance such circumstances, and secondly, where the information produced by the accused is insufficient, by itself investigating possible mitigating circumstances. The court's duties in this regard are accurately and comprehensively set out by Baker AJ in Taylor 1972 (2) SA 307 (C) and have been endorsed in a number of decisions.

> "[W]hen sentencing an undefended convicted person who qualifies for a compulsory sentence, the trial court must -

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1. Mdluli 1984 (2) PH H138 (O).
2. Manwere 1972 (4) SA 425 (RA) 432.
3. Ockhuis 1972 (2) PH H156 (C). See s 297(5).
4. See eg Act 41 of 1971 s 7; Act 56 of 1955 s 334ter, 335A (repealed by Act 51 of 1977); Act 71 of 1968 s 4(1).

> (a) inform the convicted person that he is entitled to lay before the court evidence of circumstances which, if accepted, may persuade the court to impose a lighter sentence than the compulsory sentence;[1]
>
> (b) ask the convicted person whether he wishes to lead such evidence, or make submissions to persuade the court to impose such lighter sentence;[2]
>
> (c) whether the convicted person leads evidence and/or makes submissions or not, mero motu consider whether mitigating circumstances exist in the particular case; and where the convicted person does not lead any evidence or make submissions, question him in order to elicit whether such circumstances exist;[3]
>
> (d) in all cases, record in the record of proceedings whether or not in its opinion such circumstances exist, and if it finds that they do exist, state what they are. It is not sufficient, in my view, only to enter the circumstances upon the record if and when such circumstances have been found to exist. The court should record that it has considered the matter".[4]

In informing the accused of the provisions for compulsory penalties, the crucial question remains whether this is of any use if the accused is not given any idea of what is meant by "mitigating circumstances". It is suggested that the court should explain to the accused what it regards as circumstances which have a mitigating effect.[5]

It has been emphatically stated that there is no formal onus on the accused to prove mitigating circumstances.[6] It is

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1. See also Ngwane 1969 (3) SA 44 (N) 44H; Van Straaten 1971 (4) SA 487 (N); Kanyile 1972 (1) SA 204 (N) 305H; Nkosi 1972 (2) SA 753 (T) 764; Green 1972 (3) SA 533 (O) 533H; Xulu 1972 (4) SA 675 (N); Mzolo, Mangele 1976 (1) SA 49 (N) 50H.
2. See also Mzolo, Mangele supra 50H.
3. See also Nkosi supra 764; Shangase 1972 (2) SA 410 (N) 430B; Maxaku, Williams 1973 (4) SA 248 (C) 257H; Seleke 1976 (1) SA 678 (T) 690F.
4. 312C-F. See also Ngwane 1969 (3) SA 44 (N) 44H; Maxaku, Williams supra 257.
5. Cf Shangase supra 431A.
6. Shangase supra 431A; Maxaku, Williams supra 257G; Seleke supra 690F.

thus wrong to look solely to the accused to supply special circumstances which would warrant a lesser sentence,[1] although he could be expected to bring forward circumstances which are peculiarly within his knowledge.[2] In the final instance, it is the task of the court, assisted by the accused and the prosecutor, to investigate all reasonable possibilities as to the existence of mitigating circumstances.[3] Such a full investigation should include the past history and the present circumstances of the accused.[4] The court must thus ensure, through its own investigation, that an appropriate sentence is imposed.

2. COMPENSATION PROCEEDINGS

Where an accused is convicted of an offence which caused damage to or loss of property belonging to someone else, the court has the discretion to award compensation on the application of the person so injured.[5] In considering the application, the court must determine three distinct issues; firstly, whether the accused is liable, secondly, if liable, the extent of his liability, and thirdly, whether the order should be made in view of the accused's financial status. In respect of the first two issues, the adversary mode of procedure is followed, while in the third the court must

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1. Joseph 1969 (4) SA 27 (N) 28.
2. Shangase 1972 (2) SA 410 (N) 431A.
3. Seleke 1976 (1) SA 678 (T) 690F.
4. Nkosi 1972 (2) SA 753 (T) 764.
5. S 300(1). See Lepale 1979 (1) SA 117 (B); Msiza 1979 (4) SA 473 (T); Vorster 1983 (1) PH H48 (0).

conduct an enquiry.[1]

Before beginning the proceedings the court should inform the accused that it intends to consider the question of compensation.[2] The court should thereafter, in accordance with the audi alteram partem principle,[3] afford each party the opportunity to lead evidence and address the court,[4] irrespective of how convincing the case against the accused may be.[5] Where the accused is undefended, the court should explicitly enquire whether he wishes to participate in the proceedings.[6] In Bidi 1969 (2) SA 55 (R) it was suggested that where the accused is undefended the court should ask whether he disputes either his liability or the quantum of damages.[56A]

It is in the court's discretion to refuse an award of compensation where, despite the accused's liability, he is indigent and has no assets that can be sold in execution; an order in this situation would be inappropriate since it would be unenforceable.[7] The court should thus conduct an

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1. Van Rensburg 1974 (2) SA 243 (T) 244H; Tlame 1982 (4) SA 319 (BSC) 320D.
2. Nquli 1973 (4) SA 556 (C) 557; Van Rensburg supra 244H; Baadjies 1977 (3) SA 61 (E) 62G.
3. Bidi 1969 (2) SA 55 (R) 55A; Maelane 1978 (3) SA 528 (T) 529; Lepale 1979 (1) SA 117 (B) 119B; Tlame supra 320D.
4. Msiza 1979 (4) SA 473 (T) 475E; Van Rensburg supra 244H; Tlame supra 320D; Gamiet 1929 CPD 540 541.
5. Ndhlovu, Dorizhi 1970 (1) SA 381 (R) 382A.
6. Nquli supra 557.
7. Bepela 1978 (2) SA 22 (B) 24G; Tlame 1982 supra 320H. See also Baloyi 1981 (2) SA 227 (T) 229H.

enquiry in respect of the accused's financial position. Instructive in this regard was the approach adopted in Zumbika 1978 (3) SA 155 (R). The magistrate in the court a quo merely enquired from the accused whether he was able to make restitution to the sum of $1 200, to which the latter replied in the affirmative. The Court criticized the magistrate for taking the accused's consent at face value, and held that he should still have investigated the latter's ability to pay compensation by ascertaining his savings and realizable assets.[1]

By conducting an enquiry the court will ensure that, in the exercise of its discretion, all the relevant information required to be taken into consideration, is at its disposal. The undefended accused will thus not be prejudiced should he fail to advance favourable factors.

3. PUTTING SUSPENDED SENTENCES INTO OPERATION

Section 297(7) grants the court a discretion not to impose a suspended sentence despite the fact that a condition of the suspension has been breached.[2] The court has the power to resuspend the sentence for a further period, amend any positive conditions of the suspended sentence,[S 297(8)] or refrain from putting the sentence into operation.[S 297(9)] The court may exercise this power "if satisfied that the

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1. 155H. See also Bepela 1978 (2) SA 22 (B) 24G.
2. Olyn 1982 (3) SA 31 (BSC) 32E.

person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason".[S 279(7)]

The procedure to determine whether a suspended sentence should be put into operation has been described as an enquiry,[1] or an administrative act.[2] The basic principles of an enquiry should thus be followed to ensure that, before arriving at a decision, the court has at its disposal the relevant information pertaining to that decision.

In conducting the enquiry the court should first secure the accused's participation by inviting him to lead evidence and to make representations.[3] Where the accused is undefended, he should specifically be informed about his right to participate in the enquiry;[4] to make representations[5] and to give evidence under oath if he so wishes.[6] There is as yet no decision which requires that the apprisal of his rights should include an explanation of what relevant considerations may be. It is submitted that without such a comprehensive explanation, the apprisal as to

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1. Van Nieuwenhuizen 1972 (3) SA 575 (T) 576A. See also Burgher 1931 TPD 391 393.
2. Labuschagne 1964 (3) SA 454 (T) 457F. The order of the court is thus not appealable or reviewable in terms of the Code, but only reviewable in terms of s 24 of the Supreme Court Act 59 of 1959, Labuschagne supra 455E; Payachee 1973 (4) SA 534 (NC) 536F; Gasa v Regional Magistrate for the Regional Division of Natal 1979 (4) SA 729 (N).
3. Zondi 1974 (3) SA 391 (N) 391H; Van Straaten 1971 (4) SA 487 (N) 488; Sambe 1981 (3) SA 757 (T) 758H.
4. Payachee supra 536A.
5. Motlhapi 1979 (4) SA 1052 (BSC) 1053.
6. Moletsane 1979 (4) SA 613 (BSC) 614F.

how he can advance considerations, will be a meaningless exercise.

Even if a comprehensive explanation is given regarding his rights and what they entail, the undefended accused may lack the insight and ability necessary to provide the court with sufficient and relevant information.[1] Although the court's function has been described as an enquiry,[2] the principles of an enquiry have not been fully incorporated in the law. It has been argued that there should be no onus on the accused to satisfy the court of the existence of "good and sufficient reasons" and that the court should mero motu conduct an enquiry into whether it is appropriate to put a suspended sentence into operation.[3] The argument may be summarized as follows: Firstly, neither the Supreme Court nor the Code [S 297(7)] has placed any onus on the accused to satisfy the court of the existence of "good and sufficient reasons".[4] When the discretion not to enforce suspended sentences was first introduced in 1926, the onus was explicitly placed on the accused to prove that he had been unable, through circumstances beyond his control, to comply with any condition of such suspension. The 1955 and 1977 Codes, however, omitted any reference to such an onus. Secondly, the Court has laid down various guidelines

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1. See Colleen Hall "Suspended Sentences - An Exercise of Judicial Discretion in Theory and in Practice" (1985) 9 SACC 3 11ff.
2. Van Nieuwenhuizen 1972 (3) SA 575 (T).
3. Hall op cit 9-11.
4. But see Payachee 1973 (4) SA 534 (NC) 536E; Du Toit 399-400.

according to which the discretion should be exercised,[1] and all the guidelines assume an active participation by the court in investigating all the circumstances of the case.[2] Finally, as the invocation of a suspended sentence is in essence the imposition of a punishment,[3] the same duty to enquire incumbent on a court in respect of sentencing, should also apply in this instance.[4] In principle, then, the court can only exercise its discretion judicially if it has all the relevant information at its disposal. Where the undefended accused, on invitation of the court, fails to inform the court adequately, it remains the duty of the court to establish inquisitorially an adequate basis for its decision. This means that the undefended accused will not be prejudiced by his incompetence as an adversary.

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1. See Smith v Friend NO 1973 (3) SA 168 (N) 170H; Callaghan v Klackers NO 1975 (2) SA 258 (E) 259G. See further Hall op cit 10.
2. Cf Callaghan v Klackers NO supra 259G-H.
3. Du Toit 399-400.
4. See Zondi 1974 (3) SA 391 (N) 391H; Mngoni 1985 (2) SA 448 (N) 451H.

4. SENTENCING - AN EMPIRICAL ANALYSIS

4.1. THE MITIGATING PROCESS

The undefended accused faces considerable difficulties in participating in the mitigation process and usually fails to advance relevant mitigating factors. The failure of this accused to utilize the opportunity to his advantage is not only a function of his own inarticulateness, but stems principally from the professionalized nature and structure of the mitigation process. In a survey of English court practice Shapland found that mitigating factors mentioned by lawyers covered the following:

(a) the reasons for the commission of the offence;

(b) the gravity of the offence;

(c) the offender's attitude to the offence;

(d) his personal circumstances at the time of the court appearance;

(e) his personal circumstances before the offence was committed;

(f) his future circumstances; and

(g) his past criminal record.[1]

The first three categories of factors are also used by laymen in mitigating everyday inter-personal accidents; people ask apologies, give excuses or justifications for harm which they have caused to others. The rest of the factors listed above are not part of the layman's common

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1. J Shapland Between Conviction and Sentence: The Process of Mitigation (1981) 59-74.

response to wrongs committed. Furthermore, the process of mitigating everyday accidents occurs within the context of a conversation with the victim and long monologues by transgressors are not expected.

Shapland found that undefended accused, contrary to individuals' responses to everyday accidents, seldom attempted to explain their criminal conduct in court. They mentioned on the whole very few mitigating factors (1,71), usually limiting their participation to expressions of regret.[75] The accused's incompetence was attributed to his situational position in court and the type of invitation he had received from the magistrate.[59] The latter merely asked the accused whether he had anything to say. The accused was not likely to make a long speech on his own, particularly where his audience, the magistrate, did not engage in a conversation with him and gave little feed-back on what was said. Moreover, the offender, already degraded by the conviction, perceived that his word could not carry much weight, particularly since his evidence in defence had previously been rejected. Even where he wished to participate, though, he was hampered by his ignorance of what factors the court regarded as mitigating. Shapland thus concludes that

> "By far the greatest difficulty of the unrepresented defendant is his lack of knowledge on which to base decisions as to what to say and perhaps more important, what not to say - to select and sift from his whole life history and all the circumstances of the offences those points that will produce cogent arguments to persuade a particular sentence".[120]

In Shapland's study lawyers were, in contrast, most active in the mitigation process and mentioned on average 8,23 factors, frequently referring to the accused's background and future prospects, factors which undefended accused were reluctant to mention.[75] Lawyers were also structurally in a better position to participate in the mitigating process. Since the purpose of the process was to determine an appropriate sentence for an offender, the lawyer participated as a professional with specialized knowledge, and not merely as a spokesman for the accused.[95] Specific sentences could thus be argued for, and the lawyer was consulted about what should be done to the offender. The undefended accused, because of his marginalized status, was not invited to do the same,[96] and the mitigating factors which he did mention did not enjoy the respectability and credibility attached to those submitted by lawyers by virtue of their status as officers of the court.[80-81]

In this writer's study undefended accused were similarly incompetent in assisting the court with the provision of mitigating factors. Obliged to conduct an enquiry, the court attempted to achieve accused persons' participation in the process by advising them of their rights to advance mitigating factors, and where they failed to do this adequately, it enquired after their personal circumstances.

4.1.1 INFORMING THE ACCUSED OF HIS RIGHTS IN RESPECT OF MITIGATION

The court is obliged to invite the accused to advance mitigating factors, and to inform him how this can be done, although the meaning of "mitigation" may be left unexplained. In a sample of 115 cases all the undefended accused were informed of the opportunity to participate in the mitigation process, but not all were given explanations of how this could be done. The regional court magistrates carefully explained to the accused the means by which he could adduce mitigating factors; that he could give evidence under oath himself, make an unsworn statement or call witnesses. In the magistrates' court, however, only half of the accused were apprised of their right to give evidence under oath. The other half were merely asked: "Anything to say in mitigation?" Even less were told of the right to call witnesses.[1] In neither the regional nor the magistrates' court was the purpose of the mitigation process routinely explained to the accused. Even where information was given as to how the accused could advance mitigating factors, this did not assist the accused to understand what a mitigating factor was. Some magistrates did, however, make a tentative effort to convey the essence of mitigation to the accused. In Case A4 RC, for example, the regional magistrate informed the accused: "You may state whatever may reduce your sentence."

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1. Bekker et al (16) found a similar failure to inform the accused fully of his rights. Only 21% of accused were told of the right to testify under oath and only 16% were enlightened about calling witnesses.

In translating the information as to rights, the interpreters often played an instructive role by enlightening the accused as to the purpose of mitigation. One interpreter independently advised the accused to state his circumstances "so that the court does not impose a harsh sentence on you".[Case A18 RC] In Case A80 DC the interpreter added to the magistrate's terse question, "Anything to say in mitigation", the following advice: "[For example] things like you are working, you are the sole supporter of your kids, family etc." On numerous occasions the interpreter also prompted the accused to mention further mitigating factors. The interpreter's intervention was a substitute for the court's duty to inquire into the accused's personal circumstances should the latter fail to reveal such. By prompting the accused to relate his personal circumstances the interpreters asked those questions which the court invariably would have put to determine factors which the accused failed to mention.

4.1.2. THE ACCUSED'S PARTICIPATION

Although most of the undefended accused wanted to participate (only 11% indicated that they had nothing to say), they experienced difficulties in expressing themselves adequately and advancing relevant mitigating circumstances. Only 3% gave evidence under oath and a further 1,5% called a witness to give evidence, while the rest made a statement from the dock. Forty per cent mentioned only one item, while 27% advanced a second. The factors which were most

frequently mentioned were: dependents (54%), repentence (35%), marital status (23%) and income (13%). Pleas of mercy were often made, irrelevant information was frequently tendered, and there were some requests for a "suspended sentence". The undefended accused were unable to offer anything more than their basic personal circumstances - whether married, their dependents, and employment. They seldom tried to explain why the offence was committed or to mitigate the gravity thereof.

The majority of defence attorneys, on the other hand, were most active in mitigation and 82,4% of them presented five or more factors to the court, usually arguing for specific sentences.

4.1.3. ESTABLISHING THE ACCUSED'S PERSONAL CIRCUMSTANCES

Since the undefended accused failed to participate adequately in the mitigating process, the court pursued its inquisitorial role and in most instances questioned the accused about his personal circumstances. The enquiry - conducted in 82,9% of the cases - tended, however, to be superficial and on average an accused was questioned regarding not more than three factors. The questioning focused primarily on the personal circumstances of the accused: his occupation (65,3%); dependents (53,6%); marital status (48,4%); income (33,3%); and his ability to pay a fine (28,9%).

Where a "sentencing tariff" existed for particular offences, the court still conducted the enquiry but did so in a very mechanical fashion, as if only to comply with its legal duty. Although the standard sentence for a first offender for the possession of a small quantity of dagga was invariably four months' imprisonment suspended for three years, the court would go through the motions of enquiring after the various personal factors, while seldom deviating from the established sentencing tariff for the offence.

The principle that a fine imposed should be individualized with due regard to the accused's means was observed in the main. The court enquired into the financial position of the undefended accused or was informed thereof in 81,2% of the 32 cases where a fine was imposed. One magistrate consistently asked the accused explicitly whether he would be able to pay a certain amount. Other magistrates were content with a determination of the accused's earning capacity or income.

In a few exceptional cases the court went to great lengths to arrive at an appropriate sentence and utilized its inquisitorial powers to call witnesses. In Case 63 RC a 19 year old Black male was convicted in the regional court of theft of a motor vehicle. When it appeared during mitigation that the accused's father worked at a certain store in the city, the regional magistrate decided to call the latter as a witness and instructed the prosecutor to get him to court. When the prosecutor reported that the father was not

employed at that particular store, the court instructed the investigating officer to take the accused to point out his father. The latter was eventually traced and subsequently gave evidence in support of his son.

Probation officers were not frequently called by the court. As there was no discernible rule as to when a probation officer's report was required, they were not consistently used even in the regional court, despite the severity of the prison sentences which were imposed on a number of young adult offenders.

Although the majority of the judicial officers conducted enquiries to establish a factual basis for determining an appropriate sentence, the depth and comprehensiveness of the enquiries were disparate and were strongly influenced by the type of offence, the offender and the judicial officer.

4.1.4. THE PROSECUTOR'S PARTICIPATION

The prosecutor's participation consisted mainly of handing in the SAP 69 form which reflected the accused's previous convictions. Prosecutors in the regional court were more active in addressing on sentence than their colleagues in the magistrates' court, who hardly participated at all. No instances were recorded, however, where the prosecutor presented information favourable to the accused.

4.2. SENTENCES

Some researchers have found that legal representation had a significant influence on the severity of sentence,[1] while others have reported no consistent relationship.[2] A comparison between the sentences imposed on defended and undefended accused in the present sample cannot necessarily be relied upon to reflect accurately the effect of legal representation upon sentencing since the accused who faced the more serious charges were the least represented. Table 9.1 gives some indication that there was a marked difference in the sentences received by the two classes of accused.

Table 9.1: Sentences by representation

Sentence	Defended	Undefended
cautioned or postponed	4 (18,2%)	0
suspended imprisonment	5 (22,7%)	25 (21,7%)
fine	7 (31,8%)	26 (22,6%)
fine plus suspended imp.	3 (13,6%)	10 (8,7%)
whipping	1 (4,5%)	4 (3,5%)
prison	2 (9,1%)	50 (43,5%)
	22	115

It is important to note that most of the accused who received a prison sentence did not have the benefit of legal representation, illustrating yet again the fact that the accused most in need of legal assistance were the least protected.

The translation of legally complex sentences did not always receive the same meticulous care as was exercised in the

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1. Warren op cit 333; Wheeler op cit 228-9; Vincom & Homel op cit 133.
2. Cashman op cit 208; Feeley (1979) 144; Ryan op cit 122.

magistrates' explanations. While the regional court interpreters explained provisions of a suspended sentence carefully, their colleagues in the magistrates' court gave the information in a haphazard way. At times the length of the suspension of the sentence was omitted, sometimes even the entire suspended sentence. The interpreter in Case A77 DC took the liberty to substitute the interpretation of the sentence with a moral lecture. After the magistrate sentenced an accused, convicted of the possession of dagga, to six months' imprisonment suspended for five years on the usual conditions, the interpreter castigated the accused as follows: "You rascal, free yourself away from the Satan, but if you pay no attention to what I tell you, we'll call you and we'll say come and serve your sentence because you are stubborn, you rascal."

4.3. PUTTING SUSPENDED SENTENCES INTO OPERATION

In Hall's study of the invocation of suspended sentences, she found that the accused was given the opportunity to state why the suspended sentence should not be put into operation and the ways in which he could bring information to the court's attention were explained.[1] The accused routinely failed, however, to advance reasons and the magistrates uniformly failed to conduct an enquiry into the circumstances of the second offence before invoking the suspended sentence.

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1. (1985) 9 SACC 3.

The court in this study displayed a similarly passive attitude in respect of this 'enquiry'. Case 391 DC is an example of a common approach.

Case 391 DC

After the magistrate had determined that the accused had breached one of the conditions of his suspended sentence imposed for the possession of dagga, he addressed the accused as follows:
M: The prosecutor asked me that the six months suspended sentence be imposed. Anything to say why the sentence should not be imposed?
A: I plead leniency for the six months already served are heavy for the possession of merely one gram of dagga.
M: The court is not satisfied that there is any reason why the suspended sentence should not be imposed.
He thereupon invoked the suspended part of the sentence.

In none of the cases did the court investigate the existence of any circumstances which might have obviated the need to impose the suspended sentence; it was left to the accused to advance such reasons. Without any information as to what acceptable reasons were, the accused either attempted unsuccessfully to advance some or simply remained silent.

Hall criticizes the courts' failure to conduct such an enquiry, which in effect places an "onus" on the accused to prove why the suspended sentence should not be invoked. She argues that such an approach is contrary to the case and statute law, which imposes a duty on the court to conduct this enquiry. Hall is mistaken, however, as to the structure and content of the law in this regard and contrary to what she maintains, the magistrates' practice was a faithful rendition of the case and statute law. The central tenet of her argument is that the court is obliged to conduct an

enquiry and that no onus rests on the accused to advance reasons why the suspended sentence should not be invoked. This is a convincing argument which accords with the rhetoric of the law, but this is not the letter of the law. The Supreme Court has not created a duty with any certainty or clarity, nor set aside a decision where a magistrate failed to conduct an enquiry.[1] The fact that the Court has said that there is no onus on the accused in this respect, does not imply that the judicial officer is legally bound to enquire mero motu into the circumstances of the commission of the second offence, however desirable this may be. What the Court has clearly said is that the accused should be given an opportunity to bring information to the court's attention. This was dutifully fulfilled by the magistrates in Hall's sample and the present one.

Hall's observation that the offenders were not informed about the grounds on which a further suspension could be granted, does not reveal a deviation from the case law either. The Supreme Court has given more attention to identifying the considerations that should be taken into account in exercising the discretion,[2] than enforcing the disclosure of such to the accused.

The court conduct when invoking a suspended sentence, is yet a further example of the dominant role that law plays in

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1. Cf Hiemstra 658-661. Ferreira 670 also suggests that no onus rests on the accused.
2. See Hall op cit 10.

moulding judicial behaviour. Where clear and unambiguous duties are laid down, coupled with definite sanctions for their non-observance, the judicial officers conducted the proceedings with due regard thereto. Where the rules have not been formulated lucidly and authoritively, courts, not bound to obey, did not do so voluntarily.

5. CONCLUSION

At the sentencing stage of the trial, inquisitorial intervention by the judicial officer has been provided for in the shape of a compulsory enquiry to be conducted in order to elicit the information essential for a just sentencing determination. The court must first invite the accused to advance mitigating factors, and where the latter fails to provide sufficient information, it should establish such inquisitorially. This is appropriate since the imposition of a sentence is primarily an exercise in discretion guided by policy considerations. This enquiry operates in theory for all accused but is of particular significance in the case of an undefended accused, who is usually incapable of protecting his own interests adequately in adversary proceedings. This accused's incompetence was evident in the empirical study in his inability to contribute meaningfully to the mitigation process when invited to do so at the outset of the enquiry. The inquisitorial process means that the accused will not be prejudiced by his incompetence as a skilled participant. The enquiry as a form of decisionmaking has a firm legal basis

in all but one aspect of sentencing-related proceedings (the exception being the implementation of suspended sentences), and is thus uniformly conducted. The depth or thoroughness of the enquiry, however, remains discretionary, and this results in disparate court practices. Thorough protection of the undefended accused at this stage would require guiding rules regarding the conduct of the enquiries and the extension of the process to the implementation of suspended sentences.

CHAPTER TEN APPEAL AND REVIEW PROCEEDINGS

The Supreme Court's supervisory function over lower court proceedings has a special importance where the accused are undefended, because, in the absence of a defence lawyer, the rights of this accused to a fair trial may remain unprotected. In the adversary system the onus is on the litigants to invoke the superior court's supervisory powers through appeal and review proceedings. Moreover, these proceedings, due to their technical and formal nature, are highly professionalized and costly, and, as Hiemstra CJ remarked in Motlapi 1979 (4) SA 1052 (B), "[n]ormally accused persons have neither the funds nor the knowledge to launch such proceedings".[1054A] The normal adversary procedure is thus ill-suited to ensure the uniform enforcement of the principles of a fair trial. Consequently, in a number of instances, lower court proceedings are reviewed independently of the accused's initiative. Since only a limited category of cases are reviewed in this way, the general rights of appeal and review exercisable only at the accused's instance, remain important for the enforcement of the principles of a fair trial in the vast majority of undefended cases.

1. APPEAL AND REVIEW AT THE INSTANCE OF THE ACCUSED

An accused person is entitled as of right to appeal against any conviction, sentence (including a caution), or order passed by a lower court.[S 309(1)(a)] A prisoner who wishes

to prosecute an appeal without the assistance of a lawyer, however, must first obtain a judge's certificate stating that there are reasonable grounds for an appeal.[S 309(4) & 305] An accused person may also submit proceedings of lower courts for review by the Supreme Court in terms of s 24 of the Supreme Court Act 59 of 1959, s 304(4) of the Code, or the Court's inherent right of review. Should a prisoner wish to institute review proceedings in person, he must obtain a judge's certificate as above.[S 305]

No duty has been placed on the trial court to apprise an undefended accused of these remedies at the completion of the proceedings.[1] Furthermore, seeking the protection of the Supreme Court in terms of the Code and Supreme Court Act and Rules, requires skilled participation because of the highly adversary nature of the procedure and the numerous technical rules which must be followed.[2]

The undefended accused prosecuting his own appeal is entitled to limited assistance from court officials. The Magistrates' Court Rules provide that if an appellant, due to his illiteracy or a physical defect, is unable to draw up a notice of appeal, the clerk of the court is obliged to do this at his request.[Rule 67(2)] It is suggested by Du Toit that there is no reason why the prosecutor, at the request of the clerk, could not assist in the drafting of the notice, since the latter may not have the requisite legal

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1. See Arries 1959 (3) SA 913 (C) 916C.
2. See eg Supreme Court rule 53.

knowledge for the task.[475 n 267] He further contends that the State, in dealing with such appeals, should be more lenient by not insisting on strict compliance with the rules of court. The Attorney-General usually informs an unrepresented appellant where his notice of appeal does not meet the legal requirements, in order that the necessary amendments may be made before the hearing of the appeal.[1] Should the accused manage to lodge a notice of appeal, the Court of appeal may also come to the appellant's assistance by appointing counsel to argue the appeal on his behalf.[2]

These provisions, it is submitted, do not render the undefended accused's rights to appeal and review fully accessible to him. The accused is not informed that he has such rights or how they should be exercised. Should he attempt to prosecute an appeal in person, he is entitled to very little assistance, considering that he is engaging in highly professionalized proceedings. The assistance which the clerk of the court must render is limited to writing the notice of appeal, as rule 67(2) refers only to illiteracy or some physical defect which may prevent the accused from reducing his appeal to paper. To rely on the prosecutor to give the necessary legal advice and assistance is not desirable or practicable. He may experience a conflict of interests, particularly where he was involved in the prosecution of the case and he is in any event not legally

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1. Du Toit 475 n 267. See also Sewraj 1978 (1) 434 (N) 436D.
2. See eg Loggerenberg 1984 (4) SA 41 (E).

compellable to render advice or assistance. The appointment by the Court of counsel to argue the appeal is not only subject to the Court's discretion, but may also come too late. Counsel will be appointed only after the notice of appeal has reached the Court, once the accused has had to identify the grounds of appeal and formulate the appeal himself.

In order to afford the undefended accused the protection of the supervisory powers of the Supreme Court, his rights to appeal and review should be made accessible. Firstly, the judicial officer should inform the accused of the existence of the right of appeal and review. Secondly, he should be apprised of his right to apply for legal aid to prosecute an appeal or review. It is submitted that in view of the professionalized nature of the appeal and review proceedings, it is futile for the court officials - such as the clerk of the court - to attempt to assist the accused in the exercise of his rights. Should an accused feel aggrieved by the result of his trial or the way in which it was conducted, private practitioners, instructed by the Legal Aid Board, are the only persons suitable to advise him on possible grounds of appeal and the prospects for success and, where necessary, to prosecute the appeal or review.

2. REVIEW PROCEEDINGS INDEPENDENT OF THE UNDEFENDED ACCUSED

In view of the difficulties which an undefended accused may experience in enforcing his procedural rights, the review proceedings independent of his initiative are extremely

important. In terms of the Code review proceedings are initiated automatically in respect of certain specified sentences.[S 302] Review proceedings may also be instituted by persons other than the accused in terms of s 304(4), s 116, and the Supreme Court's inherent jurisdiction.

2.1. AUTOMATIC REVIEW

The aim of automatic review is to protect undefended accused in a specified category of cases from miscarriages of justice and, in general, to provide guidance to the lower courts.[1] The significance of the system of automatic review has been described as follows:

> "When it is borne in mind that at least 90% of the accused persons are either wholly or partially illiterate and that the great majority of them are undefended, the vital importance of the system in the administration of justice in this country becomes apparent".[2]

The court's supervisory function is limited, however, to those cases where an undefended accused is sentenced in the magistrates' court to a substantial period of imprisonment, whether or not suspended, or a whipping.[S 302]

2.1.1. THE UNDEFENDED ACCUSED

Automatic review is restricted to cases where the accused has been undefended.[S 302(3)(a)] In Mboyany 1978 (2) SA

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1. Songongo 1984 (2) SA 146 (E) 150; Mboyany 1978 (2) SA 927 (T) 930A-B; Mokubung, Lesibo 1983 (2) SA 710 (O) 714H; Nyelele 1984 (1) PH H72 (O).
2. Mokubung, Lesibo supra 715C. See also Songongo supra 149H.

927 (T) an accused was regarded as legally represented as long as he enjoyed the services of a practitioner at the sentencing stage. Indeed, the lawyer need not even have been physically in court at that stage, as long as his mandate had not been terminated. The Court was of the opinion that automatic review was superfluous in those circumstances since the defence lawyer could advise and assist the accused in respect of possible remedies.[1] It is submitted that the accused will indeed be sufficiently protected if he has access to a lawyer only at the sentencing stage but that the converse also holds true; if the accused is represented only at the trial stage, but was unassisted during sentencing, the proceedings should be automatically reviewable.

2.1.2. IMPRISONMENT AS A RESULT OF A SENTENCE

The thrust of the changes brought about in 1977 was to limit reviewable cases to those where the accused has been sentenced by a magistrates' court to a substantial period of imprisonment - more than six months if the sentencer has held the rank of a magistrate for seven years or more, and three months for others. Automatic review was thus described in Dalton 1978 (3) SA 437 (O), as "the judicial control over the infringement of an individual's liberty".[440D] Review follows only if the imprisonment is a sentence of the

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1. 930. For criticism, see DJL Kotze (1978) 41 THRHR 72 74 who doubts whether the mere presence of the attorney at the sentencing stage can be a sufficient safeguard.

court and not an administrative order.[1] The referral of a person to a rehabilitation centre [S 296] may thus be reviewable as the order is a sentence of the court [S 276(1)(e)] and the period of detention is not limited to less than three months.[2] On the other hand, the order that an accused who has been found unfit to stand trial, be detained awaiting the State President's decision, is not a sentence and thus not automatically reviewable.[3] It is submitted, however, that because of the grave inroads that the latter order makes on a person's liberty, and in view of the indeterminate length of the detention, this order should receive legislative attention and be made subject to automatic review.

2.1.3. SUSPENDED SENTENCE

Before 1983 the suspended part of a prison sentence was not to be included in calculating whether the sentence was reviewable.[S 302 (2)(b)] This provision was repealed in 1983.[4] The present position is thus that a prison

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1. Automatic review may, however, be specifically provided for in other statutes which authorize detention as a result of administrative orders. See Prisons Act 8 of 1959 s 56; Act 41 of 1971 s 30-33, In re: Doubell 1984 (1) PH H11 (T); Black (Urban Areas) Consolidation Act 25 of 1945 s 29(11); Coloured Persons Rehabilitation Centres Law 1 of 1971 s 15-17, Arendse 1978 (2) SA 494 (C).
2. Tolmay 1980 (1) SA 182 (NC) 184A; Dalton 1978 (3) SA 437 (O) 439F.
3. Blaauw 1980 (1) SA 536 (C).
4. Act 59 of 1983 s 22. For the unsatisfactory operation of the repealed provision see Boyi 1978 2 PH H232 (E); Paulsen, Ntenase, Bila 1982 (4) SA 91 (T) 93F; Mokoena 1983 (2) SA 312 (O); Mokubung, Lesibo 1983 (2) SA 710 (O); Chabagae 1978 (4) SA 807 (O) 810H; Moletsane 1979 (4) SA 613 (BSC). See also NC Steytler "Die Outomatiese Hersiening van Opgeskorte Vonnisse" (1983) 7 SACC 178.

sentence, irrespective of whether it is wholly or partially suspended, will be reviewed as long as the period of imprisonment exceeds the set limits.[1]

Putting into operation a suspended sentence of a fine coupled with an alternative of imprisonment, which would become reviewable on default of payment in terms of s 302(3)(b), could result in the same injustices which led to the repeal of the provision in respect of suspended prison sentences.[2] If a conviction or sentence is set aside on review long after the completion of the trial, the first conviction and suspended sentence may have been taken into account in the imposition of subsequent sentences. If the first sentence is later set aside, then all subsequent sentences that took that conviction and sentence into consideration, should also be reviewed. Furthermore, the extra-curial prejudice that a person with a criminal record suffers cannot be recompensed by the subsequent reversal of his conviction.[3] In Songongo 1984 (2) SA 146 (E) Kroon AJ accordingly called for the repeal of s 302(3)(b) or its suitable amendment to eliminate the possibility of such unjust results.

2.1.4. IMPRISONMENT AS A RESULT OF A DEFAULT IN THE PAYMENT OF A FINE

In an obiter dictum Law J stated in Lyons 1984 (3) SA 63

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1. Mathebola 1984 (4) SA 113 (T) 116.
2. Songongo 1984 (2) SA 146 (E) 149.
3. Songongo supra 149. See also Chabagae 1978 (4) SA 807 (O); Paulsen et al 1982 (4) SA 91 (T) 94E-F.

(N) that imprisonment following on a person's failure to pay any fine, made that case reviewable in terms of s 302(3)(b).[64H] Furthermore, a fine exceeding the monetary limits set out in s 302(1)(a)(ii) should also be subject to review, even if that fine had been paid. This extension of the scope of automatic review was soon set aside by a Natal full bench decision in Naidoo 1985 (1) SA 36 (N) where it was held that only if a person is in default of the payment of a fine exceeding the set monetary limits and must serve the alternative sentence of imprisonment, will the case be reviewable.[1] This would apply to all such cases irrespective of the length of imprisonment that must be served.[2] Where the imprisonment which is to be served in default of the payment of a fine, exceeds the reviewable limit for imprisonment, but the fine does not exceed the monetary limit, the case also qualifies for automatic review.[3] There is no unanimity, however, on the question of whether, for the purposes of review, the length of the sentence of imprisonment to be served in default of payment of a fine, should be added to any other sentence of imprisonment, whether or not suspended. The Transvaal Provincial Division has decided that when an alternative prison sentence must be served, the length of that sentence must be added to any other prison sentence whether or not it

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1. 42H. See also Songongo 1984 (2) SA 146 (E) 148; Ismail 1983 (4) SA 240 (T) 242A.
2. Mathiot 1984 (3) SA 140 (O) 144; Mathebola 1984 (4) SA 113 (T) 116.
3. Mathebola supra 117; Mathiot supra 144E.

is suspended,[1] while the Northern Cape Division is of the opposite view.[2] The decision of the Transvaal court is, it is submitted, correct. If the aim of automatic review is to afford an undefended accused a measure of protection in respect of a sentence of imprisonment, whether actual or potential, then surely according to the pro libertate principle of construction, the interpretation most favourable to the accused should be adopted.

2.2. WHEN A MATTER IS BROUGHT TO THE NOTICE OF THE SUPREME COURT IN TERMS OF S 304(4)

In terms of s 304(4) the Supreme Court may review the proceedings of any lower court in which a sentence was imposed, if it is brought to its notice that the proceedings were not "in accordance with justice". This provision affords a variety of persons the opportunity to initiate review proceedings independently of the accused in cases which fall outside the ambit of automatic review. Since the 1977 Code reduced the scope of automatic review so drastically, Eksteen J stated in Eli 1978 (1) SA 451 (E) that the Court would be more inclined to exercise its powers under s 304(4) than in the past.[452]

There is no limit to the ways in which a judge's attention can be drawn to a miscarriage of justice. This rule thus provides magistrates with a useful means of rectifying their

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1. Mathebola 1984 (4) SA 113 (T) 117.
2. Louw 1984 (1) SA 549 (NC) 553.

own or others' incorrect convictions or sentences.[1] In Jacobs 1955 (2) SA 526 (T), for example, a magistrate who felt that the sentence he had imposed was too harsh, submitted the case for review. A magistrate unconnected with the trial could also forward the record of proceedings heard by a colleague.[2] Prosecutors have, on occasion, assisted undefended accused by submitting for review the record and supporting affidavits indicating the innocence of the accused.[3]

Judges have on numerous occasions initiated review proceedings when irregularities came to their attention in a variety of ways. In Mbatha 1969 (2) PH H128 (O), the Court hearing an appeal by an undefended accused on sentence only, set the case down for review as it was not satisfied that the conviction was correct.[4] In Monkoe 1966 (1) PH H15 (T), when the innocence of an accused became apparent only during the appeal of one of his co-accused, the Court came to his assistance by ordering that the record of his trial should be submitted for review. Even where an undefended accused noted an appeal, but did not appear on the day of the hearing, the Court acted mero motu and reviewed the case.[5] Acting on a newspaper report which highlighted a miscarriage of justice involving a juvenile, Didcott J in M

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1. See eg Themba 1966 (1) SA 644 (O); Ruiter 1962 (1) SA 161 (O).
2. Anderson 1962 (2) SA 286 (O).
3. Mtembu 1961 (3) SA 60 (O).
4. See also Prinsloo 1970 (3) SA 550 (O); Phukungwana 1981 (4) SA 209 (B).
5. Beck 1958 (4) SA 150 (C); Hlope 1962 (2) SA 607 (T).

1982 (1) SA 240 (N) called for the record of the proceedings and eventually set the conviction and sentence aside on review.

Where it becomes apparent after conviction but before sentence that the conviction cannot stand, the Courts have had to confront the provisions of s 304(4), which accords the power of review only after the imposition of sentence. In certain divisions the Court has insisted that sentence must first be imposed before the case can be submitted for review.[1] In Sekakala 1962 (2) SA 105 (NC), however, the Court intimated that it was not precluded from interfering before sentence was passed.[2] There seems to be no need, however, to give the provision such an extensive interpretation in view of the court's acknowledged inherent right of review before sentence is passed.

2.3. THE SUPREME COURT'S INHERENT RIGHT OF REVIEW

Since there is no statutory provision which allows review proceedings before a sentence has been imposed, the Court has exercised its inherent right of review to remedy this lacuna in the law.[3] The Court may exercise its inherent right of review "where a grave injustice might otherwise result or where justice might not by other means be

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1. Seloke 1983 (2) SA 455 (O); Ruiters 1983 (4) SA 260 (C); Olyn 1984 (2) SA 75 (NC).
2. Magistrates' Court Act of 1944 s 97 and 98(4). S 304(4) re-enacted these sections.
3. Taylor 1976 (4) SA 185 (T); Shezi 1984 (2) SA 577 (N); April 1985 (1) SA 639 (NC); Smit 1948 (4) SA 266 (C) 267; Ngwenya 1959 (2) SA 397 (N). See generally J Taitz The Inherent Jurisdiction of the Supreme Court (1985).

attained".[1] The possibility of a grave injustice need not necessarily flow from an irregularity in the trial itself but could result from any circumstance which casts a different light on the conviction.[2] If it is clear that the conviction cannot stand, then the Court should without hesitation intervene.[3] To assist the Court in its decision whether to invoke its inherent right of review, the judicial officer who submits a case for review before sentence, must clearly indicate the basis of his belief that the conviction is wrong.[4]

Although there has been fairly widespread acceptance of this utilization of the Court's review power, there are some dissenting decisions which stand in the way of total uniformity on the issue.[5] The Orange Free State Provincial Division, for instance, has consistently refused to review a case before sentence has been passed.[6] As a result there have been calls to grant the magistrates' court the same power as the regional courts have in terms of s 116, to submit a

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1. Mametja 1979 (1) SA 767 (T) 768F.
2. Shezi 1984 (2) SA 577 (N) 580C; April 1985 (1) SA 639 (NC) 646.
3. Molefi 1985 (2) SA 474 (B).
4. Molefi supra 475D.
5. See CF Klopper "Hersiening van Landdroshofverrigtinge voor Vonnis" (1976) 39 THRHR 143; DJL Kotze "Hersiening voor Vonnis - Die Kar voor die Perde?" (1979) 96 SALJ 444.
6. Mpatsi 1957 (2) SA 517 (O); Thabanchu 1967 (2) SA 323 (O); Seloke 1983 (2) SA 455 (O); contra Gordon 1950 (2) PH H197 (O); Malakwana 1975 (3) SA 94 (O). See JL Snyman (1983) 46 THRHR 349. This rule has also been adopted infrequently in other divisions, eg Stokel 1966 (1) SA 143 (T).

case for review before sentence is passed.[1] In the light of the overwhelming acceptance of the court's inherent jurisdiction to prevent a miscarriage of justice, however, there can be no justification for following the line of decisions requiring a prior imposition of sentence.

2.4. NOTIFICATION BY THE REGIONAL COURT WHEN CALLED UPON TO IMPOSE SENTENCE AFTER A TRIAL IN THE MAGISTRATES' COURT

Regional magistrates perform an intermediary reviewing function in respect of cases tried in the magistrates' court and referred to them for sentencing.[S 116(1)] Where a case is submitted for sentence to the regional court, the judicial officer must, after considering the record of the trial, pass sentence, unless he is "of the opinion that the proceedings are not in accordance with justice or that doubt" to that effect exists.[S 116] The criterion prescribed is the same as that laid down in section 304(1) and (2) for review by a judge. The regional magistrate, however, has no power to call for further information from the trial magistrate and if he notices an irregularity he "must proceed on the assumption that the irregularity operated in the most prejudicial manner of which it was capable".[2] In such a case he must, without sentencing the accused, submit the reasons for his opinion to the registrar of the Supreme Court, together with the record of the case for purposes of review.[S 116(3)(a)] Where such a case is

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1. Seloke 1983 (2) SA 455 (O).
2. Mafuya 1985 (1) PH H56 (N).

submitted for review, it is necessary to call for the trial magistrate's reasons for conviction, despite the fact that the regional magistrate has presented an argument against conviction.[1]

3. THE PROCESS OF AUTOMATIC REVIEW

Review proceedings may comprise of two stages: First, the trial record is examined by a judge in chambers (hereinafter referred to as the reviewing judge). If he is satified that the proceedings were in accordance with justice, he certifies the record to that effect. If he is not so satisfied, he must submit the record to a Court for review.[S 303] Provision is made for the participation of the accused and the trial magistrate in the review proceedings; each may submit further arguments before the record is placed before a judge in chambers.[2] Additional information or argument may also be called for by the reviewing judge or the Court on review.

3.1. PARTICIPATION BY THE MAGISTRATE

The magistrate is entitled to add remarks to the record before it is transmitted to the registrar.[S 303] In Norman Smith 1966 (1) PH H151 (C) it was suggested that a

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1. Sethunsa 1982 (3) SA 256 (O).
2. The clerk of the court must within one week after the completion of the case forward the record to the registrar of the Supreme Court (S 303). The expeditious forwarding of the record is essential to prevent serious prejudice (arising from delay) to the accused, who is likely to be in custody (Mofokeng 1974 (1) SA 271 (O); Nyelele 1984 (1) PH H72 (O)).

magistrate who has any doubt as to whether the sentence he has imposed is too severe, should utilize this opportunity to air his view and not wait for a query from the judge. If the accused has submitted any statement or argument,[S 303] he may comment on it.[1]

3.2. PARTICIPATION BY THE ACCUSED

The accused may append to the record any written statement or argument within three days of the imposition of sentence.[S 303] As Hiemstra correctly points out, this period of three days is not peremptory but directory and the late filing of a written statement should be permissible.[682] Information that could mitigate the sentence, for instance, may be brought to the court's attention in this statement.[2] The accused may also set the case down for argument before the Supreme Court.[S 306] The magistrate must in terms of the Code inform the accused of these rights: that the record of the proceedings will be transmitted within one week to the registrar of the Supreme Court; that he may make a copy of such record before transmission; that he may set the case down for argument before the Supreme Court [S 306]; and that he may append to the record any written statement or argument within three days of the imposition of the sentence.[3]

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1. Hiemstra 682.
2. See Brunette 1979 (2) SA 430 (T).
3. S 303. See also Ferreira 721.

3.3. PARTICIPATION BY THE MAGISTRATE, THE ACCUSED AND THE ATTORNEY-GENERAL AT THE DIRECTION OF THE COURT ON REVIEW

Where the reviewing judge considers that any proceedings were not in accordance with justice, or has doubts in that regard, he is obliged to obtain reasons from the magistrate for the conviction or sentence.[S 304(2)(a)] If the judge is convinced that the proceedings were clearly not in accordance with justice and that the person convicted may be prejudiced if the record is not forthwith placed before a Court of review, he may dispense with this requirement.[S 304(2)(a)]

The reviewing judge may direct that further information or evidence be supplied to him - taken either by himself or by the magistrate.[S 304(1)] The Court of review may also hear any evidence and summons any person to appear and give evidence or produce any document or article.[S 304(2)(b)] If the Court desires that any question of law or fact be argued before it, it may direct that the Attorney-General and counsel appointed for the accused present such argument.[1] More often only a written memorandum of the Attorney-General is obtained.[2] The Court has on occasion adopted the memorandum _in toto_ as its judgment,[3] while in other instances it has rejected the opinion offered.[4] Although

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1. S 304(3). See Grey 1983 (2) SA 536 (C).
2. See for example Sibuya 1979 (3) SA 192 (T); Mdodana 1978 (4) SA 46 (E); Sehane 1979 (1) SA 318 (T); Sambe 1981 (3) SA 757 (T); Andrews 1982 (2) SA 269 (NC); Mitchell 1982 (3) SA 72 (T); Moluazi 1984 (4) SA 738 (T).
3. Sibuya 1979 (3) SA 192 (T).
4. See eg Mitchell 1982 (3) SA 72 (T) 74A.

the Attorney-General's opinion in many instances favours the accused and has led to the setting aside of the conviction, it is submitted that this practice is objectionable in principle. Firstly, despite the Attorney-General's ethical duty of impartiality, his very position as representative of the State makes him structurally biased in favour of the prosecution. Secondly, the practice of hearing only the one side is in conflict with a fundamental principle of a fair trial, the audi alteram partem rule. As the Court is empowered to appoint counsel for the accused to argue any point of law or fact,[S 304(3)] it should obtain the views of a member of the bar acting for the accused whenever the opinion of the Attorney-General is sought.

3.4. THE COURT'S APPROACH TO AUTOMATIC REVIEW PROCEEDINGS

Automatic review was not initially conceived of as being solely for the benefit of the accused, or the undefended accused in particular, but rather as a mechanism to control the proceedings in general.[1] The review Court's statutory duty was thus to determine whether the proceedings were in accordance with "real and substantive justice",[2] and the Court perceived its duty from an early stage as being to "see that justice is done both to the convicted person and the State".[3] A decision of a magistrate may thus be

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1. See ch 3 below.
2. Ord 20 of 1856 s 45; Wetboek of 1891 (OFS) ch 4 schedule rule 166; Harmer 1906 TS 50 52.
3. Sukana 1916 TPD 576 578. See also Zulu 1967 (4) SA 499 (T) 500; Mokoena 1975 (4) SA 295 (O).

altered even though this would prejudice the accused, for instance where a conviction for a more serious offence is substituted,[1] or an incompetent or illegal sentence is corrected and the new sentence imposed is more severe.[2] The Court thus follows a strict bureaucratic approach; rules are to be applied uniformly irrespective of which party they benefit.

Since protecting the undefended accused has always been among the main objectives of automatic review, particularly since 1977 when defended cases were excluded from this review,[3] the Court has been reluctant to use it to the accused's prejudice and has exercised its discretion to refuse to enforce a rule which would be to the accused's disadvantage. In Makata 1975 (2) SA 315 (T) the accused was sentenced without his list of previous convictions being produced in court, as was then obligatory. The Attorney-General requested that the sentence be set aside and the case remitted to the trial court for the correct procedure to be followed. De Villiers J, in considering the request, outlined the two competing considerations that the court should take into account. On the one hand, it was unfair to the accused to reopen the case and cause him renewed discomfort when the mistake was not his. On the other,

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1. Mokoena 1984 (1) SA 278 (O); Ngobo 1980 (1) SA 579 (B); Mbayi 1976 (4) SA 638 (Tk).
2. Anderson 1962 (2) SA 286 (O); Zulu 1969 (4) SA 499 (T); Msindo 1980 (4) SA 263 (B).
3. Mboyany 1978 (2) SA 927 (T) 930A-B; Mokubung, Lesibo 1983 (2) SA 710 (O); Nyelele 1984 (1) PH H72 (O); Songongo 1984 (2) SA 146 (E) 150.

the court has a duty to see that justice is done and this includes the enforcement of the provisions of the Code. The Court had a discretion, however, to decline to interfere on grounds of fairness and in casu it refused to set the sentence aside because of the hardship it would cause the accused.[1] In Beharie 1966 (1) PH H122 (N) the Court followed a similar approach. The accused was acquitted on the main charge but convicted on the alternative charge. Although the evidence supported a conviction on the main charge and not on the alternative, the Court declined to exercise its power to alter the conviction as this would have prejudiced the accused. In these cases the principle seems to have been accepted that the primary aim of automatic review is to ensure that the undefended accused was fairly tried and that this institution should not readily be used to his prejudice.

4. EXTENDING AUTOMATIC REVIEW

Since undefended accused lack the knowledge, skill and the finances to invoke post-conviction remedies, the institution of automatic review is indispensable for the fair administration of justice. It is submitted, however, that the benefit of automatic review is too limited; it does not apply to regional courts and in the magistrates' courts its field of influence is restricted to certain categories of cases.

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1. See also Van Lingen 1960 (2) SA 29 (T).

The exclusion of regional court proceedings from the operation of automatic review has been defended on the basis that the competency of the regional magistrates is sufficient to protect undefended accused from miscarriages of justice.[1] It is submitted, however, that the competency of a judicial officer is not in itself infallible to safeguard this accused from injustices. A fundamental principle of a fair trial - that all proceedings should be open to review by a superior court - highlights the fact that even competent judicial officers, such as judges, may at times be open to correction. Moreover, when the Supreme Court itself had exclusive jurisdiction over offences which have since 1977 mainly been tried by the regional courts, the former insisted that pro Deo counsel be appointed for the accused not defended on brief. Finally, the independence and hence impartiality, of regional magistrates is open to criticism because of their status as civil servants and their initial appointment solely from the ranks of the prosecutors.[2] In view of the extensive substantive and sentencing jurisdiction entrusted to these magistrates, it is imperative that the cases over which they preside be subjected to independent review.

In the magistrates' court, while automatic review is available for specified cases, it is submitted that the manner in which review is implemented, restricts its potential beneficial influence. A serious obstacle to the

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1. See Botha Report par 4.09.
2. See Hoexter Report part II par 1.4.2.

achievement of the controlling purpose of automatic review is that the type of sentence likely to be reviewed is too predictable. If magistrates are able to predict with some accuracy whether a case will go on review, then full compliance with all the rules may be reserved for these cases only. By referring to the charge a magistrate could, at the outset of the trial, predict which cases are likely to be reviewed. Dealing in drugs, because of the prescribed penalties,[1] invariably leads to a reviewable sentence. The seriousness of the case could also be determined from the evidence of the first State witness. With the knowledge that a case is likely to be reviewed, the magistrate could then conduct the proceedings accordingly. The court could also avoid the possibility of automatic review; it could simply impose a sentence slightly lower than the minimum reviewable sentence or, when a reviewable sentence cannot be avoided, transfer the case to the regional court for purposes of sentencing.[S 116] Although the regional court must be convinced of the accused's guilt before sentencing him, the same detachment and critical approach of the Supreme Court may not be forthcoming.

In order to avoid the possible negative consequences attached to the predictability of cases that might be reviewed, it is submitted that the present system of automatic review should be complemented by a scheme whereby

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1. Act 41 of 1971 s 7.

cases are randomly selected for review. The knowledge that any case - even where a non-custodial sentence is imposed - may be submitted for review, may discipline judicial officers to ensure that the principles of a fair trial are applied in every case. A similar system should also be instituted for regional court proceedings. The selection of cases, conducted at the instance of the Supreme Court, need not be numerous, but it will give the Court significant control over the conduct of proceedings in serious cases in the regional court and the less serious ones in the magistrates' court.

5. APPEAL AND REVIEW PROCEEDINGS - AN EMPIRICAL ANALYSIS

The accused arraigned in the regional court, who were seldom represented and usually sentenced to lengthy terms of imprisonment, could challenge the court's decisions only by means of the highly professionalized and costly appeal or review proceedings. Most, however, remained ignorant of their rights relating to appeal and review; the court was under no obligation to inform the accused in this regard and, consequently, no regional magistrate in this study did so.

In the magistrates' court the accused were likewise not informed of their rights to appeal and review. These rights would remain inaccessible to the vast majority of the accused due to either their ignorance or indigence. The institution of automatic review was thus the most important method by which the proceedings of the magistrates' court were supervised. This controlling device was not, however, frequently applicable and in only two cases were reviewable sentences imposed. In these cases the accused were informed of their right to make representations to the reviewing judge. As the present sample was too small and not all the stages of the cases were observed, it was not possible to determine whether in these two cases or in others where a reviewable sentence was likely, judicial officers were more careful to comply with their legal duties.

In order to achieve a better understanding of the functioning of automatic review, it was decided to examine its operation in respect of the cases heard by the Durban magistrates' court during 1983. From the 15 courts which fall in the Durban magisterial district,[1] and administered from the Durban magistrates' court building, 601 cases were forwarded for automatic review. The following types of sentences rendered the cases reviewable: imprisonment (64,9%); reformatory (3,6%); rehabilitation centre (9,0%); suspended imprisonment (21,8%),[2] and fine (0,7%). The cases involved the following offences: theft (31,6%), dealing in drugs (20,7%), possession of drugs (15,2%), housebreaking (10,4%), assault with the intention to do grievous bodily harm (7,3%), robbery (5,9%), and other offences (6,0%).

The records of cases submitted for review restricted the reviewing judge's scrutiny to proceedings relating to pleas and the production of evidence. Aspects not directly related to these - the remand and bail decisions - were not recorded verbatim. The records merely contained the remand dates and whether or not bail had been granted. The reviewing judges did not demand that these proceedings should be fully recorded and, consequently, was in no position to examine the way in which these decisions were made. The judges'

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1. Including at least six courts sitting at Amamzintoti, Wentworth and Cato Manor.
2. During that year the repeal of s 302(2)(b) caused the review of certain suspended prison sentences.

concern was clearly centred on the question of whether the accused's guilt was established and whether the sentence was appropriate.

The Supreme Court performed its reviewing duty conscientiously and 77,8% of the cases were reviewed within a month after sentence was passed (including the time spent on the transcription of the court record). Most of the accused sentenced to a term of imprisonment spent that time in custody. Most cases (91,6%) were confirmed without further ado; a further 5,2% were confirmed after the magistrate responded to a query of the reviewing judge. One conviction was altered by a Court on review whilst seven were set aside, six of these being remitted to the magistrates' court. A further eight sentences were altered and three were set aside. Thus in only 3,2% of the cases did the Supreme Court interfere with the decisions of the magistrates.[1] This was about half of the national average of 6,1% as reported by the Hoexter Commission.[Part IV par 2.2.1.2.3] The Supreme Court was thus largely satisfied that the conduct of the proceedings, was "in accordance with justice".

The finding that 96,8% of the reviewed cases were confirmed, corresponds with the general import of the study's empirical data; on the whole magistrates complied with clear and

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1. An examination of the cases where queries were raised, and/or convictions and sentences altered or set aside, proved to be impossible as many of the records could not be traced.

sanctionable legal rules and executed their duties according to the letter of the law. It must be pointed out, however, that more procedural irregularities were encountered during the observation period than what were noted in the 601 cases reviewed in 1983. The blatant non-observance of some legal rules as recorded in the study, was limited to cases where there was no likelihood of review. This lends support to the contention that in cases which are not likely to be reviewed, the court's conduct may conform less to the letter of the law. This does not distract from the general conclusion that there was no significant disparity between magistrates' court practice and the Supreme Court's view of justice. The way in which undefended accused are tried in practice is thus a faithful reflection of the Supreme Court's view on how and to what extent the principles of a fair trial should be enforced in respect of these accused.

6. CONCLUSION

Despite the extreme importance of the supervision of the administration of justice in the lower courts, where the vast majority of accused are tried without the assistance of legal representation, the protective powers of the Supreme Court remain inaccessible to most of them. Their ignorance, indigence and the professionalized nature of the legal remedies, make most lower court decisions impervious to challenge.

Undefended accused benefit from the Supreme Court's

supervisory function only where the proceedings are reviewed independently of their initiative. Through the institution of automatic review, the Supreme Court inquisitorially examines a select number of proceedings. Although the scope of automatic review is limited, the importance of this institution lies in the formulation of rules which set the standard of justice applicable to all undefended cases.

Since the Supreme Court regards most cases automatically reviewed as "in accordance with justice", the injustices routinely perpetrated in the lower courts are not to be attibuted solely to the behaviour of court officials, acting individually or collectively, but to the legal rules which structure and guide court behaviour and define the requirements of a fair trial.

SECTION D: CONCLUSION

CHAPTER ELEVEN THE UNDEFENDED ACCUSED: A GENERAL REVIEW

Throughout the development of South African criminal procedure, little attention has been paid by the legislature to the position of the undefended accused and few steps have been taken to incorporate the principle of equal and impartial justice into legislation. The plight of the indigent accused has been recognized to the extent that he is entitled to the free subpoenaing of material witnesses and may qualify for legal aid. Yet although in theory the Legal Aid Act 22 of 1969 should provide free legal assistance to most indigent accused, the limited funding set aside for this purpose and the failure to make this right accessible, has meant that only a minute fraction of those eligible for legal aid, have benefitted from it. The institution of automatic review - restricted to undefended cases - has provided some protection for a section of this class of accused. Few attempts have been made, however, to provide assistance for the undefended accused. The absence of a thorough legislative commitment to the principle of equal and impartial justice and the failure of the legislature to provide adequately for the protection of the undefended accused in a demanding adversary system, has meant that attention must be directed - for assistance in this regard - to the Supreme Court which, through its automatic review of some lower court proceedings, is in a position to develop and enforce protective rules.

The Supreme Court has acknowledged the difficulties encountered by undefended accused and has made provision for judicial assistance to them. The active judicial participation prescribed is a deviation from the fundamental nature of the adversary process which involves a passive role for the judicial officer, but it becomes necessary where the parties themselves cannot by their own efforts ensure that justice is done. The Supreme Court has encumbered the judicial officer with various duties under the broad scope of a general duty to see that the undefended accused is fairly tried.

1. THE DUTIES OF THE JUDICIAL OFFICER

There are basically three types of duties, which are as follows: (a) a duty to facilitate the accused's participation in the proceedings as an adversary by advising him of his rights and duties and assisting him in their exercise; (b) a duty to control the prosecutor in the exercise of his powers; and (c) a duty to conduct an enquiry before arriving at administrative-type decisions.

1.1. THE COURT'S DUTY TO FACILITATE THE ACCUSED'S PARTICIPATION IN THE PROCEEDINGS

The court is obliged to inform the accused of some of his procedural rights and duties and to assist him in exercising some of those rights where he clearly experiences difficulty in doing so. The accused must be apprised of his right to remain silent after pleading not guilty; the right to cross-

examine State witnesses; the right to present his defence and the ways in which this can be done; the existence of presumptions; the right to participate in the mitigation process and the right to participate in the automatic review proceedings. Complementing the disclosure of rights and duties, is the duty to assist the accused in the exercise of these where he experiences difficulty in putting his questions in cross-examination to the State witness, presenting his defence, rebutting a presumption, or getting his witnesses to court.

The court is obliged to disclose only certain rights, however, and the accused need not be apprised of the following: the right to consider his position before pleading; the right to apply for a remand; the right to bail; the right to appeal against an adverse bail decision; the right to be represented by a legal practitioner; the right to apply for legal aid; the right to prepare for trial; the right to request further particulars; the right to object to the charge sheet; the different pleas open to an accused; the right to recall witnesses; the right to apply for a discharge at the end of the State case; the right to subpoena witnesses; the right of indigent accused to subpoena material witnesses free of charge; and the rights relating to appeal and review. Where there is no duty to inform an accused of a right, there is correspondingly no duty to assist him in the exercise of it.

It is therefore clear that only rights which deal directly

with the central issue of the trial - the determination of criminal liability and imposition of sentence - need to be disclosed. Of particular importance are the rights relating to the production of evidence. Such rights will need to be disclosed, however, only if they arise in all cases (eg, the right to cross-examination) or need to be applied in a particular case (eg, the right to subpoena a witness only if the accused experiences difficulties in getting a witness to court). Rights which ostensibly touch only tangentially, or not at all, on the production of evidence, are simply ignored. It is ironic that the only two types of assistance provided by the legislature for indigent accused - the free subpoenaing of material witnesses and the provision of legal aid - need not be made accessible to possible beneficiaries by disclosure. Where rights are to be disclosed, little guidance has been given as to the manner of apprisal. There is no requirement that the meaning of the right should be explained, or that the legal considerations which structure and guide the exercise of the right should be disclosed. Without this information the apprisal as to a right may have little meaning for an undefended accused.

1.2. THE COURT'S DUTY TO CONTROL THE PROSECUTOR IN THE EXERCISE OF HIS POWERS

Where an undefended accused fails to object to the prosecutor's improper exercise of his powers, the court should intervene mero motu to restrain such conduct. What is required from the judicial officer is an awareness that he

should exercise his function of control over the proceedings without being requested to do so by the accused. The court must ensure that the formulation of the charge meets the required standards, refuse the improper splitting of charges, ensure that the State evidence is admissible, and keep the prosecutor's cross-examination of the accused and his witnesses within acceptable limits. The enforcement of legal rules independently of the accused's initiative would benefit all accused, but its impact would be felt most by the undefended accused.

The court's duties in this regard are also selective. There is no clearly defined duty to guard against the unwarranted adjournment of proceedings or to challenge an objection to the granting of bail. The court's duty to control the prosecution has been spelled out primarily in terms of the guilt determination process while control over other aspects of the prosecutorial powers has been left to the court's discretion.

1.3. THE COURT'S DUTY TO CONDUCT AN ENQUIRY

It is the court's duty to establish independently a sufficient factual basis for certain administrative-type decisions where the parties have failed to adduce adequate information. The duty to conduct an enquiry flows from the nature of these decisions. No onus can be placed on either party to convince the court of a "correct" decision, because the court's task is to make a decision which, in the

light of policy considerations, will best serve the ends of justice. To make an appropriate decision the court should have all relevant information at its disposal. It should first afford both parties the fullest opportunity to adduce information and argument favourable to their positions. If the accused fails to provide such, the court should establish inquisitorially whether considerations favourable to him do exist. It is well-established that the court is obliged to conduct an enquiry before imposing a sentence and awarding compensation. Such an enquiry is not, however, obligatory in respect of decisions not related directly to the central issue of sentencing. No clear or binding inquisitorial duty has been imposed with regard to bail, the amount of bail, the forfeiture of bail money, the remand of the proceedings, or the implementation of suspended sentences - all of which involve administrative-type decisions.

There has been no clear extension of inquisitorial fact-finding to judicial-type decisions. To arrive at the correct judicial decision in determining criminal liability, the court in the adversary system is traditionally bound to rely on the evidence as adduced and tested by the parties. The adversary mode of procedure, however, is placed under considerable strain where the undefended accused is unable to participate skilfully in this process. There have been some tentative indications that it may be the duty of the court to establish mero motu a sufficient factual basis for

decisions in this situation. It may be the court's duty to ascertain the reliability of the evidence produced by the State where the accused fails to test it adequately. As the imposition of such a duty runs counter to the adversary procedure, the development of this duty has been cautious.

The first two duties outlined above are directed towards the maintenance of the adversary mode of procedure. By facilitating the accused's participation with information and assistance, it is envisaged that he will perform his role as an adversary and, through the maintenance of the party-orientation of the proceedings, a fair trial will result. By restraining the prosecutor from acting improperly, the court exercises its normal duty to control the proceedings, but in the trial of an undefended accused it performs that function on its own initiative, without waiting for the accused to raise an objection. The trial thus remains adversary and the production of evidence and the presentation of legal argument remain the responsibility of the parties. The third type of duty introduces a definite inquisitorial flavour to the prevailing adversary process in that the court is obliged to conduct an enquiry in establishing mero motu the factual basis for certain administrative-type decisions.

In imposing these duties, the Supreme Court has not often articulated a theoretical basis for assistance. Justifications, when given, for the imposition of duties on judicial officers, have usually been expressed in the

vaguest of terms. The Court has on occasion said that "justice and common sense" require that an accused's rights should be explained to him.[1] In other cases references have been made to "billikheid en redelikheid",[2] "reg en geregtigheid",[3] and "elementary but fundamental principles of fairness to an accused person".[4] What is clear is that the court's active participation in the proceedings is derived from its general duty to see that justice is done.[5]

It is apparent from the duties imposed on judicial officers that the Supreme Court perceives justice for the undefended accused as lying primarily in an adequate determination of his criminal liability, and not in the conduct of proceedings in accordance with all the principles of a fair trial. Although the activist role which these duties oblige a judicial officer to play, may render considerable assistance to an undefended accused, it will fail to ensure that this accused is fairly tried for two main reasons: firstly, the common law principle of equal justice is not pursued as this accused is not tried in accordance with all the principles of a fair trial, and secondly, the rules applicable are inadequate even to achieve the more limited goal of ensuring that the accused's guilt is reliably established.

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1. Du Plessis 1970 (2) SA 562 (E) 564H. See also Bkenlele 1983 (1) SA 515 (O) 518D.
2. Sithole 1969 (4) SA 286 (N) 287H.
3. Shonyeke 1981 (2) PH H119 (SWA).
4. Kanyile 1972 (1) SA 204 (N) 205H.
5. Hepworth 1928 AD 265 277; Seheri 1964 (1) SA 29 (A) 34H-35A; Baloyi 1978 (3) SA 290 (T) SA 293G.

2. THE FAILURE TO PURSUE THE PRINCIPLE OF EQUAL JUSTICE

The Supreme Court has not encumbered judicial officers with duties which would ensure that in the prosecution of an undefended accused all the principles of a fair trial accessible to defended accused, would be pursued. The only duties laid down relate primarily to the production of evidence. The effect of these decisions is that one set of rules applies to the defended accused and a different - less protective - set of rules applies to undefended accused. Since the services of a legal practitioner are a commodity obtainable only at a price, such a dispensation is inherently discriminatory as it is based on the economic status of an accused. This offends clearly against the principle of equal justice which holds that accused persons should receive equal treatment before a court of law.[1] Was it, however, possible for the Court to have imposed duties which would have given effect to the equal justice principle? It is submitted that it was open to the Court - in view of the nature of its supervisory powers - to adopt such an approach but that due to other policy considerations, it neglected to do so.

2.1. THE SUPREME COURT'S POWER TO CREATE DUTIES

The Supreme Court has imposed clear duties on judicial

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1. See Zgili v McCleod (1904) 21 SC 150 152; In re Marechane 1882) 1 SAR 27 31; See also Griffen v Illinois 351 US 12 19 (1956); Douglas v California 372 US 383 387 (1963); Ross v Moffit 417 US 600 609 (1974). See further ch 2 par 1; ch 1 par 5.

officers by sanctioning their non-observance with the reversal of the conviction or sentence. The Court is, however, bound by the provision in s 309(3) of the Act which holds that a conviction or sentence may be set aside, reversed or altered on the basis of an irregularity only if a "failure of justice has in fact resulted from such irregularity or defect". The definition of a "failure of justice" is therefore of crucial importance. The Supreme Court has distinguished two types of irregularities which will lead to a failure of justice. The first one affects the production of comprehensive and reliable evidence, while the second involves a deviation from the fundamental principles of a fair trial without affecting the merits of the case.

Where an irregularity has affected the production of evidence, the question whether it has resulted in a failure of justice will depend, according to Holmes JA in Tuge 1966 (4) SA 565 (A), upon

> "whether the court hearing the appeal considers on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there is no resultant failure of justice".[1]

If it is possible to separate the evidence affected by the irregularity from that unaffected, the court must base its decision on the latter evidence.[2] If such a separation is not possible, for example, where the accused's cross-examination has been irregularly disallowed, the Court

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1. 568F-G. See also Yusuf 1968 (2) SA 52 (A) 57.
2. See eg Naidoo 1962 (2) SA 625 (A).

cannot be convinced beyond reasonable doubt of the accused's guilt as possible evidence has been excluded.[1] The principle is that any irregularity which prevents the evidence from being comprehensively and reliably placed before the court, thereby raising doubt as to the correctness of the conviction, leads to a failure of justice.

The Supreme Court could thus, on the basis of this test, set aside convictions and sentences and in the process develop duties relating to the production of evidence, on the basis that some doubt inevitably existed as to the accused's guilt. The test is not, however, applicable in respect of rights not directly related to the production of evidence.

The second type of irregularity is predicated on the notion that there are certain fundamental principles which must be observed in all circumstances for the trial to be fair. If one of these principles is not met, then, whatever the evidence may prove, there has been a failure of justice *per se*. In *Moodie* 1961 (4) SA 752 (A) Holmes JA said that

> "in exceptional cases, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted if there had been no irregularity".[758F]

Holmes JA's reference to "execptional cases" makes it clear that the Court will exercise caution and selectivity before setting aside a conviction on this basis. Where a conviction

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1. *Gani* 1958 (1) SA 102 (A) 109.

is set aside, the trial is a nullity and the Court is precluded from considering the merits of the case.[1] It should, however, be noted that the setting aside of a conviction on this ground does not debar the State from prosecuting the accused again as the acquittal was not based on the merits of the case.

The Court, where it enforces the fundamental principles of a fair trial in this way, is giving precedence to public policy considerations.[2] The values defining procedural justice are regarded as being of greater importance than the punishment of a particular accused; these values are of general application and are intended to ensure a fair trial in all cases. In the words of Rumpff CJ in Mushimba:

> "Die 'geregtigheid' waarna verwys word, is nie 'n begrip wat veronderstel dat die beskuldigde noodwendig onskuldig is nie. Geregtigheid wat geskied het in hierdie sin is die resultaat wat 'n bepaalde eienskap van die verrigtinge aandui. Die eienskap toon aan dat die vereistes wat grondbeginsels van reg en regverdigheid aan die verrigtinge stel voldoen is. Die vraag of onreëlmatige of met die reg strydige verrigtinge in verband met 'n verhoor van 'n beskuldigde van so 'n aard is dat dit gesê kan word dat van daardie grondbeginsels nie nagekom is nie, en geregtigheid dan nie geskied is nie, sal afhang van die omstandighede van elke geval en sal altyd 'n oorweging van publieke beleid vereis".[844C-D]

2.2. POLICY CONSIDERATIONS

When the non-observance of a legal principle does not affect

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1. Naidoo 1962 (4) SA 348 (A) 353; Nzuza 1963 (3) SA 631 (A).
2. Lwane 1966 (2) SA 433 (A); Mushimba 1977 (2) SA 829 (A) 844D. See Rall 1982 (1) SA 828 (A) 833A where reference is again made to the "interests of public policy".

the evidence, then, the Court is faced with two conflicting policy considerations; the need to punish the guilty and the importance of maintaining the principles of a fair trial. This dilemma McBarnet describes as follows:

> "The problem is that judges are exercising a dual function in reaching their decision. They must not just ensure that justice is done in the sense of the accused getting his deserts; they must also ensure that the technical checks on how criminal justice is executed are upheld. They must not just uphold the substantive criminal law but the procedures of legality. They must think not only of the apparently guilty man before them but of the protection of the innocent in the future. But this duality of function sets up an impossible contradiction. The decision is a finding for either one party or the other. It has either to declare the methods illegitimate, the evidence inadmissible and quash the defendant's conviction, or uphold the conviction, but in doing so, inevitably they legitimise the questionable methods - inevitably because of a second duality in the functions of decisions. The judicial decision does not just resolve a particular case but sets a precedent for future cases".[158]

Whether irregularities are regarded by the Court as fatal despite the accused's apparent guilt, will thus indicate which procedural values the Court recognizes to be fundamental to a fair trial. A court subscribing to the tenets of the crime control model, as described by Packer, would interfere only where there is doubt about the factual guilt of the accused or in the case of a gross procedural irregularity which calls into doubt the reliability of the guilt determination process.[228] The function of review in the due process model, on the other hand, is broader, for here it would also address infringements of the accused's rights which have occurred at the pre-trial stages of the process, and aim to deter their repetition in subsequent

cases.[229] The crime control model thus holds that a conviction stands if there is proof of factual guilt despite the irregularity, while the due process model posits that any denial of a basic right is a ground for reversal regardless of the strength of the case.[231] The aim of the due process model is thus of a social utilitarian nature: "If the criminal goes free in order to serve a larger and more important end, then social justice is done, even if individual justice is not".[1]

Between these two sets of values the Supreme Court has vacillated. It has set aside convictions, despite the apparent guilt of the accused, on the basis that certain principles are fundamental to a fair trial, and their denial renders the proceedings a nullity. Examples are the right to an impartial hearing, the right to legal representation, the right to be prepared for pleading and trial, the right to participate in every decisionmaking process, and the right against self-incrimination. The Court recognized these rights where they were positively asserted by the accused, usually through his legal representative, and denied by the court, or where the judicial officer infringed upon those rights by a positive act. In the trial of undefended accused the Court has acknowledged that this accused - usually ignorant and uneducated - cannot be assumed to be aware of his rights. It can therefore not be expected from him to assert those rights in an adversary manner. Where an undefended

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1. AS Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure" (1059-60) 69 Yale LJ 1149.

accused is not apprised, then, for example, of the right to legal representation, the availability of legal aid, or the right to consider his plea, the Court is confronted with the following question: Is it a fundamental principle that all accused should be treated equally before the law in that all rights should be accessible to all accused irrespective of whether or not they are defended? By holding that a judicial officer commits no irregularity by failing to make the abovementioned rights accessible to an undefended accused, the Supreme Court implicitly failed to regard equal justice as a fundamental principle of a fair trial. It thus accepted that an undefended accused may be hampered in his contest with the prosecution by his own ignorance and incompetence and, at the same time, receive less favourable treatment than defended accused. In assessing the fairness of the trial of an undefended accused only in terms of the satisfactory establishment of his guilt, the Supreme Court's decisions are thus more in accord with the values of crime control - interfere only where there is doubt about the factual guilt of the accused - than with due process of which the principle of equal justice constitutes a central tenet.

3. THE UNSATISFACTORY DETERMINATION OF CRIMINAL LIABILITY

The Supreme Court's practice of enforcing only those procedural rights of the undefended accused which relate to the production of evidence, points to the nature of the Supreme Court's understanding of a fair trial for this accused; he should be given every opportunity to challenge

the State case and adduce evidence to prove that his guilt has not been established beyond reasonable doubt. Justice has thus been equated with a sound guilt determination process. It is submitted, however, that the procedural rules which have been developed for this purpose are inadequate to achieve even this limited goal in the case of an undefended accused.

Where an undefended accused pleads guilty, it is the duty of the court to establish inquisitorially from the accused whether there is a reliable factual basis for his plea. There is, however, no duty to guard specifically against involuntary pleas and hence the possibility of coerced false admissions cannot be excluded.

Where the undefended accused contests the State case, his criminal liability may not be reliably determined because the court is not bound, (a) to facilitate his participation as an effective adversary, or (b) to step in and compensate for the breakdown of the adversary system caused by his failure to be an effective participant.

(a) The accused's participation

There are various factors which present obstacles to the undefended accused's participation as a competent adversary. Firstly, because the rights not directly linked with the production of evidence are inaccessible to an undefended accused, he is hampered in his participation in settling

factual disputes. The assumption which seems to underlie the Supreme Court decisions - that there is a watertight distinction between rights affecting the production of evidence and other rights and that the denial of the latter does not affect the former - cannot be sustained. It is submitted that the accused's other due process right are inextricably linked to the central issue of a trial, the proof of the accused's guilt beyond reasonable doubt and the imposition of an appropriate sentence. The rights to legal representation, to bail, to be prepared for trial, are all integral to the accused's ability to participate in the search for the truth. Secondly, even the rights relating to the production of evidence are not adequately explained. When and how the right to cross-examine should be explained is unclear. The accused is not apprised of the material considerations pertaining to his choices in presenting the defence case. Even the right to subpoena defence witnesses (and in the case of indigence, the free subpoena of material witnesses) is not disclosed. Thirdly, the judicial officer's duty to assist the accused in exercising rights where the latter experiences difficulty, is poorly defined and discretionary.

(b) The court's intervention

The rules do not compel a judicial officer to compensate for the undefended accused's inability to participate as an effective adversary (although the latter is inevitable in view of the apprisal of rights and assistance he receives).

There is as yet no clear duty on the court to ensure that the conviction is based on reliable evidence. Even where the undefended accused fails to determine the reliability of the State evidence, the court is not compelled to establish this independently of the accused. The court may assist the accused in his cross-examination, but should he decline to cross-examine or do it inadequately, the court is not required to step into the breach. While the adversary mode is strictly maintained for the production of evidence, the inequality of the contestants will mean that the truth will not be established. The Court's limited view of justice - the conviction of those whom the State has proved guilty beyond reasonable doubt on the basis of reliable evidence - can therefore not be realized even by the faithful application of the legal rules.

The failure of the legislature and the Supreme Court to incorporate the principle of equal justice into the legal process has a profound effect on the administration of justice in the lower courts. A system that is flawed in its own structure cannot be expected to provide a fair trial for all accused. Where the undefended accused routinely fails to be a competent adversary and all the principles of a fair trial are not pursued or enforced, the court proceedings will inevitably be characterized by unjust practices and outcomes.

4. LEGAL RULES AND COURT PRACTICE

Sociological examinations of the courtroom behaviour of judges and prosecutors have generally been based upon the assumption that the law to be applied is clear and unambiguous and, more importantly, contains a comprehensive and authoritative expression of accused persons' due process rights. Where these rights are not implemented by the court officials, their conduct is examined in terms of non-legal factors, since the normative structure in which they operate is regarded as unproblematic.[1] The law in action has thus been explained not in terms of the legal structure but in terms of occupational factors such as heavy case loads,[2] information games played by court personnel,[3] or the pursuit of efficiency.[4]

Valuable insights are provided by these studies but the understanding of the court practice is inevitably inadequate due to the basic assumption that the court operates within a well-established liberal legal framework. Doreen McBarnet has challenged this notion, arguing that court practice denying an accused his due process rights is not necessarily

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1.See MM Feeley "The Concept of Laws in Social Science: A Critique and Notes on an Expanded View" (1976) 10 Law and Society Review 497.
2. AS Blumberg "The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession" (1967) 1 Law and Society Review 15.
3. Pat Carlen Magistrates' Justice (1976).
4. AE Bottoms & JD McLean Defendents in the Criminal Process (1976).

at odds with legal rules.[1] She distinguishes between the ideology or rhetoric of justice and the actual content of legal rules. The ideology of justice, as embodied in "law in the books", proclaims all the accused's rights while a closer analysis of the fine print of legal rules reveals the incomplete and ineffectual incorporation of those rights.[2] The reason for non-adherence in court practice to the ideology or principles of a fair trial is thus to be sought in the legal structure itself. Contrary to the perception that "law in the books is quite different from the law in practice",[3] the latter is but a product of the formal legal rules. According to McConville and Baldwin

> "It is misleading to suggest that the sort of injustices that arise within the English system can be attributed to say, a handful of corrupt police officers, or to incompetent lawyers, or even lazy or foolish judges. No doubt such individuals exist and may in isolation cause appalling injustice. But most miscarriages of justice which occur within our system cannot be explained in these terms. What we see as of greater importance is the formal structure of legal rules and procedures which allow and even facilitate the erosion or violation of the rights of defendants".[17]

They thus draw a distinction between 'aberrational' and

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1. Doreen J McBarnet "Pre-trial Procedures and the Construction of Conviction" in Pat Carlen (ed) The Sociology of Law (1976) 172; "Magistrates' Courts and the Ideology of Justice" (1981) 8 British J of Law and Society 181; Conviction: Law, the State and the Construction of Justice (1981).
2. Conviction 5. See also RV Ericson & PM Baranek The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process (1982) 219.
3. See eg M Zander "Promoting Change in the Legal System" (1979) 42 Modern LR 489 497.

'systemic' injustice.[1] The former represents incorrect outcomes in a sound system - a system designed to avoid such mistakes. The latter "results not from human error but from fundamental structural weaknesses within the system itself".[2]

It is important, therefore, not to overemphasize the conduct of the administrators of justice. If, as McConville and Baldwin argue, "the rights of individuals are at many points uncertain and ambiguous, responsibilities of those in the prosecution process are ill-defined, and the adversary model produces numerous conflicts and contradictions", then court practice cannot be consistent with or resemble the ideology of justice.[3]

From the empirical study outlined in this work, it is evident that the lower criminal courts routinely produced unjust practices and outcomes. It was also clear that this was a result of the legal structure's failure to guard adequately against the undesirable consequences flowing from an undefended accused's inability to be a competent adversary in highly professionalized adversarial proceedings.

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1. A distinction made by K Kipnis "Criminal Justice and the Negotiated Plea" in K Kipnis (ed) Philosophical Issues in Law (1978) 304, McConville & Baldwin 17.
2. McConville & Baldwin 17.
3. 18. See also AB Smith & AS Blumberg "The Problem of Objectivity in Judicial Decisionmaking" in JA Robertson Rough Justice: Perspectives on Lower Criminal Courts (1974) 108 117 in respect of sentencing.

4.1. THE FAILURE OF THE UNDEFENDED ACCUSED AS A COMPETENT ADVERSARY

The undefended accused failed to fulfil his role as an effective adversary to the prosecutor. He lacked the legal knowledge, skill, and experience necessary to make considered legal decisions, to test the State evidence, to challenge the prosecutor's actions and to present an adequate defence case. These incapacities were not easily remedied by the court's attempts to "educate" the accused in the ways of the law. Simply informing an accused of his rights did not render him capable of asserting or exercising them; the fundamental difficulties inherent in attempting to equip a layman to participate in a professionalized process remained. For one, the legal concepts to be conveyed to the accused had been designed for use by lawyers and not by "the legally naive".[1] It would be difficult, if not impossible, to express in simple terms the import of such a concept without losing its essence. The most valuable method of explanation - by example - was assiduously avoided.

Where an explanation was given, it might be difficult to ascertain whether the accused was able to comprehend it.[2] The danger of "court deafness" was ever present; an accused, fearful of the unfamiliar and formalistic proceedings, might be too scared or nervous to concentrate, and when asked by the magistrate whether he understood an

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1. V Aubert "Researches in the Sociology of Law" 7 American Behavioral Scientist 16 as quoted by Mileski op cit 484.
2. See Mileski op cit 483-4.

explanation, would respond in the affirmative.[1] The accused might also be reluctant to admit his incomprehension lest he should appear stupid, or even worse, difficult.[2] Unless the court was prepared to investigate thoroughly the accused's capacity to understand explanations given and to use this knowledge in conducting an adequate defence, the trial would press on without the accused's full participation. Whatever might be done then, by the court, to make of the undefended accused a capable adversary, there was little chance that this "one shot player"[3] could be satisfactorily equipped to ensure that he could invoke and benefit from the principles of a fair trial.

Achievement of a fair trial thus depended upon the conduct of the other "seasoned players" in the proceedings, the judicial officer and the prosecutor.

4.2. ASSISTANCE BY THE JUDICIAL OFFICER AND THE PROSECUTOR

The judicial officer dutifully attempted to facilitate the undefended accused's participation by informing him of the right to silence after a plea of guilty, the right to cross-examine State witnesses, the various avenues open to present the defence case, the right to address the court on the merits and the right to advance mitigating circumstances. He also, on occasion, assisted the accused in his cross-

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1. Carlen op cit 84.
2. Carlen op cit 108. See also Ericson & Baranek op cit 186.
3. Cf Ericson & Baranek op cit 221.

examination and in getting defence witnesses to court. No attempt was made to compel the prosecutor to give a full disclosure of the factual allegation in the charge. Inadmissible hearsay evidence was excluded but the court did not stringently enforce the rule against leading questions. The most effective assistance was rendered when the court participated inquisitorially in the proceedings. On the whole the court attempted to establish the correctness of a plea of guilty and if there was any doubt as to an accused's guilt, the plea was scrupulously changed to one of not guilty. It routinely fulfilled its inquisitorial function of establishing the accused's personal circumstances before imposing a sentence. On occasions, it rendered valuable assistance by conducting enquiries as to the granting of remands or bail. Where the prosecutor disclosed an inconsistent statement of a State witness, the court examined the witness incisively. In a few cases the court also raised the issue of the accused's discharge at the end of the State case.

The extent of the prosecutors' compliance with their impartial duty as "ministers of the truth" was by the very nature of the duty indeterminable. In a few instances where the State witnesses' evidence was palpably unreliable, they would reveal this. Likewise, where there was no case against the accused, the prosecutors did not hesitate to abandon the State case. The general impression, however, was that the prosecutors performed their task in the combative spirit of

the adversary system; they presented the case for the State and attacked the defence as true adversaries of the undefended accused.

A fair trial was not routinely accomplished by the assistance these "seasoned players" provided. Firstly, legal rules did not oblige them to pursue actively all the principles of a fair trial and secondly, even where clear rules did exist, duties were invariably discretionary and were consequently not carried out in accordance with the principles of a fair trial.

4.2.1. THE FAILURE TO PURSUE ALL THE PRINCIPLES OF A FAIR TRIAL

The conduct of the judicial officers consistently reflected the procedural rules as enacted by statute and developed and interpreted by the Supreme Court. They were conscientious in applying clearly defined rules of general application to which definite sanctions were attached for non-adherence. The converse was equally true; judicial officers did not voluntarily render assistance where the Supreme Court ruled specifically that they were not obliged either to disclose certain rights, control the prosecutor's discretion, or conduct enquiries. The same occurred where case law was silent on a matter. Furthermore, where a legal duty was unclear, ambiguous or the sanction for non-adherence uncertain, compliance did not follow either. For a decided case to be followed in practice, it had to possess those qualities which characterize law; it had to be of general

application, certain and precise, with an identifiable and definite sanction which followed on its breach. Case law, however, often fails to satisfy these criteria since it does not always operate on a level of general rules.[1]

By its very nature case law comprises of conflicting decisions, obiter dicta, rules couched in vague terms, and rules dependent on the circumstances of the case.Since the majority of the rule-making decisions relevant to the trial of undefended accused are made in automatic review proceedings at provincial division level, there arise conflicting decisions in the various divisions, which cannot give authoritative guidance for all the lower courts. The result is that where judicial conflict or confusion exists, a magistrate is free either to adopt the decision to his liking, or to decide not to follow any. Furthermore, rules are often couched in situational terms with their application depending on the circumstances of a particular case. The question whether the circumstances are met lies within the discretion of the judicial officer and anything less than a clear and unequivocal existence of the circumstances may result in non-application of a rule.

The inadequate incorporation of the principles of a fair trial into clear legal duties was seen to have a pervasive effect on court practice. Uninformed of the right to legal representation and the possibility of legal aid, the vast

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1. See McBarnet 163.

majority of accused remained undefended and ill-equipped for the adversary proceedings. The presumption of innocence was frequently ignored: the bail decisionmaking was unstructured and erratic and unwarranted incarceration of the undefended accused was common; the accused, uninformed that his explanation of his plea of not guilty could only be used as evidence against him, made extensive prejudicial statements; and the court, not obliged to discharge the accused at the end of the State case when there was no evidence against him, or to close the defence case when there was no prima facie case to meet, put some accused unnecessarily on their defence. The truth was not always satisfactorily established for the settlement of factual disputes: the accused's incompetence as a cross-examiner was not routinely compensated for by the court's examination of State witnesses; the accused's difficulties in presenting a coherent defence were exacerbated by his ignorance regarding the subpoenaing of witnesses. Excessive punishment might have been imposed with the invocation of suspended sentences because the court did not conduct an enquiry prior to their implementation. The accused was not routinely granted a full opportunity to participate in every decision: he was not given notification when bail or remand decisions were being made; he did not receive specification of the charges he had to meet; he was not given the opportunity to prepare for pleading or trial; and he was not informed about the purpose of an address on the merits or mitigation of sentence. The court's impartiality was not always manifest: not obliged to

assume an active role where the accused was unable to cope with the adversary process, the court in effect showed partiality towards the prosecution by allowing the latter to take unfair advantage of the accused's incompetence. Save for the few cases automatically reviewed, proceedings were well-insulated against superior court scrutiny as the accused was not informed of the post-conviction remedies, which in any case remained inaccessible because of the expense and professionalism required to utilize them.

4.2.2. DISCRETION AND THE PURSUIT OF THE PRINCIPLES OF A FAIR TRIAL

To a large extent the court's treatment of the undefended accused lies within its own discretion. Where no clear legal rules demand protective steps in a particular situation, the court alone may decide whether any assistance at all will be rendered to the accused. Where the Court has imposed duties of assistance upon the judicial officer, that assistance is invariably not clearly defined and the quality and extent of the assistance will be determined according to the court's discretion. Explanations of rights, for instance, are usually conducted without reference to any standards of comprehensiveness. Also undefined are the strictness of the court's control over the prosecutor's conduct, the exercise of its power to question and call witnesses, and the thoroughness with which obligatory enquiries are conducted. In exercising their discretion, judicial officers may act in the accused's favour by pursuing all the principles of a

fair trial. On the other hand, it is totally permissible to ignore all the principles not legally enforceable or to fulfil those duties laid down with the minimum of thoroughness.

The exercise of any discretion inevitably leads to variances among judicial officers. The most notable differences between the regional courts, presided over by more senior and experienced judicial officers, and the magistrates' courts, were the former's meticulousness in conducting the mandatory explanation of rights and their more incisive questioning after a plea of guilty. Yet despite these disparities, the conduct in these different courts was on the whole similar. Although they faced more severe charges and penalties, the accused in the regional court did not receive more types of assistance than those in the magistrates' court. The regional magistrates did not more frequently disclose rights where it was not compulsory to do so and did not act inquisitorially more often to establish a better factual base for their judgments. Although they had more time at hand, they were not markedly more active in pursuing the principles of a fair trial. Operating within the same legal framework the magistrates' and regional court practice remained the same, the latter exhibiting only greater diligence in the formal application of enforceable legal rules.

A few magistrates went beyond the call of duty in attempting

to ensure that all the principles of a fair trial were observed. One magistrate routinely informed the accused of his right to legal representation and the right to be prepared for pleadings and trial, and conducted enquiries during the bail and remand proceedings. This was, however, the exception rather than the rule. Discretion was more frequently exercised in favour of the prosecution: the court's conduct after a plea of guilty, in disclosing the right to remain silent and in questioning the accused, operated predominantly in favour of the State; when the court put questions to State witnesses, these were more often designed to assist the prosecution in establishing a prima facie case than to test the reliability of the evidence. In the same way the court was more likely to examine the accused incisively than to assist him in the presentation of the defence case. At times racial prejudice also appeared to be influential: in the granting of bail some judicial officers were motivated by racial considerations and this prejudice was again encountered in the lack of assistance rendered to Black accused.

The failure of judicial officers to pursue the principles of a fair trial in the exercise of their discretion, cannot be attributed principally to the particular individuals occupying those positions. Neither the legal rules which guide their actions nor the wider legal structure in which the court system functions, encourage the pursuit of equal and impartial justice. The Supreme Court, because of its

ambivalent attitude towards the principles of a fair trial and its failure to pursue the goal of equal justice, did not provide authoritive guidance for the lower courts. The prosecutorial background of most judicial officers and their position as civil servants are circumstances likely to result in a pro-prosecution bias. Moreover, a legal system which sanctions and enforces racial discrimination, is very likely to influence the attitude and conduct of judicial officers who are often called upon to apply the very laws sustaining apartheid.

In this atmosphere where the judicial officer was often neither compelled nor encouraged to pursue all the principles of a fair trial, the interpreter adopted the court's approach and was less than professional in the performance of his task.

4.3. THE INTERPRETER: TRANSLATING COURT PRACTICE

The formal role of the interpreter is unambiguous - to facilitate communication where one party is not conversant in the court language. He delivers an expert service and assumes a neutral position in the contest between the parties. In the words of Channon,

> "A good court interpreter must have the ability to translate faithfully without adding to the questions asked or the answers given. He must be completely impartial and take no personal interest in the outcome of the case and remain unaffected by anything he sees or hears".[1]

The interpreters' court conduct, however, did not uniformly

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1. ON Channon The Role of the Court Interpreter (1982) 23.

correspond to this role description. Some interpreters exhibited partiality in favour of the prosecution and in many instances their interpretation was incomplete or inadequate.

The very nature of the interpreter's function as sole communication link between the accused and the court, allows him a measure of independence from the control of the court personnel, who are usually not conversant in the African language used in court. Yet, despite the fact that the accuracy of the translation may be beyond the court's control, the judicial officer can ensure that the interpreter translates all communications. Little attempt was made, however, to enforce even this basic prerequisite of the interpreters' task. The judicial officers' failure to ensure adequate translation was primarily a function of their own attitude towards the relevant proceedings, which in turn was a product of the relevant legal rules or absence thereof. Where the court, for example, was not obliged to bring the accused into the bail or remand decisionmaking processes, it did not insist upon translation of the prosecutor's request for remands or objections to bail or even the accused's own comments or requests in this regard.

There was also little control over the quality of what was in fact translated. The administrative control by the Department of Justice over the quality of interpretation is extremely limited. After an interpreter has successfully

completed a course in interpretation, he is examined only once every 12 to 15 months by a chief court interpreter who spends one day in his court.[1] No steps have been taken to establish in the courtroom a system by which the accuracy of the translation may be controlled. For the purposes of the court record, only the words spoken in English or Afrikaans are tape-recorded, while the Zulu spoken by the accused and the interpreter is omitted. Any form of ex post facto control as to the correctness of translation is thus impossible. Such a total lack of control unnecessarily creates the opportunity for possible abuse of interpreters' sphere of autonomy. The immunity against direct and routine monitoring opens the way for the inadequate or even corrupt execution of the interpreting function. The latter risk is particularly great where there is a possibility of bias in the interpreter.

Although the interpreter is required to perform his role impartially, his position in the court structure does not promote this. His role as an independent and impartial expert is compromised by his position as a member of the team of court officials, including the prosecutor and the court orderly, whose daily task is the processing and disposal of the cases on the court roll. Before the court proceedings in this study commenced, the interpreter entered in the court book the cases for the day, interviewed State witnesses for the prosecutor and in some instances

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1. Report of Department of Justice 1 July 1983-30 June 1984 18.

ascertained the pleas of the accused. When the court was in session, he called the accused and the witnesses, and managed the movement of the accused in and out of the dock. Where he was allocated to a specific court for a lengthy period of time, he soon developed a good working relationship with the prosecutor. Thus the interpreter did not, as his function demands, stand apart from the prosecution; instead, as part of the State machinery, he became susceptible to its ideology.

As a member of the State bureaucracy, furthermore, he assumed a specific position in the court hierarchy and, in accordance with his qualifications and task, was ranked below the judicial officer and the prosecutor. His subservient position as a 'ranked' court official was obvious in the way he related to the other court participants. With the exception of one old and respected interpreter, none dared to interrupt the court's speech with a request for a pause to enable interpretation of all that was said. Similar behaviour was apparent in relation to the prosecutor. Interpreters did not stop Afrikaans or English-speaking witnesses from responding immediately to prosecutors' questions or those put by the court and confined their translation to the answers given. On the other hand, the interpreters asserted their position of power and authority over Black witnesses and accused, not hesitating to stop them in mid-sentence. At times they expressed their authority even in physical terms by forcibly

pushing obstinate accused out of the dock and down the stairs leading to the cells below.

The interpreter's position as a cog in the court machinery, and his subservient role in it, facilitated his internalization of the values and attitudes of his court superiors. This inevitably compromised his impartiality and the resultant bias was evident in what he chose to translate and the manner in which he did it. The undefended accused, confronted with a foreign language, was not given the benefit of unambiguous facilitation of communication, but instead had to confront one more obstacle in a system weighted against the achievement of a fair trial. In performing their task the interpreters not only interpreted the language of the court but also translated into practice the court's ambivalent attitude towards the undefended accused and the principles of a fair trial.

5. CONCLUSION

The quality of justice attained in a trial is a function of the rights, duties, efforts and abilities of the accused, the prosecutor, the interpreter and the judicial officer to pursue the principles of a fair trial. In the adversary trial, the prosecutor's role, although ambiguously defined, is unambiguous in its execution; fighting for the conviction of the accused and abandoning a case only where the innocence is patent. An equitable result is unlikely to be attained where his adversary, the accused, is crippled by

indigence, ignorance and incompetence. In the absence of a definite and comprehensive inquisitorial role for the judicial officer to rectify the imbalance by pursuing all the principles of a fair trial, there are few obstacles in the way of the prosecution's dominance of the process and equal justice for all accused remains unrealizable. The injustices that occur in court practice are clearly not due primarily to the failings of a few magistrates, prosecutors or interpreters. The injustice is 'systemic'; it is the product of the many facets of the South African legal system which bear on the trial of the undefended accused.

CHAPTER TWELVE THE PURSUIT OF EQUAL AND IMPARTIAL JUSTICE

The principle of equal justice has been referred to in two very different political documents in recent South African history. In the South African constitution of 1983 the principle of equality before the law was included in the preamble as one of the "national aims". On the other side of the political spectrum, the Freedom Charter, adopted in 1955 by the Congress of the People, and forming the basis of the African National Congress' political manifesto, proclaims that "all shall be equal before the law" and "all shall enjoy equal human rights". Equal justice is and will remain a central issue in the political debate and constitutional development of South Africa, and the pursuit of this ideal in criminal justice will be of considerable importance.

Yet equal procedural justice can at best be attained only in limited degree if the wider legal order is unjust and discriminatory.[1] As Bottomley remarks,

> "To the extent that equal justice is correlated with equality of status, influence and economic power, the construction of a just system of criminal justice in an unjust society is a contradiction in terms. Criminal justice is inextricably interwoven with and largely derivative from broader social justice".[2]

This should not, however, mean suspending the pursuit of procedural equality until the time when a more egalitarian society is achieved in South Africa. While a just system of procedure cannot change the unjust rules of substantive

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1. LW Potts "Criminal Liability, Public Policy, and the Principle of Legality in the Republic of South Africa" (1982) 73 Journal of Criminal Law and Criminology 1061 1107.
2. Criminology in Focus (1979) 112.

criminal law, let alone the conditions of an unjust society, social justice in a wider context cannot be pursued without a simultaneous pursuit of procedural justice. At a time when social and economic inequality cannot be excluded from the courtroom, their intrusion should at least be contained and minimized by a fair system of procedure.

1. THE PURSUIT OF EQUAL AND IMPARTIAL JUSTICE: THE POSSIBILITIES

In jurisdictions where legal representation is regarded as a fundamental right, the yardstick of procedural justice will be the quality of justice secured by legal practitioners whose business it is to protect and advance their clients' interests as fully as possible. In such a professional-orientated system, as in South Africa, the enforcement of the principles of a fair trial is predicated upon professional assistance. In such circumstances, procedural justice for all accused can be realized fully only by making competent legal representation accessible to all indigent accused, and this should be the primary objective of the South African criminal justice system. Legal aid for indigent accused should thus be extended as expeditiously as finances and manpower resources allow. Such a programme should begin with the phasing in of the right to counsel for those most in need thereof, namely the accused in the regional courts. Serious consideration should in the meanwhile be given to the more efficient utilization of the presently available financial and manpower resources

through, for example, the introduction of a system of public defenders and representation by senior law students. Since, however, there is no possibility that legal aid will be provided to the majority of the indigent accused faced with serious charges in the foreseeable future, the principle of equal justice should also be pursued through alternative strategies.

Where the adversary system fails by its very nature to secure the equal application of the principles of a fair trial for undefended accused, indeed, when it facilitates the perpetration of injustices, deviation from this mode of procedure becomes essential.[1] Where an undefended accused cannot enforce the principles of a fair trial by his own efforts, they can be achieved only by the intervention of an activist judicial officer.[2] This would mean that the judicial officer's role could no longer be a passive one, requiring him to make decisions only when called upon. Instead, he should pursue assertively all the principles of a fair trial. In order that such an active judicial role could be achieved and maintained and that it could consistently achieve justice for undefended accused, it is important that it should be located firmly within the context of a bureaucratic system of justice.

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1. See Weinreb Denial of Justice (1977) 143.
2. R Seidman "The Legal Process in Africa" in WB Harvey (ed) An Introduction to the Legal System in East Africa (1975) 158; WL Church "The Power to Call Witness" (1971 & 1972) 3 & 4 Zambian Law Journal 162.

2. BUREAUCRATIC JUSTICE

At the core of a bureaucratic system of justice is the ideal of equal application of the principles of a fair trial to all cases according to firmly established rules. Reiss sums up the purpose of bureaucratic justice as follows:

> "Bureaucratization of the administration of justice should guarantee the distributive property of justice since the property of bureaucracy is the universal application of standards according to rules".[1]

Essential to the achievement of the purpose is control over the officials of the system; some means of ensuring that the rules of conduct are adhered to. The system is thus to be tightly constructed with "rational organization, hierarchical control, common purpose and central administration".[2] This means that the decisions and impartiality of officials will be overseen by a higher authority.

What should be pursued in the South African system of criminal justice, it is submitted, is an activist judicial officer, responsible for implementing the principles of a fair trial (which would be concretized in clear legal rules) in an impartial manner, with his decisionmaking supervised by a superior court.

2.1. AN ACTIVIST JUDICIAL OFFICER

The South African Supreme Court has over the years developed

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1. AJ Reiss "Citizen Access to Criminal Justice" (1974) 1 British Journal of Law and Society 50 70.
2. Feeley Court Reform on Trial 17-18.

a more activist role for the judicial officer when dealing with undefended accused, demanding the execution of numerous duties. It is submitted that these duties should be expanded to include the enforcement of all the principles of a fair trial.

To ensure that the accused's participation is informed, prepared and judicious, the court should be obliged to apprise him of the various rights available to him, including those not directly related to the production of evidence. Merely mentioning the existence of rights, however, does not ensure the accused's judicious participation. It is essential to explain the meaning of such rights and to disclose the important considerations relevant to their exercise. Supplementary to the court's advisory duty should be an obligation to assist the accused in the exercise of those rights. As the accused does not have the necessary experience or insight to exercise his rights to his best advantage, the court should be obliged to assist in their effective and prudent use. There are, of course, instances where even assistance will not suffice to protect the accused. This is where the accused is totally lacking in the ability to make use of information and assistance to conduct his own defence. In such cases, it is submitted, the court should be obliged to intervene actively and participate on the accused's behalf. An example would be closing the accused's case for him where there is no State case to be met. The court's duty to counter the

improper exercise of the prosecutorial powers should be extended to the scrutiny of the prosecutor's decision regarding bail and remands. Finally, where the court is not provided with a sufficient factual basis for a decision, whether administrative or judicial, it should establish this inquisitorially. This duty should extend to the determination of bail, the forfeiture of bail money and the invocation of suspended sentences. In the settlement of factual disputes where the accused cannot test the reliability of the State witnesses' evidence, it should be incumbent on the court to examine such evidence.

The standard mode of thinking has been that in adversary proceedings judicial impartiality is ensured by ascribing a passive role to the judicial officer. With two equally matched opponents the need for his participation does not arise and any intervention by the court would be bound to be viewed as a display of partiality. However, in a contest where the undefended accused is patently unequal to the prosecution in ability and resources, a judicial officer, by remaining passive and allowing the prosecution to take unfair advantage of the accused's inability, sides most decidedly with the prosecution. The principle of impartiality demands that the court's conduct should not favour either of the contestants. Where one of the parties is manifestly not capable of matching his opponent's ability the court's duty of impartiality calls for its active participation in the proceedings.

2.2. CLEAR AND BINDING RULES

The empirical study confirmed that while clear and unambiguous rules were routinely observed by the courts, ill-defined rules were ignored, particularly where the possible sanction for their non-observance was less than certain. A prerequisite for the universal application of the principles of a fair trial, therefore, is that the legal rules must not only embody those principles, but that they must be formulated with precision and clarity, with well-defined and efficacious sanctions for their non-observance.

2.3. AN IMPARTIAL JUDICIAL OFFICER

Even where the pursuit of the principles of a fair trial is made obligatory, the full realization of those principles in practice will to a large extent remain dependent on the proper exercise of the court's discretion. The discretionary component in the administration of justice allows numerous factors to be influential, irrespective of whether they are relevant or acceptable. The quality of justice would still be a function of the tenor of the court's conduct. In mediating between the demands of the various interest groups, be it as between the State and the accused or as between various classes of accused persons, the ideal of an impartial judicial officer acquires added importance where he assumes an activist role in a bureaucratic system of justice. The advantages of an activist judicial officer will remain unrealized if he does not have a commitment to the

principles of a fair trial. Since the quality of the assistance rendered to the accused, the extent of the control exercised over the prosecution, and the comprehensiveness of the factual base established for decisions, are in the final analysis discretionary, a prosecution-minded judicial officer may defeat the objectives of these duties. Similarly, discriminatory practices against accused on racial grounds may also subvert the principle of equal justice. All possible methods of promoting impartiality among judicial officers should therefore be employed. Attention should be paid to the mode of appointment of judicial officers, the granting of judicial independence, appropriate training, and the strict supervision of proceedings.

The danger that judicial officers, appointed solely from the ranks of the prosecutors, may be prone to be biased in favour of the prosecution, has often been articulated.[1] Moreover, the status of magistrates as civil servants compromises their judicial independence as they are susceptible to undue influence from the State.[2] The appointment of judicial officers predominantly from the white community also stands in the way of an image of the court's impartiality. It is therefore important for the creation of an impartial lower court bench that magistrates be appointed from the ranks of legal practitioners

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1. See above the Lansdown Report par 352; Hoexter Report part IV 5.1.3.
2. Hoexter Report part IV par 1.4.24.

other than prosecutors. The establishment of judicial independence through the granting of tenure,[1] akin to the position of judges, is another important method by which judicial independence is fostered and the possibility of undue influence minimized. The incorporation of the public in the court's decisionmaking processes through the appointment of assessors, will further enhance the court's independence, and hence impartiality.

Since a new activist approach to the conduct of proceedings is called for, the training of judicial officers in this regard is peremptory. Although the suggested approach is not novel but merely an extension of the judicial officers' present duties in respect of the undefended accused, the correct attitude towards the accused and the proceedings needs to be inculcated. What is required is the training of judicial officers as liberal bureaucrats;[2] liberal in pursuing the principles of a fair trial, and bureaucratic in applying those principles uniformly to all accused.

2.4. SUPERVISING LOWER COURT PROCEEDINGS

Central to bureaucratic justice is a hierarchical system of supervision to ensure the universal application of standards according to rules. The supervision of the lower court proceedings occurs routinely and at the instance of the supervising body. In South Africa the institution of automatic review by the Supreme Court of certain proceedings

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1. See Hoexter Report part II par 3.2.
2. Cf Bottoms & McClean op cit 220.

in the magistrates' court embraces this principle. The Court's proper review function should then be to ensure that the undefended accused is tried according to all the principles of a fair trial. The need for such supervision is particularly acute where the judicial officer plays an activist role in the proceedings, because in the execution of inquisitorial powers, any pro-prosecution bias that a judicial officer may harbour, will be exacerbated. Through the review of randomly selected cases, the Supreme Court will provide guidance for the correct approach to the new inquisitorial duties, and the beneficial effect of this supervision will permeate to the proceedings of all the lower courts.

3. REFORMING COURT PROCEDURE

The injustice suffered by the undefended accused in the lower courts is largely attributable to the failure of the legislature to acknowledge the need for special protection of those who cannot enforce the principles of a fair trial for themselves and the Supreme Court's reluctance to seek the enforcement of all the principles of a fair trial. Any change for the more equitable prosecution of undefended accused will have to be brought about by these two law-creating bodies.

In the development of the law in this regard, the legislature has on the whole played a minor role. There has been little specific recognition of the plight of

the undefended accused and the equal application of the principles of a fair trial has not often featured in the parliamentary agenda. In the administration of civil justice, the Small Claims Court Act of 1984 was the first acknowledgement of the inadequacy of the existing machinery of justice, and provided the "small man" with access to justice without requiring the services of a legal practitioner. Concern for the undefended accused could also lead to innovative measures along similar lines in the administration of criminal justice.

The Supreme Court has developed a considerable body of law relating to the undefended accused and will no doubt, within the present statutory framework, further develop the duties for an activist judicial officer. The creation of duties has been hampered, however, by the Court's reluctance to enforce the principle of equal justice. The enforcement of all the principles of a fair trial can only be realized if the Court would adopt a more social utilitarian approach to its supervising function. By accepting the principle of equal justice as fundamental to a fair trial, the Court should not hesitate to set convictions aside, despite the apparent guilt of the accused, where an undefended accused has not been tried according to all the principles of a fair trial.

On examination of the criminal procedure and court practice at the beginning of the previous century the Colebrook and Brigge Commission argued forcefully that justice would only be done through the pursuit of the principle of equal and

impartial justice. Subsequent legislative and judicial developments failed, however, to realize this ideal with respect to the undefended accused. The principle of equal and impartial justice remains valid today and only through the full incorporation of this principle in legislation and case law, will the administration of criminal justice in the lower courts cease to be routinely characterized by "systemic" injustice.

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