

**PROTECTION OF THE RIGHTS OF AN
UNREPRESENTED ACCUSED**

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**PROTECTION OF THE RIGHTS OF AN UNREPRESENTED
ACCUSED**

by

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DECLARATION

I declare that the mini- dissertation hereby submitted to the University of Limpopo, for the degree Master of Laws (LLM) in Management and Development has not been previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

Motubatse M.J

Date

PREFACE

This research would not have been a success without the motivation and support from my wife Seage Salome Motubatse, my mother Masana Elsie Motubatse, my former lecturers and Prof. D.M Matlala who was my initial supervisor including the late Prof. T. Scheepers (May His Soul Rest In Peace) who assisted me in finalising this piece of research. I also want to dedicate this mark to my two lovely kids Tlhokomelo and Masana, not forgetting Lister Mbowane and Jamela Khoza who helped together with Phineas Ntibane from Lulekani Library staff. I want to thank Adv. B.S Nkosi for his dedication to his work in assisting me to see to it that I complete this dissertation and took over as my supervisor while I was under a stressful situation.

M.J MOTUBATSE

Abstract

Every accused person has the right to a fair trial which encompasses the right to adduce and challenge evidence in court. Whilst the Constitution of the Republic of South Africa confers the right to legal representation, an accused person may still opt to conduct his or her own defence. Once an unrepresented accused opts to conduct his or her own defence, the presiding officer then becomes obliged to assist the undefended accused to present his or her own case.

South Africa adheres to the accusatorial / adversarial system. Under the accusatorial / adversarial system the presiding judicial officer is in the role of a detached umpire, who should not descend the arena of the duel between the state and the defence for fear of becoming partial or of losing perspective as a result of the dust caused by the affray between the state and the defence. Under the accusatorial/adversarial system, a presiding officer may find it challenging to assist an unrepresented accused or may inadequately assist him or her. This may be so because a fair trial is not determined by ensuring exercise of one of the rights to a fair trial but all the rights to a fair trial.

This mini-dissertation, on the injunction of section 35 of the Constitution of the Republic of South Africa which makes provision for the rights to a fair trial, covers the different rights of an unrepresented accused. This is done alongside related provisions of the Criminal Procedure Act 51 of 1977 and pertinent case law. The fact that an unrepresented accused has waived legal representation at the expense of the state and has opted to conduct his or her own defence should not be to his or her peril. The court has a constitutional injunction to protect and advance the rights of an unrepresented accused. Justice must not only be done but must also be seen to be done.

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1. Introduction

The mini dissertation is concerned with the protection of the rights of an unrepresented accused as and when already appearing before a court of law. A court of law takes control of the criminal proceedings once an accused has already appeared before it. This mini thesis shall not cover the protection of the rights of an undefended suspect or undefended detainee due to the fact that pre charge occurrences are at most, not traceable.

The mini dissertation shall not cover the rights of an accused to legal representation either at his or her own expense or at the expense of the state if substantial injustice would otherwise result. The mini thesis operates from the premise that an accused person has been promptly advised of his or her rights to legal representation and for whatever reason opted to conduct his or her own defence.

To state the rationale behind an accused opting to conduct his or her own defence would be beyond the scope of the mini dissertation. It may however be speculated that some accused choose to conduct their own defence because they lack confidence in the services rendered by legal practitioners even at the expense of the state and others simply prefer to conduct their own defence.

The rights of an unrepresented accused as entrenched in the Constitution of the Republic of South Africa¹ (the Constitution) among others include the right to be promptly informed of the charge with sufficient detail to answer to it,² the right to have adequate time and facilities to prepare a defence.³ The right to have a public trial before an ordinary court,⁴ the right to have the trial begin and conclude without unreasonable

¹ Constitution of the Republic of South Africa Act 108 of 1996.

² Section 35 (a) of the Constitution of the Republic of South Africa Act 108 of 1996.

³ Section 35 (b) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁴ Section 35 (c) of the Constitution of the Republic of South Africa Act 108 of 1996.

delay.⁵ The right to be present when being tried,⁶ the right to be presumed innocent, to remain silent and not to testify during the proceedings⁷ and the right not to be compelled to give self- incriminating evidence.⁸

An undefended accused has the right to be tried in a language that the accused person understands or to have the proceedings interpreted in that language⁹, the right to plead to the charge the state prefers against him or her including to an alternative charge in respect of which a conviction may be sustained,¹⁰ the right to present and challenge the prosecution's case, the right to be promptly advised of the application of prescribed or mandatory sentences in terms of the Criminal Law Amendment Act¹¹ (CLAA); the right to be promptly advised of his or her right to appeal against conviction or sentence or both conviction and sentence and of the right to review of the proceedings.

The rights of an unrepresented accused in criminal proceedings ought to be protected by the presiding judicial officers. Presiding judicial officers however, often than not, infringe the rights of an undefended accused which they are expected to protect. The violation of the rights of an unrepresented accused may for instance come as a result of the presiding judicial officer's failure to promptly advise an undefended accused of his or her procedural rights. It may also come as a result of the presiding judicial officer's not enabling or allowing the accused who is unrepresented to exercise his or her rights. It may also come as a result of the presiding judicial officer's abdication of his or her responsibilities of promptly informing an undefended accused of his or her rights to the court interpreter (to inform an undefended accused of his or her rights).

Criminal proceedings of a particular state may either be adversarial (accusatorial) or inquisitorial. The essential difference between the accusatorial and the inquisitorial

⁵ Section 35 (d) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁶ Section 35 (e) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁷ Section 35 (h) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁸ Section 35 (j) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁹ Section 35 (k) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁰ *S v Mbokazi* 1998 (1) SACR 438 (NPD). See also *S v Mosehla* A75/12 (2012) ZAGPPHC 43 (22 February 2012).

¹¹ 105 of 1997.

system lies in the functions of the respective parties, the presiding judicial officer, the prosecutor and the defence. In an inquisitorial system which applies in countries such as France the judge is *dominis litis* (master of the proceedings). He or she actively conducts and even controls the search for the truth by dominating the questioning of witnesses and the accused. After the arrest, the accused is primarily questioned by the investigating judge, not (mainly) by the police. In the trial, the presiding judge primarily does the questioning more than counsel for the prosecution or the defence.

Under the accusatorial system which applies in South Africa the presiding judicial officer is in the role of a detached umpire, who should not descend the arena of the duel between the state and the defence for fear of becoming partial or losing perspective as a result of the dust caused by the affray between the state and the defence. The police are the primary investigating force; they pass collected evidence on to the prosecution in dossier (file) format, who then becomes the *dominis litis*. The trial takes the form of a contest between the two theoretically equal parties, that is the prosecution and the defence who do the questioning, in turn leading their witnesses and cross examine the opposition's witnesses.¹²

Whilst criminal proceedings in South Africa are adversarial / accusatorial there are however some sections of the Criminal Procedure Act (CPA) that are inquisitorial. Some of the inquisitorial sections of the CPA are sections 112 (1) (b) and section 115. Section 112 1(b) deals with the plea of guilty to a serious offence whilst section 115 deals with the plea of not guilty. In terms of section 112 (1) (b) the presiding judicial officer is mandated to pose some questions to the accused with a view of ascertaining the plea of guilty tendered by such accused. In terms of section 115, the presiding judicial officer is mandated to invite an accused to make a statement indicating the basis of his or her defence, if he or she so wishes, with a view of limiting the issues in dispute between the state and the accused.

¹² Joubert *et al Criminal Procedure Handbook* 8th ed. (2007) 21.

In defining the adversarial nature of criminal proceedings as they find application in South Africa, Steytler points out it is a trial conducted through the medium of spoken words and it is therefore oral in nature. The orality of the system is consistent with an adversarial / accusatorial system¹³. In an adversarial / accusatorial system, the two parties viz. the prosecution and the defence are 'equal' and each one of them is required to state their respective positions to a judge or a magistrate who is required to be impartial throughout the proceedings and then deliver a judgement based on the merits of the case.

The accusatorial system is intended to ensure each side is accorded a participation in the decision that is reached. The due process under this system thus require the persons to be affected by the decision to be made to have some formally guaranteed opportunity to influence that decision. 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 the prosecution strongly promoting and protecting their own interests, a just decision will be made.¹⁴

Criminal proceedings in South Africa are premised on the principle of 'equality of arms'. The 'equality of arms' principle strives to confer a guarantee that both sides will be given the same procedural opportunities to prove their cases. Therefore, the court cannot act in a way that gives the prosecution an advantage over the defence and *vice versa*. Section 39 (2) of the Constitution confirms the above by requiring all courts when interpreting any legislation and when developing the common law or customary law to promote the spirit, purport and objectives of the bill of rights.¹⁵

Adversarial proceedings are generally driven by the inequality of parties, due to the indigence and the lack of legal representation. This has since placed an obligation on

¹³ N.C Steytler *Making South African Criminal Procedure More Inquisitorial* Law, Democracy and Development Vol.5 2001 at 3.

¹⁴ N.C Steytler *The Undefended Accused on Trial* (1998) 1. See also T. Bruinders *The Undefended Accused in the Lower Courts* (1988) 4 SAJHR 239 and A. Chaskalson *The Unrepresented Accused* (1990) 3 *Consultus* 98.

¹⁵ *S v Ndlovu* 2002 SACR 325 (SCA), *S v Lekheto* 2002 SACR 13 (O) and *S v Mitshama* 2000 (2) SACR 181 (W)

presiding judicial officers to assist unrepresented accused to ensure they receive a fair trial. Section 35 (3) of the Constitution¹⁶ does not define the concept of a fair trial. Courts of law however have since been tasked with the interpretation of this concept.¹⁷ The notion of fairness and justice is used as the yardstick to determine the contents of a fair trial.¹⁸

In *S v Thidiso*,¹⁹ the approach to determining the test for a fair trial was pronounced as involving an evaluation of the case from a holistic point of view. The conduct and proceeding as a whole need to be looked at including the impact on the evidence obtained and the verdict of an alleged irregularity. The rights of an accused to a fair trial begin at the commencement of criminal proceedings which may be initiated through arrest, service of a summons or through service of a written notice to appear. The bright line is always subject to the fact that pre charge and post charges occurrences may affect the right of an accused to a fair trial.²⁰

2. The right to be presumed innocent, to remain silent;²¹ and (the right) not to testify during the proceedings

The right to be presumed innocent, to remain silent; and the right not to testify during proceedings has been in existence prior to the adoption of the democratic constitutions²². The CPA also has provisions of ensuring this right is adequately protected. Some of the provisions of the CPA intended to protect this right include sections 112 (1) (b) (plea of guilty) and 115 (plea of not guilty) procedures and presumptions relating to certain statutory provisions.

¹⁶ Constitution of the Republic of South Africa Act 108 of 1996.

¹⁷ *Motala v University of Natal* 1995 (3) BCLR 374 (D).

¹⁸ *S v Makhatini* 1995 (2) BCLR 226 (D).

¹⁹ 2002 (1) SACR 207 (W).

²⁰ Woolman *et al Constitutional Law of South Africa* 2nd ed. 2011 Vol.3 at 51.

²¹ Currie *et al* (eds) *The Bill of Rights Handbook* (2005) 751 -752. They argue that failure to advise an unrepresented accused of his or her right to remain silent is a constitutional breach and might lead to subsequent statements made by the accused being deemed inadmissible in terms of section 35 (5) of the constitution.

²² Constitution of the Republic of South Africa Act 200 of 1993 and the Constitution of the Republic of South Africa Act 108 of 1996.

Section 112 (1) (b) deals with the plea of guilty by an accused. Even in instances when the accused pleads guilty to the charge, the presiding judicial officer has the duty of ensuring justice prevails even in instances where an unrepresented accused pleads guilty. Section 112 (1) (b) thus require a series of questions aimed at determining whether the accused admits all the elements of the offence preferred against him or her to be posed to the accused person. Depending on the charge, questions intended to establish the guilt of an accused that may be posed for instance on a charge of assault with the intention to do grievous bodily harm may be (i) Did you assault the complainant? (ii) Did you assault him with a beer bottle? (iii) Why did you assault the complainant with a beer bottle? and (iv) Did you realise that by assaulting the complainant with a beer bottle you will cause him injuries?

In the event the presiding judicial officer, in the interests of justice, is satisfied that the accused does not admit an element or the elements of the offence, he or she will enter a plea of not guilty in terms of section 113 of the CPA. Section 113 of the CPA makes provision for the correction of the plea of guilty to that of not guilty. Once the provisions of section 113 have been invoked the case will be proceeded with as if the accused had initially pleaded not guilty to the charge. The procedure in terms of section 115 of the CPA shall apply.

When an unrepresented accused pleads not guilty to the charge the presiding judicial officer is mandated to invite him or her to make a statement indicating the basis of his or her defence. The presiding judicial officer must promptly inform the undefended accused of the purpose achieved by indicating the basis of one's defence, if the accused so wishes. The purpose of indicating one's defence is to establish the issues in dispute between the state and the accused.

With regard to the procedure followed in terms of section 115 (1) and (2) of the CPA Schwikkard and Van der Merwe caution that it is possible a challenge may be thrown

which is that section 115 (1) and (2) of the CPA effectively contravene the right to remain silent.²³ The procedure laid down in terms of section 115 (1) and (2) of the CPA, it is submitted, does not amount to the violation of the right to remain silent. An accused person who pleads not guilty to the charge is simply invited, if he or she so wishes, to make a statement indicating the basis of defence. The accused is not compelled to make such a statement. The fact that the presiding judicial officer is obliged to promptly inform him or her that he or she is not forced to make such a statement is confirmation that the accused's right to remain silent remains intact.

The right to be presumed innocent, to remain silent and (the right) not to testify during the proceedings also applies in respect of certain statutory provisions such as section 37 (1) of the General Laws Amendment Act²⁴ (GLAA). This section makes provision that on a charge of theft of property the onus of proving lack of knowledge that the property was stolen lies with the accused. In *S v Manamela*,²⁵ the court had to deal with the reverse onus provided for by section 37 (1) of the GLAA which stipulates thus:

“(1) Any person who in any manner, otherwise than at a public sale acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause of proof of which shall be on such first-mentioned person, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly authorised by the owner thereof to deal with or dispose of them shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.

The majority of the court held that section 37 (1) of the GLAA was a justifiable infringement of the right to silence but an unjustifiable infringement of the presumption of innocence. The reverse onus placed on the accused to prove lack of knowledge that the property received was stolen infringed the right to remain silent by reason of the fact

²³ Schwikkard and Van der Merwe *Principles of Evidence* 3rd. ed. (2009) 516 – 517.

²⁴ 62 of 1955.

²⁵ 2000 (3) SA 1 (CC).

that the accused is expected to establish he or she had reasonable grounds for believing the seller of the goods was authorised to sell them.

The right to be presumed innocent, to remain silent, and not to testify during the proceedings is also to be considered in light of section 174 of the CPA. Section 174 makes provision that at the close of the case for the prosecution, if the court considers that there is no evidence that the accused committed the offence charged with or any other offences of which he may be convicted, it may return a verdict of not guilty. The presiding judicial officer must exercise a proper judicial discretion in considering section 174. The discharge of the accused in terms of section 174 may be done by the court *mero motu / suo motu* (on its own).

An undefended accused, it is contended, more often than not, would not be familiar with the stipulations of section 174. When the presiding judicial officer, it is submitted, discharge the undefended accused in terms of section 174 he or she acts in a manner consistent with the accused's right to a fair trial. In *S v Mathebula*,²⁶ the court had to consider whether, in light of the Constitution, the failure by the presiding judicial officer to discharge an accused at the close of the state's case amounted to an unfair trial. There was no evidence implicating the accused to the offence committed and the court refused to discharge him in terms of section 174 with the hope that evidence implicating the accused would be forthcoming from his co accused (who made a statement to the police implicating the accused).

The discretion not to grant the discharge in terms of section 174 was held to contravene the right to be presumed innocent, to remain silent and the right not to testify in the proceedings. It amounts to a gross unfairness to take into consideration future evidence which may or may not be tendered against the accused either by himself or herself or by other co accused (much so) after the state had failed to prove anything against him or her.

²⁶ 1997 (1) SACR 119 (B).

3. The right to have adequate time and facilities to prepare a defence

There is a link between the right to have adequate time to prepare a defence and the right to have facilities to prepare a defence. An unrepresented accused may for instance be provided with adequate time to prepare a defence. Adequate time to prepare a defence may however be hampered by the lack of facilities to prepare a defence. The same can be said with regard to facilities to prepare a defence. If facilities to prepare a defence are made available but the time to prepare a defence is inadequate the right to prepare a defence is compromised.

In preparation for the trial an undefended accused has the right to have access to the contents of the police docket or dossier. The right to have access to the police docket or dossier is however not absolute. Section 39 (1) (a) of the Promotion of Access to Information Act²⁷ makes provision that the information officer of a public body may refuse access to the record where the record is to be accessed for purposes of a bail application in terms of section 60 of the CPA. In *Shabalala and Others v Attorney General, Transvaal and Another*,²⁸ various applications were made to access copies of the relevant police docket / dossier which included statements and lists of exhibits in the possession of the state.

The court *a quo* refused the applications on the basis that the accused had not satisfied the court that the relevant documents in possession of the state were regarded within the meaning of section 23 of the Constitution²⁹ which provided for the exercise of any of their rights to a fair trial. In upholding their right to access to the police docket, the constitutional court however held that a blanket privilege was inconsistent with the constitution to the extent to which it protected the state from disclosure of all the documents in the police docket.

²⁷ 2 of 2000.

²⁸ (CCT23/94) (1995) ZACC12; 1995 (12) BCLR 1593, 1996 (1) 725 (29 November 1995).

²⁹ Constitution of the Republic of South Africa Act 200 of 1993.

The right of an unrepresented accused to access the police docket / dossier must not amount to the disclosure of the identity of state secrets. In *S v Zuma*,³⁰ the court pointed out the rules of practice evolved to assist the illiterate and indigent accused to ensure that he or she is tried fairly and that justice is done. The failure to comply with one or more of the rules relating to a fair trial may result in a failure of justice, depending on the facts and circumstances of each case. *S v Jaipal*³¹ confirms the above referred *dictum*. It was pointed out that if an irregularity leads to an unfair trial, then that will constitute a failure of justice.

4. The right to be present at the trial

The general rule is that an accused person has to be present at the trial. This means that an accused person, unless his or her presence at the trial makes the continuation of proceeding impracticable, ought to be present as from the moment he or she is promptly informed of his or her procedural rights, when the charge is put, when he or she pleads to the charge; when the state leads evidence, when he or she challenges the evidence tendered, when he or she is convicted or acquitted; when he or she is sentenced and when he or she is promptly advised of his or her right to appeal or to review.

Section 159 of the CPA regulates the presence of an accused at the trial and also makes provision for instances when the presence of an accused at the trial may be dispensed with. In the event it is ordered the criminal proceeding be conducted in the absence of the accused for instance when the accused disrupted the proceedings and the proceedings continued in his or her absence, the accused may later on be called to address the court on mitigation of sentence in the event he or she was convicted of the charge.

³⁰ 1995 (2) SA 642 (CC).

³¹ 2005 ZACC 1, 2005 (4) SA 581 (CC).

An unrepresented accused ought to be warned before-hand of the consequences of disrupting the proceedings which consequences is that he or she will be removed from the court and that the proceedings will be conducted in his or her absence. If an accused was removed from the court on account for instance of disrupting the proceedings, it is the responsibility of the presiding judicial officer to advise him or her of his or her right to examine any witness who testified during his or her absence. The presiding judicial officer must also read the record of the proceedings to the accused.

In *S v M*,³² it was held that despite the fact that section 158 of the CPA was peremptory, a departure from having proceedings conducted in the absence of the accused, depending on the circumstances of each case, it may result in the quashing of the conviction if the irregularity resulted in a failure of justice.

5. The right to have the trial begin and concluded without delay

The expeditious commencement and completion of criminal proceedings is a well recognised criteria for a fair trial. For the protection of the right to have the trial begin and conclude without delay section 342A of the CPA makes provision for the presiding judicial officer to:

(a) refuse further postponement of the criminal proceeding;

(b) grant a further postponement subject to certain conditions;

(c) before or during the plea stage, order that the case be struck off the court's roll and not to be reinstated without the written instruction from the Director of Public Prosecutions;

³² 2004 (1) SACR 238 (N).

(d) after plea, order that the matter be proceeded with as if the delaying party's case had been closed; and;

(e) make a costs order against the delaying party.

In *Sanderson v Attorney General, Eastern Cape*³³ Kriegler J (as he then was) dealt with systematic delays relating to criminal proceedings as follows:

'Systematic factors are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systematic causes can no longer be regarded as exculpatory. The Bill of Rights is not a set of (aspirational) directive principles of state policy. The state should make whatever arrangements necessary to avoid violation of rights. One has to accept that we have not reached that stage.

Even if one accepts that systematic factors justify delays, as one must at the present, they can only do so for a certain period of time. It would be legitimate, for instance, for an accused to bring evidence showing that the average systematic delay for particular jurisdiction had been exceeded. In the absence of some evidence, the court may find it difficult to determine how much systematic delay to tolerate. In principle, however, they should not allow claims of systematic delay to render the right nugatory'.

In *Director of Public Prosecutions KwaZulu Natal v Regional Magistrate, Durban and Another*,³⁴ Hugo J with Combrink J concurring, held that in the event of an inordinate delay in bringing prosecution the remedy is permanent stay of prosecution. In *casu*, the state challenged the order of permanent stay of prosecution granted by the magistrate on the strength of the delays on the part of the state. The court, in dismissing the challenges, alluded to the fact that in giving effect to the right to a trial within a reasonable time. Magistrate courts have jurisdiction to grant an order for permanent stay of prosecution.

³³ 1998 (2) SA 38 (CC).

³⁴ 2001 (2) SACR 463 (NPD).

As the circumstances of each case vary the presiding judicial officer remains in a better position to determine the step to take to ensure a criminal proceeding begins and concludes within a reasonable time. A presiding judicial officer has the duty to enquire from the prosecutor on the causes of the delays. This enquiry relates to the causes of the delays which may have the potential of prejudicing an undefended accused. An unrepresented accused should be offered an opportunity of stating his or her view on the application for a postponement of the case by the state. There are certain systematic delays that are acceptable and they include for instances when the accused or the complainant as the case may be, is referred for mental observation in terms of sections 77, 78 and 79 of the CPA.

6. The right to a public trial before an ordinary court

According to Steytler an accused person needs to be tried in an ordinary court which protects him or her from the *ad hoc* creation of courts and applications of procedures which may be abused by the executive to the detriment of judicial independence and impartiality³⁵. A trial in an open court by an ordinary court means that every member of the public and even the media may be in attendance unless the court directs that the proceedings be held behind closed doors generally known as *in camera* proceedings. The circumstances of each case determine whether the criminal proceeding has to be open to all.

The importance of the right to a public trial is best captured by Yekiso J³⁶ (as he then was) by pointing out that:

it is not limited to access to criminal proceedings by the ordinary members of the public, as also the media. The accused is given the right to a public trial to ensure that justice seen to be done. The right to a public trial would include the right to participate fully in the proceedings, be it by way of adducing and challenging evidence, or by way of addressing the court on the merits of the case after the conclusion of

³⁵ N.C Steytler *Constitutional Criminal Procedure* (1998) 267.

³⁶ *S v Muller and Others* 2005 (2) SACR 451 (CPD) at 457 par. c – d.

evidence. It would include the right to participate meaningfully in the conduct of the trial, from the pleading stage of the proceedings up to the pronouncement of the verdict.

The CPA in sections 153 and 154 stipulate the circumstances or the grounds upon which members of the general public and the media may be excluded from attending a particular criminal proceeding. A criminal proceeding may for instance be held *in camera* where the identity of the accused or the witness has to be protected. It may also be held behind closed doors when for example the accused is a minor³⁷ or where the life of the accused may be exposed to danger or where the criminal proceeding has some sexual elements or aspects such as in cases of rape and indecent assault.

7. The right to be promptly informed of the charge with sufficient details to answer to it

An accused person especially one who is unrepresented or undefended has to know clearly and in detail the charge or charges including alternative charges which the state prefers against him or her. In the event an undefended accused does not understand the charge or alternative charge preferred against him or her, the presiding judicial officer has the duty of explaining such charge or alternative charge in simple terms.

Section 85 of the CPA makes provision for the quashing of a charge against an accused when for instance the charge does not disclose the essential elements of the alleged offence or when it does not contain sufficient particulars of the alleged offence. Quashing of a charge does not apply in all cases. The circumstances of each case determines whether or not the charge can be quashed more in particular when it is not capable of being amended or the particulars it provides cannot be cured of the defects.

³⁷ Section 63 (5) of the Child Justice Act 75 of 2008 makes it compulsory that criminal proceedings involving a minor be held behind closed doors.

In *S v Mosehla*,³⁸ it was held that an undefended accused has to be advised of a competent *verdict* in respect of which a conviction may ensue. The court emphasised that at all the stages of criminal trial the presiding judicial officer acts as a guide of the undefended accused. In *S v Mbokazi*,³⁹ in highlighting the importance of informing an undefended accused of his or her right to a competent verdict (an offence with which the accused may be convicted if proved beyond doubt by the state), Thirion J stated thus:

“It had to be accepted that the accused had never been required to plead to the alternative charge of theft. Since he had never pleaded to the alternative charge, there was never a *lis* between the state and the accused on that charge, and it was therefore not competent for the magistrate to have convicted the accused on that charge”.

In *S v Hlakwane en ‘n Ander*,⁴⁰ the accused had simply been cautioned of the risk of being convicted on a competent verdict. Muller J, considered the conduct of the trial magistrate of cautioning the accused of the risk of being convicted on an alternative charge to be an irregularity. Even when the accused had made some admissions relating to the competent verdict, the court ought to have promptly advised him of the application of competent verdicts to the main charge with which he was charged.

The right of an undefended accused to be informed in detail of the charge or alternative charge applies even in instances where there is a reverse onus placed on the accused person or where there is a presumption operating against an accused person. Tip AJ in *S v Manamela and Another*,⁴¹ was able to state that:

‘if an undefended accused was not promptly informed of an alternative charge in respect of which a conviction may ensue, an unrepresented accused could not be taken to have been promptly informed of the charge, the primary purpose of which was to place him in a position to comprehend what had to be presented by way of defence’.

³⁸ A75/12 (2012) ZAGPPHC 43 (22 February 2012).

³⁹ 1998 (1) SACR 438 (N).

⁴⁰ 1993 (2) SA 362 (O).

⁴¹ 1999 (2) SACR (W).

8. The right to plead to the charge

An undefended accused has the right to plead to the charge preferred against him or her and the presiding judicial officer has the responsibility of promptly advising him or her of such right. Section 106 of the CPA gives life to this right by making provisions for a number of pleas that may be tendered by an accused. An accused is said to be arraigned when he or she has been called upon to appear, is informed of the charge, when it is demanded whether he is guilty or not guilty; and when the plea is entered⁴².

The term arraignment as indicated above, it is submitted, appears to create the impression that an accused person can only tender the plea of guilty or not guilty. Apart from the plea of guilty and not guilty section 106 of the CPA makes provision for the following pleas which an accused have to be promptly advised of:

(a) previous conviction,

(b) previous acquittal,

(c) receipt of free pardon from the President,

(d) lack of jurisdiction by the court,

(e) discharge from prosecution in terms of section 204 of the CPA after giving satisfactory evidence for the state,

(f) lack of title to prosecute by the prosecutor, and

⁴² Joubert *et al Criminal Procedure Handbook* 8th ed. (2007) 211.

(g) prosecution may not be resumed or instituted owing to an order under section 342 A of the CPA

An accused especially who is not defended is not expected to be familiar with the pleas as provided for by section 106 of the CPA. The presiding judicial officer thus have the responsibility of promptly advising the unrepresented accused of the pleas he or she may tender and this, it is submitted, should not be limited to the plea of guilty and not guilty. The plea tendered by the undefended accused, it is contended, serves the function of determining the form or procedure the trial will assume. An instance thereof is a plea of guilty which, if accepted by prosecution and if it satisfies the presiding judicial officer, will relieve the state of proving the elements of the offence.

The presiding judicial officer also has the duty of promptly advising an undefended accused that he or she may change the plea of not guilty to that of not guilty and vice versa. In the event of the change of plea from guilty to not guilty and *vice versa*, the procedure applicable to the said plea has to be followed.

The right to plead to the charge, it is submitted, also applies to plea bargain⁴³ which in essence is a written agreement between the defended accused and the prosecution to the effect the accused pleads guilty to either the main charge or to a charge with which he or she may be convicted and that a particular sentence to be imposed by the court is agreed upon. Plea bargain is an old age practice which has since been incorporated into the CPA.

Plea bargain has to comply with the requirements stipulated in section 105 A which are that it must (1) be in writing, (2) excludes the presiding judicial officer from taking part in the negotiations, (3) the presiding judicial officer must question the accused on the contents of the agreement to satisfy himself or herself whether the accused is in fact admitting all the allegations in the charge and (4) the sentence agreement is just.

⁴³ Section 105 A of the Criminal Procedure Act 51 of 1977 as inserted by section 2 of the Criminal Procedure Second Amendment Act 62 of 2001.

If the court is not satisfied with the plea bargain agreement either in terms of the merits or the sentence, it must inform the parties of the sentence which it considers just. Both the prosecution and the legal representative (on behalf of the accused) may therefore opt to abide by the agreement in terms of the merits and the court convicts and sentences the accused in the normal way or both prosecution and the legal representative (on behalf of the accused) or one of them may choose to withdraw from the agreement. The trial would therefore commence *de novo* before another presiding judicial officer⁴⁴.

Plea bargain, it is submitted, is a plea and it only differs with the ordinary plea by being codified and if it satisfies the court, by predetermining the sanction to be imposed. It (plea) bargain is however inconsistent with an undefended accused's right to a fair trial in that it excludes an unrepresented accused from taking part in the negotiation. The right to a fair trial, it is contended, has to apply to all persons accused of infringing penal provisions irrespective of whether they are represented. To the extent that section 105 A excludes an unrepresented accused a perception may be created that accused that are represented have privileges that are not available to undefended accused.

9. The right to be informed of the prescribed or mandatory sentences

In the event the charge against an undefended accused attracts a prescribed or mandatory sentence such as in terms of sections 52 and 53 of the CLAA the presiding judicial officer has the responsibility of promptly advising an unrepresented accused of such prescribed or mandatory sentences. Sections 52 and 53 of the CLAA make provisions for the imposition of prescribed or mandatory sentences such as life imprisonment and a substantial term of imprisonment such as 15 years, 20 years and 25 years. Failure to promptly advise an undefended accused of prescribed or

⁴⁴ Joubert *et al Criminal Procedure Handbook* 8th ed.(2007) 216 -217.

mandatory sentences may, depending on the circumstances of each case, result in a miscarriage of justice.

In *S v Mbambo*,⁴⁵ the court set aside the sentence of life imprisonment imposed on the accused for raping a 9 year old girl. The proceedings before the trial court were held not to have been in accordance with justice. The accused was in this case not defended. At the commencement of the trial the court had the duty of promptly advising him of the severity of the prescribed or mandatory sentence upon conviction which duty it did not comply with. The court held that the undefended accused ought to have been advised of the prescribed or mandatory sentence as well as of the right to legal representation. On the face of the possible severity of the sentence that may be imposed upon conviction the undefended accused ought to have been encouraged to utilise the services of a legal practitioner.

In *S v Muller and Others*,⁴⁶ the proceedings on a rape charge in the regional court were found not to be in accordance with justice. The accused was convicted and referred to the High Court for sentencing in terms of section 52 (2) (b) of the CLAA. Yekiso J (as he then was) stated thus:

'heads of arguments no matter how comprehensive they may be in dealing with the issues in dispute, could never have been intended to substitute or compromise the parties' rights to address the court on the merits. Heads of argument are not more than inanimate documents outlining the views of the parties on the issues in dispute. A party only breathes life into such heads of arguments by way of additional oral arguments, with all the power of persuasion that goes with such oral argument. An accused person is entitled, and indeed, has a right to hear audible arguments on the merits...unless there are clear indications that the accused has waived his right in this regard'

⁴⁵ 1999 (2) SACR 421 (WLD).

⁴⁶Footnote 35 *supra* at 457 par. h – j and at 458 par. a.

10. Contempt of court in *facie curiae*

It sometimes happens that an accused acts or conducts himself or herself in a manner which may be viewed to be in contempt by the presiding judicial officer. With a view of preventing and of dealing with an accused who acts or conducts himself or herself in a contemptuous manner the provisions of section 108 of the Magistrates Courts Act⁴⁷ (MCA) may be invoked. In terms of section 108 the presiding judicial officer may, at a summary criminal proceedings, hold an unrepresented accused for contempt of court in *facie curiae*. Holding an accused for contempt of court in *facie curiae*, it is submitted, should be approached with caution by virtue of the fact that the accused held for contempt of court in *facie curiae* is not provided with sufficient opportunity to prepare for such a trial.

It is advisable that an accused who conducts or acts in a manner viewed by the presiding judicial officer to be in contempt of court in *facie curiae* be formally charged and the case be referred to the public prosecutor to institute a normal criminal proceeding where witnesses may be called. In *S v Lavhenga*.⁴⁸ the provisions of section 108 of the MCA were not *per se* held to be unconstitutional but that the following important guidelines need to be complied with:⁴⁹

- (a) a court should first consider whether it would not be appropriate to resort to the normal procedure of referring the matter to the Director of Public Prosecutions;
- (b) if summary procedures are followed the accused should be warned of the procedures and should be advised of the relevant statutory provisions;
- (c) the accused must be advised as to what aspects of his or her conduct contravened section 108;

⁴⁷ 32 of 1944.

⁴⁸ 1996 (2) SACR 453 (W).

⁴⁹ Footnote 50 below at 495 b – 496 a.

(d) the accused must also be advised of all of his or her constitutional rights to legal representation and must be given the opportunity to exercise such a right; and

(e) the presiding judicial officer must then carefully consider whether the guilt of the accused has been established beyond reasonable doubt.

Contempt of court *in facie curiae* differs from instances where an accused appears before the court for failure to appear (in court) in contravention of sections 55(2), 67 (2), 72 (2) and 188 of the CPA. Where summary criminal proceedings were found to be constitutional for instance an enquiry was based on the original charge sheet provided the accused was furnished with the details of the alleged offence.

11. The right to be tried in the language which the accused understands

A fair trial includes conducting the trial in the language that an accused fully understands. It is for this reason that competent court interpreters are appointed to benefit the accused persons by interpreting the proceedings⁵⁰. It is crucial that the accused person follows the criminal proceedings. The presiding judicial officer has the responsibility of ascertaining whether the accused is able to follow the criminal proceedings rather than for him or her to later on complain about the criminal proceedings that were unfair. In *S v Damoyi*.⁵¹ the proceedings were conducted in IsiXhosa by reason of the fact that the accused, presiding judicial officer and the public prosecutor were all IsiXhosa speakers. In an automatic review of the sentence imposed, the proceedings were found to be in accord with the principle of access to justice.

In the event the accused is mute the presiding judicial officer must see to it that a person learned in sign language is utilised or at least if the mute accused is able to write, the criminal proceedings may then be conducted through the medium of writing.

⁵⁰ Section 6 (2) of the Magistrates Courts Act 32 of 1944.

⁵¹ 2004 (1) SACR 121 (CPD).

On the importance of the use of one official language by the court Tshabalala J (as he then was) in *S v Motomela*⁵² pointed out

{In my judgment}, the best solution is to have one official language for courts... All official languages must enjoy parity of esteem and be treated equitably but for practical reasons and for better administration of justice one official language of record will resolve the problem, Such a language should be one which can be understood by all officials irrespective of mother tongue'.

In *S v Ngubane*,⁵³ the accused had not understood the evidence tendered because it had been conveyed to him in a language he was not conversant with. He was Zulu speaking and the proceedings were interpreted to him in Tswana. The proceedings were set aside by reason of the fact that he was unable to follow the proceedings and this compromised his right to a fair trial.

In *S v Mzo*,⁵⁴ the court held that it was the presiding judicial officer's responsibility to decide how and to what extent he must explain the accused's rights and their implications. The only function of the interpreter is to convey this explanation to the accused in a language which the accused understands. It therefore amounts to an irregularity for the presiding judicial officer to delegate his or her responsibility to the interpreter.

12. The right to present evidence and to challenge the prosecution's evidence

In order to accord an unrepresented accused the right to a fair trial it is important he or she is enabled to exercise this right. Owing to the fact that the accused is undefended the presiding judicial officer is enjoined to assist the accused to present evidence and to challenge the state's case. The presiding judicial officer must promptly inform the unrepresented accused of the consequences flowing from the presentation of the state's case which is done through examination in chief (of state witnesses), cross

⁵² (1998) 2 All SA 1 (CK).

⁵³ 1995 (1) SACR 384 (T).

⁵⁴ 1980 (1) SA 538 (C).

examination by the state of the accused in the event he or she is not discharged in terms of section 174 of the CPA, and through the re- examination of his or her own witnesses.

In line with the right to a fair trial the presiding judicial officer has the responsibility of assisting an undefended accused to present his or her case and to challenge the case for the prosecution and this duty cannot be delegated to the court interpreter. The presiding judicial officer should in certain circumstances assist an unrepresented accused to put pertinent questions aimed at placing the accused's defence properly to the witnesses for the state. The assistance of the unrepresented accused with pertinent questions should not jeopardise the impartiality of the judgment the presiding judicial officer has to arrive at the conclusion of the case.

The undefended accused must promptly be appraised of section 166 of the CPA which provides that he or she has the right to examine any witness called on behalf of the prosecution, cross examine his or her co accused when they testify and also to cross examine witnesses for his or her co accused, and the right to re- examine his or her witnesses and to cross examine the witnesses called by the state.

Failure to explain to the undefended accused the right to present and challenge evidence for the prosecution by the presiding judicial officer, and failure to allow an unrepresented accused the opportunity to present his or her case particularly through cross examination of state witnesses may, depending on the circumstances of the case, result in the miscarriage of justice, and may result in the proceedings being set aside. The unrepresented accused should for instance be asked if he or she agrees with each material allegation made against him or her. If the unrepresented accused does not agree with an element or elements of the allegation, the presiding judicial officer must establish the reason why the accused does not agree with the element or elements of the allegations.

S v Mokoena,⁵⁵ illustrates the importance of the assistance of an undefended accused by the presiding officer. In this case it was held that the unrepresented accused must be properly assisted by the court even if this involves a 'descent into the arena'. The court must to a certain extent, act as the accused's legal representative and assist in cross examination which in *S v Ndou*.⁵⁶ was pronounced to be vital by reason of the fact that is of no use to inform an unrepresented accused of it if he or she does not know what it entails.

13. The right to address the court on the merits

After the defence has closed its case, both the prosecution and the defence may address the court on the merits of the case⁵⁷. If there is a failure or refusal to permit an unrepresented accused the right to address the court on the merits of the case, the conviction and the sentence will be set aside as it will be a violation of the rights of the undefended accused and would amount to an unfair trial as protected by section 35 of the Constitution⁵⁸.

It is when an undefended accused is provided with the opportunity of addressing the court on the merits of the case that he or she may provide information that might be relevant for a just decision by the court. The *audi alteram partem* principle demands that an unrepresented accused must also be given the opportunity to address the court on the merits of the case after the state would have done so. The presiding judicial officer must therefore explain the purpose of addressing the court on the merits of the case to an undefended accused.

In protecting the rights of an unrepresented accused who may be illiterate the presiding judicial officer may in clear terms for instance inform the undefended accused that 'You

⁵⁵ 2005 (1) SACR 594 (T).

⁵⁶ 2006 (2) SACR 497 (T) at 500.

⁵⁷ Section 175 of the Criminal Procedure Act 51 of 1977.

⁵⁸ Constitution of the Republic of South Africa Act 108 of 1996.

have heard what the state witnesses said against you and you have also presented your case. You now have the opportunity to say why the state witnesses should not be believed, for instance if they have contradicted each other, or if they have a reason to lie to the court'. An undefended accused must at this stage of the proceedings be reminded of the charge he or she is facing and of the elements thereof so that he or she may vindicate the elements which have not been proved by the state.

14. The right to mitigate on sentence

A sentence imposed (on the accused) must fit the offender and the crime; and must be blended with some measure of mercy. An undefended accused who is convicted of an offence has the right to address the court on sentence. The presiding judicial officer has the responsibility of promptly informing an undefended accused of his or her right to address the court in mitigation of sentence.

Depending on the circumstances of each case, the failure to allow an unrepresented accused the opportunity to mitigate on sentence does not *per se* amount to a failure of justice. In *S v Sibert*,⁵⁹ it was held that sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law public interest requires the court to play a more active inquisitorial role. The accused should not be sentenced unless all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court...If there is insufficient evidence before the court to enable it to exercise a proper judicial sentencing discretion, it is the duty of the court to call for such evidence.

If an undefended accused is given the opportunity to adduce evidence in mitigation of sentence the trial court will actively explore all the available sentencing options. The court must also initiate a probation officer's report to be compiled, even where the accused is unrepresented. Some undefended accused may for instance not be familiar

⁵⁹ 1998 (1) SACR 554 (A) at 558 -559.

with sentences such as correctional supervision. In the case where the convicted accused is a minor who was assisted by a parent or a guardian in the proceedings, the parent or guardian must as well be provided with the opportunity of mitigating on sentence. The address of the court in mitigation of sentence by the parent or guardian is intended at protecting the interests of the child in conflict of the law.

According to Du Toit⁶⁰, the position on the mitigation of sentence is as follows:

(a) It is highly desirable that mitigating and aggravating factors are placed before the court through evidence under oath. Such evidence can be tested in cross examination and will place the court in a good position to make a decision based on the facts.

(b) In order to receive such evidence the opportunity will always be afforded to the parties to call witnesses and lead evidence.

An unrepresented accused who faces a serious charge such as murder or rape should be promptly advised of the right to mitigate on sentence and on how factors can be adduced. The undefended accused may exercise the right to mitigate on sentence from the dock or under oath and may also call witnesses to mitigate on his or her behalf.

15. The right to appeal and to review

In line with the right to a fair trial an unrepresented accused has the right to appeal against the criminal proceedings that has resulted in him or her being convicted and sentenced. In this regard the presiding judicial officer has the responsibility of promptly appraising an undefended accused who is convicted and sentenced of his or her right to appeal against the conviction or sentence or against both. The presiding judicial officer is obliged to explain to an undefended accused that he or she has the right to lodge an appeal within 14 days computed from the day after conviction and sentence, that the

⁶⁰ Du Toit *et al* *Commentary on the Criminal Procedure Act 51 of 1977* (2011).Par. 28 -4.

accused may apply for condonation for the late lodging of the notice of appeal if not filed within the prescribed 14 days, and also to apply for leave to appeal in the high court and even to petition the Minister of Justice and Constitutional Development if leave to appeal was not granted by the trial court or by the high court.

The presiding judicial officer is also obliged to promptly inform an undefended accused of the procedure for lodging an appeal and of the arguments to put forth in the application. The explanation must be with regard to the fact that it (appeal) may be against the conviction or sentence or both.

An undefended accused must also be promptly appraised of his or her right to have the proceedings reviewed. Review is against the procedure followed during the trial. The procedure followed during the trial may *inter alia* be reviewed automatically in terms of section 302 of CPA or upon application by the accused person.

16. Concluding observations and recommendations

Despite the fact that every accused person has the right to legal representation including at the expense of the state if substantial injustice will otherwise result, an accused person may still opt to conduct his or her own defence. The fact that the undefended accused has chosen to conduct his or her own defence does not mean he or she has to be punished by being left to fend for himself or herself or that he or she be left at his or her own prejudice. An unrepresented accused's right to a fair trial as entrenched in the Constitution, it is submitted, must always be intact.

The right to a fair trial is a combination of a series of rights which together constitute a fair trial and which conform to the maxim that justice must not only be done but must be seen to be done. It therefore becomes important that constitutional and statutory provisions relating to the right to a fair trial be complied with. The CPA, MCA, CLAA and

the CJA compliment the constitutional provisions relating to the rights of an unrepresented accused to a fair trial.

The constitution and other statutory provisions relating to criminal proceedings place an injunction on the presiding judicial officer to act as the guide for the undefended accused which in certain instances may involve the presiding officer descending to the arena. A right is of no use or value if the bearer thereof is not promptly advised of it and is not enabled to exercise it. The presiding judicial officer is by law thus obliged to ensure that the unrepresented accused is tried in accordance with the precepts of justice. The presiding judicial officer's responsibility of protecting the undefended accused's right to a fair trial goes beyond promptly appraising an undefended accused of his or her constitutional procedural rights but also of ensuring that such rights are exercised.

The presiding judicial officer, in ensuring the right of an unrepresented accused to a fair trial, must not abdicate his or her responsibility of protecting all the rights of the undefended accused to the interpreter. The function of the interpreter is to translate the proceedings to the accused person in such a way the undefended accused takes a meaningful part in the proceedings. Such abdication of responsibility to an interpreter may, depending on the facts and circumstances of each case, amount to a failure of justice.

The undefended accused must at all times be promptly advised of all his or her procedural rights in a simple language and must be given the opportunity to exercise such rights. A trial can only be said to have been fairly conducted when the unrepresented accused has been promptly appraised of all his or her procedural rights and when he or she has been provided with the opportunity to exercise all the rights that accrue to him or her. The fact that an accused, for whatever reason opted to conduct his or her own defence does not mean his or her right to a fair trial which comprises of

various rights has to be compromised as doing so will be inconsistent with the principle that justice must not only be done but must be seen to be done.

Processes such as appeal and review serve the purpose of verifying the fairness of the proceedings in terms of both substance and procedure. There are some convictions and sentences that have and continue to be set aside on appeal or review and this is an indication that appeal and review confirm the correctness and fairness of the proceeding. Presiding judicial officers as people who deal with the accused who is not defended must not live with the hope that their judgments will either be appealed against or reviewed. They must ensure the undefended accused, much as it is the case with the represented accused, are promptly advised of their procedural rights and are enabled to exercise them.

The possibility of convicting an innocent undefended accused owing to failure or neglect by the presiding judicial officer to ensure the rights are properly exercised may amount to grave injustice to the undefended accused. Unlike review, appeal has some requirements to be met and one of them is leave to appeal and there must be prospects of success. This, therefore create the possibility that an undefended accused who for instance has not been informed of his or her procedural rights or who has not been allowed to exercise his or her right to a fair trial to be prejudiced on the basis of being undefended.

Presiding judicial officers are persons drawn from the ranks of practising advocates, attorneys, lecturers and prosecutors. The office of a presiding judicial officer does not only involve dealing with criminal matters but it also deals with *quasi-judicial* issues such as maintenance, protection orders, civil, criminal matters. Given the recruitment of presiding judicial officers and the different functions they perform it is recommended they undergo intensive training before they are appointed. Currently presiding judicial officers are trained sometime after they have been appointed.

It is further recommended that presiding judicial officers should as a matter of fact always appreciate the fact that when an accused is unrepresented he or she must be promptly advised of his or her procedural rights; and must be enabled to exercise such rights. It must always be of advantage for the undefended accused to take an effective part in the proceedings that would eventually determine his or her fate in line with the constitutional right to a fair trial.

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