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Accusatorial (adversarial) process as a procedural safeguard in the face of adverse pre-trial publicity*

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OPSOMMING

Akkusatoriese (adversoriese) proses as 'n prosessuele beskermingsmaatreël teen nadelige voorverhoorpublisiteit

Voorverhoorpublisiteit rakende 'n hangende strafsak, wat kan voorkom in die vorm van mediadekking van die sak of 'n voorafgaande beslissing in parallelle geregtelike verrigtinge (gebaseer op wesenlik dieselfde feite as die strafsak), mag tot die beskuldigde se nadeel wees. Sodanige mediadekking of bevindings in 'n parallelle geregtelike uitspraak mag die beskuldigde in die pleging van 'n misdryf, waarop hy of sy teregstaan, impliseer. Die publisiteit mag daarop sinspeel dat die beskuldigde "skuldig" is aan die misdaad waarop hy of sy teregstaan of van swak inbors is en 'n geneigdheid het om misdaad te pleeg. Daarteenoor mag voorverhoorpublisiteit die beskuldigde as onskuldig aan enige strafregtelike oortreding voorstel. Die vraag is dan of daar 'n daadwerklike of wesenlike risiko is dat sodanige publisiteit die onpartydige beregting van die strafsak wesenlik sal beïnvloed of skaad; anders gestel, of die publisiteit waarskynlik 'n klimaat van vooroordeel in die beregtingsproses of uitslag van die sak by die verhoorhof mag teweegbring en daardeur die grondwetlike reg op 'n billike verhoor sal skaad. Die voormelde moet beoordeel word teen die agtergrond van die stelsel van prosessuele beskermingsmaatreëls en geregtelike meganismes wat ontwikkel is om sodanige gevolg te voorkom. Die standpunt in hierdie artikel is dat die akkusatoriese proses 'n fundamentele prosessuele beskermingsmaatreël of -meganisme daarstel wat bydra om die onpartydige beregting van die beskuldigde se verhoor te verseker of om die invloed van vooroordeel op grond van voorverhoorpublisiteit te negeer. Die artikel ontleed die werking van 'n tipiese akkusatoriese verhoor en hoe die strukturele vereistes daarvan die risiko kan verminder dat die strafverhoorhof onbetaamlik deur nadelige of ongunstige voorverhoorpublisiteit beïnvloed word.

1 INTRODUCTION

Pre-trial reporting on crime is an accepted and common, world-wide practice, albeit that it can give rise to tension between the right to freedom of expression, more particularly the right to a free press and other media, enshrined in section 16

* The article is based on the author's doctoral thesis entitled *An analysis of pre-trial publicity and the accused's right to a fair trial: A deconstruction of the Krion case* (UP 2019). [It is the first of three related articles to be published in 2019 – Ed.] The author is indebted to Adv Arno Rossouw and Pastor Willem Bronkhorst for their invaluable assistance with the Afrikaans summary.

of the Constitution of the Republic of South Africa, 1996,¹ and the right to a fair trial, guaranteed in section 35(3) of the Constitution.² Such tension may arise even though a criminal trial in South Africa is not adjudicated upon by a jury, but by a trained judicial officer (either a judge or magistrate depending on the forum in which the trial is heard) sitting alone or with assessors.³

As the term suggests, the nature of pre-trial publicity in relation to a pending criminal case has been described as follows:⁴

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

*Brown v National Director of Public Prosecutions*⁵ is the first known South African case in which the court had to deal with an application for a stay of prosecution lodged by the accused based in part on the substantive issue of widespread and adverse pre-trial publicity and whether it would prejudice the accused’s right to a fair trial.⁶ In its judgment on the application, the court defined “pre-trial publicity” as follows:⁷ “The term trial by media relates to a matter that has received extensive media coverage prior to the trial commencing, this is known as pretrial publicity.”

It is generally recognised, as notably illustrated in South Africa in the Oscar Pistorius and Shrien Dewani cases, and former president Jacob Zuma’s rape and fraud and corruption matters, that notorious or high-profile cases, both civil and criminal, can immediately capture the attention of the public and receive extensive media coverage. In respect of criminal matters, it invariably happens that such media reportage would continue as the police investigation progresses and suspects are arrested.⁸ In *Brown*, on the matter of pre-trial publicity, the

1 Hereafter “the Constitution”.

2 See, eg, *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) (hereafter “*Midi Television*”); Snyman *Criminal law* (2014) 320–322; Hill “*Sub judice* in South Africa: Time for a change” 2001 *SAJHR* 563; Stevenson “Reformulation of *sub judice* rule and prior restraint of publications resolved: A victory for press freedom: *Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape)* 2007 9 BCLR 958 (SCA)” 2007 *Obiter* 614; Paizes “Conduct of proceedings” in Du Toit *et al Commentary on the Criminal Procedure Act* (RS 60 2018) 22–42B; Van Rooyen “Challenges to the *sub judice* rule in South Africa” 2014 *HTS Teologiese Studies/Theological Studies* 1–9.

3 See *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC); Swanepoel “Pre-trial publicity: Freedom of the press versus fair trial rights in South Africa?” 2006 *Ecquid Novi* 3. For a leading Southern African decision on the matter, see *Banana v Attorney-General* 1999 1 BCLR 27 (ZS). Cf also *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T).

4 Radke *Pre-trial publicity and the criminal justice system* (LLM diss Alberta 1991) 17.

5 [2012] 1 All SA 61 (WCC).

6 In Zimbabwe, this issue arose in the leading decision of *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) (hereafter “*Banana*”).

7 [2012] 1 All SA 61 (WCC) para 33.

8 Cf *Banana* 1999 1 BCLR 27 (ZS) 29B–H 32G–34D; *Midi Television* 2007 2 SACR 493 (SCA) para 1.

court recognised “the public’s legitimate right to know about the involvement of people who have committed serious crimes which have had an adverse result on the public”.⁹

As crime is “invariably injurious to the public interest, by which is meant the interests of the state or the community”,¹⁰ the public has an interest in seeing justice being administered in trial proceedings. It also has an interest in the exposure or pre-trial reporting of suspicions of crime, arrests being made, police conducting investigations, the formal charging or indicting of accused persons, and the question of bail, etcetera. Equally permissible to media reporting of trial proceedings in terms of the open justice principle, must be any publication or media statement regarding actual facts relating to a pending case.¹¹ Facts do not cease to be a matter of public interest merely because they form the background to pending litigation.¹² By bringing to light certain facts, a pre-trial media report may serve “as a brake on speculative and unenlightened discussion”.¹³ A statement in the media that a person is suspected of committing a crime cannot be equated with a statement that the person has actually committed the crime; “it is not the same as to say that he or she is guilty of that crime”.¹⁴ The public would know that the guilt or innocence of a person charged with a criminal offence is to be determined by a court of law on the basis of admissible evidence and that a person charged may be acquitted in the end.¹⁵

Where a criminal case has a marked degree of notoriety, or the accused is a newsworthy person or prominent leader or public figure and where the case is a high-profile matter, the media has every right to report on the case as a matter of public interest and concern. This is a feature of modern times.¹⁶

Pre-trial publicity may also take a different form, namely, a prior published court decision given in parallel judicial proceedings arising from substantially the same facts as the pending case, such as a civil judgment given on the same facts as a pending criminal case.¹⁷ The earlier judgment may contain findings

9 [2012] 1 All SA 61 (WCC) para 2.

10 Snyman *Criminal law* 4.

11 Loucaides “Questions of fair trial under the European Convention on Human Rights” 2003 *Human Rights LR* 39.

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

13 *Ibid.*

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

15 *Ibid.*

16 See *Banana* 1999 1 BCLR 27 (ZS) 34C in the context of pre-trial publicity adverse and prejudicial to the accused. However, s 154(2)(b) of the Criminal Procedure Act 51 of 1977 (“the Criminal Procedure Act”) seems to prohibit the publication of any information relating to a sexual offence charge or charge of extortion or blackmail, before an accused has pleaded to such a charge – see Kruger *Hiemstra’s criminal procedure* (RS 11 2018) 22–25. This statutory provision is aimed at protecting the complainant and preventing him or her from being discouraged from reporting certain incidents for fear of publicity – see Murray “Protection of the identity of the victim and the public’s right to know – *Zululand Observer* 1982 2 SA 79 (N)” 1982 *SACC* 286. A preferable interpretation of the provision would be that a publication of any information is prohibited if it may reveal the identity of the complainant. This would achieve the purpose of protecting the complainant while allowing other information to be published as a least severe infraction of the right to freedom of expression – Murray 1982 *SACC* 285–286.

17 Cf *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T).

made by the court which are adverse to an accused who is still to stand trial: such findings may impute, directly or by implication, criminal conduct or wrongdoing to the accused.¹⁸

Pre-trial publicity may moreover take the form of evidence presented and findings made in a judicial commission of inquiry or arbitration hearings, which evidence and findings are made public. A commission of inquiry or arbitration matter may give rise to a subsequent criminal prosecution, which is presided over by a judicial officer who is aware of the evidence and findings in the earlier proceedings in light of the public nature of the proceedings or the attendant publicity or broadcasting of the hearings.¹⁹

It is undoubtedly so that pre-trial media reporting on crime and investigative journalism are inevitable features of the right to freedom of expression, including freedom of the press and other media, in a constitutional democracy. However, such publicity may be sensationalised. Details of crime may also be revealed which may otherwise be inadmissible as evidence in court, but which become public knowledge before a trial commences. Highly incriminating evidence, such as a confession made by the accused or DNA or forensic evidence linking the accused to the crime, or prejudicial information, such as that the accused has previous convictions, may be disclosed in the media before trial. This is commonly known as a “trial by media”.²⁰ The Oscar Pistorius and Shrien Dewani matters are notable cases in point. A trial by media can be harmful. Such publicity may “convict” the accused or portray the accused as “guilty” before his or her trial begins or prior to the court’s judgment on the merits.

The publicity may induce a belief or create the impression that the accused is guilty before he or she has been properly tried and convicted in a court of law. Evidence may also be “weighed” by the media whilst the case is still *sub judice*. Pre-trial publicity, such as in relation to Jacob Zuma, may paint a very negative narrative regarding an accused or indicate that the accused is of bad character, even suggesting that the accused had the propensity to commit the crime in question. Furthermore, pre-trial media reports or comments or statements concerning pending criminal cases are frequently inaccurate and highly speculative. There can also be a proliferation on various media platforms of disinformation and “fake news” regarding an accused and/or the crime he or she is alleged to have committed. Crime news can easily be manipulated in the media.

To condemn or “convict” a person of criminal wrongdoing before he or she has had due process or a fair trial where all allegations and evidence can be properly tested and ventilated in a court of law and where the *audi alteram partem* rule is respected, can be particularly damaging to the dignity, reputation and social standing of an individual. This “conviction” is pervasive in the media which frequently panders to the court of public opinion and is often biased in the manner in which it reports on crime. A trial by media may moreover undermine the confidence that can be had in the authority of the court to decide on the guilt

¹⁸ *Ibid.*

¹⁹ One thinks, eg, of the commission of inquiry hearings in respect of the Marikana police shooting and presently state capture, as well as the *Life Esidimeni* arbitration hearings. Cf also, eg, *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995) 98 CCC (3d) 20 (SCC).

²⁰ See, eg, Swanepoel 2006 *Ecquid Novi* 4; Snyman *Criminal law* 321.

or innocence of an accused. If an accused is “convicted” in the media, but the court ultimately finds the accused not guilty, the perception may be created that the court’s finding is wrong, whereas in reality it is correct.²¹ Media coverage in advance of trial may conversely portray the accused as innocent of the crime with which he or she has been charged.

The central question that may arise in the above circumstances, which in turn may have a bearing on the question of the *sub judice* rule (particularly in relation to pre-trial publication bans) and the related crime of contempt of court *ex facie curiae*,²² is whether there is a real and substantial risk that adverse or prejudicial pre-trial publicity would materially affect the impartial adjudication of the accused’s case or have a biasing effect on the outcome of his or her trial.²³ Is such publicity likely to result in the presiding judicial officer (and/or, where appropriate, his or her assessors) prejudging the issues to be adjudicated on at trial or the guilt of the accused, which constitutes clear impugnabile bias and may result in the trial court evaluating the evidence differently,²⁴ or being predisposed to a particular outcome? The question would be whether the trial judicial officer is likely to be influenced by the pre-trial publicity and therefore fail to adjudicate in the criminal trial objectively, with an open mind and with the necessary impartiality,²⁵ thus violating the constitutional right to a fair trial by an impartial court.²⁶

There is in general not an *a priori* answer to the question of whether a particular trial would be fair or not.²⁷ Fairness cannot be determined in a vacuum

21 Snyman *Criminal law* 321.

22 Cf, eg, *Midi Television* 2007 2 SACR 493 (SCA); *Dagenais v Canadian Broadcasting Corp* (1995) 94 CCC (3d) 289 (SCC); Snyman *Criminal law* 320–322; Stevenson 2007 *Obiter* 614. It may be noted, however, that in light of *Midi Television*, Moseneke DCJ in an extra-curial address observed that the *sub judice* rule is on the verge of extinction and its scope has been significantly narrowed by reason of the fact that a media statement outside of court would “rarely” affect the outcome of a case in South Africa, where there is no jury system – see Moseneke “The media, courts and technology: Remarks on the media coverage of the Oscar Pistorius trial and open justice” (15 May 2015) 15–17, available at <https://bit.ly/2RJYH86>. He also remarked, in this context, that “the social and other media blasts and immediacy make the *sub judice* rule nearly impossible to hold and to keep, for better or for worse. What is more it will be near impossible for the courts to police the rule. And, as you know, what the courts cannot police cannot be enforced” (16–17). For similar observations, see, eg, Dugard “Judges, academics and unjust laws: The *Van Niekerk* contempt case” 1972 *SALJ* 278–279; Hill 2001 *SAJHR* 566–567; Cleaver “Ruling without reasons: Contempt of court and the *sub judice* rule” 1993 *SALJ* 533–534.

23 *Banana* 1999 1 BCLR 27 (ZS) 34E–H. Cf the reformulated test for *sub judice* contempt and the related question of a pre-trial publication ban, as enunciated by the Supreme Court of Appeal per Nugent JA in *Midi Television* 2007 2 SACR 493 (SCA) para 19.

24 *De Lille v Speaker of the National Assembly* 1998 7 BCLR 916 (C) para 17; Devenish “Disqualifying bias. The second principle of natural justice – The rule against partiality or bias (*nemo iudex in propria causa*)” 2000 *TSAR* 402 403–404; Tarkington “Lost in the compromise: Free speech, criminal justice, and attorney pretrial publicity” 2014 *Florida LR* 1918.

25 Cf *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) para 8.

26 See *Van Rooyen v The State (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 35; *S v Basson* 2007 1 SACR 566 (CC) para 26; *S v Van der Sandt* 1997 2 SACR 116 (W) 132c; Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa, 1996* (1998) 266.

27 *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 4.

but is an issue to be decided upon the concrete facts of each case.²⁸ The question of the effects or impact of pre-trial publicity on the impartial adjudication of a criminal trial would need to be weighed against the backdrop of the developed system of procedural safeguards and judicial mechanisms that have evolved to prevent just that.²⁹

It is only when these safeguards are inadequate to guarantee judicial impartiality in the adjudication of a case and to rid the influence of prejudice in the face of adverse pre-trial publicity, that the benefit of a fair trial process will be lost to the accused or a fair trial would be rendered impossible of attainment.³⁰ It is submitted that there are several in-built procedural safeguards and judicial mechanisms in the South African criminal law system that can protect the fairness of an accused's trial when the court is confronted with pre-trial publicity, even publicity which is virulent, widespread and overwhelming.³¹ These safeguards or mechanisms apply to both a trial by a judicial officer presiding alone, which make up the bulk of criminal trials conducted in South Africa,³² and a trial by a judicial officer sitting with assessors. They include (i) legal representation for the parties (which is an important controlling mechanism of the judicial authority);³³ (ii) the oath of office of and codes of conduct for judicial officers; (iii) training or education of judicial officers; (iv) the participation of the trial judicial officer in the fact-finding or deliberation process *with* any assessors (who, unlike a jury, do not constitute a separate fact-finding entity to the judicial officer and must furnish reasons for their decision – they decide the case with the presiding judicial officer);³⁴ (v) the primacy of orality in the trial proceedings; (vi) the

28 *Key v Attorney-General, Cape Provincial Division* 1996 2 SACR 113 (CC) para 13; *S v Steyn* 2001 1 SACR 25 (CC) para 13; *S v Thebus* 2003 2 SACR 319 (CC) para 111. See also, appositely, *S v Radebe* 1973 1 SA 796 (A) 812H. The right to a fair trial also “requires a substantive, rather than a formal or textual approach” – *S v Shaik* 2008 1 SACR 1 (CC) para 43.

29 *Banana* 1999 1 BCLR 27 (ZS) 34H–I 38D–E.

30 *Ibid.*

31 Cf *idem* 38D–39B.

32 Schwikkard *Possibilities of convergence: An outside perspective on the convergence of criminal procedures in Europe* (2008) 21.

33 Labuschagne “Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrolemeganismes van die regsprekende gesag” 1993 *De Jure* 356.

34 The “differences between assessors and juries are substantial and compelling” in that assessors as members of the court determine questions of fact with the judicial officer (they deliberate with the presiding officer in reaching a decision on the merits, that is, on the guilt or innocence of the accused), they are at all stages of the trial under the constant and immediate “supervision” and “guidance” of the presiding officer, their reasoning is made public (whereas juries do not furnish reasons for their verdicts), and they may participate in the trial proceedings by putting questions to witnesses and the accused – see *S v Jaipal* 2005 1 SACR 215 (CC) paras 35–45; *Banana* 1999 1 BCLR 27 (ZS) 37D–F 38H–I; Van der Merwe “An introduction to the history and theory of the law of evidence” in Schwikkard and Van der Merwe (eds) *Principles of evidence* (2016) 15–16 (para 1 6); De Vos “The jury trial: Reflections of a South African observer in Western Australia” 2017 *TSAR* 261–267 275; Hahlo and Kahn *The Union of South Africa: The development of its laws and constitution* (1960) 262; Richings “Assessors in South African criminal trials” 1976 *Criminal LR* 112–113; Bekker “Assessore in Suid-Afrikaanse strafsake” in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 37; Huebner “Who decides? Restructuring criminal justice for a democratic South Africa” 1993 *Yale LJ* 977; Van Zyl Smit and Isakow “Assessors and criminal justice” 1985 *SAJHR* 227–230; Dugard “Lay participation in the administration of justice” 1972 *Crime, Punishment and Correction* 58; Schwikkard *Possibilities of convergence* 21–27; Skeen “Criminal procedure” 5(2) *LAWSA* (2004) para 291;

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open court or open justice principle; (vii) the opening address by the prosecutor; (viii) the closing arguments by the prosecution and the defence; (ix) a trial by a judicial officer and not a jury which is an important guarantee in itself of fairness and impartiality in the adjudication process;³⁵ (x) the requirement that the trial court must give reasons for its decision, which may enable one to determine whether the court was unduly influenced by or had any undue regard to extraneous information such as pre-trial publicity in reaching its verdict;³⁶ and (xi) the

Basdeo *et al* "The trial courts" in Joubert (ed) *Criminal procedure handbook* (2017) 262; Kahn "Restore the jury? or 'Reform? Reform? Aren't things bad enough already?' V" 1993 *SALJ* 324–325 330. The giving of reasons for a decision by a court comprised of a judicial officer and assessors is statutorily peremptory – see s 146 of the Criminal Procedure Act; s 93ter(3)(e) of the Magistrates' Courts Act 32 of 1944.

- 35 See, eg, De Vos 2017 *TSAR* 269–271. The task of sifting and evaluating evidence in the decision-making process and only taking into account that which is actually relevant and admissible, disregarding irrelevant and inadmissible material, rests upon a judicial officer's shoulders virtually on a daily basis. The presiding officer is trained for such a task and it is generally second nature to him or her. In this respect, a judicial officer is in a different position from that of an ordinary jurymen because a judicial officer is trained to discriminate between various facts all within his or her knowledge, to apply some and to reject others as having no bearing upon the matter to be decided. See *S v Mampie* 1980 3 SA 777 (NC) 779D–E; *Khan v Koch* 1970 2 SA 403 (R) 404E–F; *R v Essa* 1922 AD 241 246–247. There is a general or widely held notion that judicial officers, by virtue of their training, experience and oath of office, are better able than jurors to lay aside prejudicial extraneous information and to decide the cases that come before them purely on the basis of the evidence and submissions of counsel presented at trial: if an accused is tried by a judicial officer, pre-trial publicity is assumed not to prejudice his or her right to a fair trial – see *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995) 98 CCC (3d) 20 (SCC) para 32 (Westlaw para 33). Judicial officers "by training are unlikely to be influenced by most comments on pending proceedings" – Dugard 1972 *SALJ* 278. See also, eg, Hill 2001 *SAJHR* 566–567; Cleaver 1993 *SALJ* 533–534; De Vos "Oscar Pistorius: why media reporting is not infringing on *sub judice* rule" (18 February 2013) Constitutionally Speaking 18 February 2013, available at <https://bit.ly/2SxUKTZ>; Waye "Judicial fact-finding: Trial by judge alone in serious criminal cases" 2003 *Melbourne Univ LR* 427. Van Rooyen 2014 *HTS Teologiese Studies/Theological Studies* 7 asserts that "it is also well known that judges, who are bound by their oath, only decide matters on the facts as placed before them in the matter at hand. They would ignore any opinions expressed in the media." The writer reaffirms that "judges, who are trained to decide a case on the facts before them, will not be influenced by speculation and views expressed in the media" (9). See, similarly, *Banana* 1999 1 BCLR 27 (ZS) 36D–E 37F–38C; *S v Chinamasa* 2001 1 SACR 278 (ZS) 298E–F; *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC) paras 104–114 and para 115: "Judges have years of experience and are aware of the dangers of media reports on 'high profile' cases. The judge will, however, view each case based on its own merits"; *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) paras 8–9. For contrary views in this regard, see Loucaides 2003 *Human Rights LR* 40; Swanepoel 2006 *Ecquid Novi* 9; Schwikkard *Possibilities of convergence* 27; Wistrich *et al* "Can judges ignore inadmissible information? The difficulty of deliberately disregarding" 2005 *Univ of Penn LR* 1251; Damaška *Evidence law adrift* (1997) 50. Waye 2003 *Melbourne Univ LR* 427 observes that "there have been warnings that intuitive views regarding judicial immunity to community pressure may be over-sanguine. Cases that engender community outcry because of their shocking facts are likely to place difficult fact-finding burdens on judges whose opinions are later open to scrutiny and criticism when reasons for judgment are published".

- 36 See, eg, *S v Jaipal* 2005 1 SACR 215 (CC) para 45: "A reasoned decision allows for close scrutiny of the conclusions reached in view of the evidence presented and the influence of irregularities on a decision are more likely to be detected than in the case of a finding reached in secrecy." See also, eg, *Banana* 1999 1 BCLR 27 (ZS) 38I; Schwikkard *Possibilities of*

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appeal or review system. These safeguards may be said to be part of the checks and balances within the judicial system and are vital mechanisms to protect the accused from a biased or an unjust or erroneous decision.³⁷

Despite their critical importance, the presence of procedural safeguards and judicial mechanisms to prevent prejudicial extraneous information from biasing the impartial adjudication process of a criminal case or the outcome of the case, is given scant attention in the literature in discussions on the effects of pre-trial publicity. It is posited in this article that the adversarial court process is a defining feature of criminal justice in South Africa and indeed a fundamental safeguard of the accused's right to a fair trial.³⁸ As far as it is known, this accusatorial trial procedure has not been considered as a safeguard in the context of adverse pre-trial publicity (although seemingly alluded to by Gubbay CJ in *Banana v Attorney-General*),³⁹ and yet, as shall be seen, it is a vital or pivotal, if not the primary or pre-eminent, protective mechanism for ensuring that an accused receives a fair trial when the court is confronted with such publicity.

The article explores the structural demands and form of the South African accusatory trial in order to demonstrate that such a process may reduce the risk of a criminal trial court being unduly influenced by prejudicial pre-trial publicity.

2 MORPHOLOGY OF THE SOUTH AFRICAN ACCUSATORY TRIAL

"One of the crucial elements of a fair hearing is the right to be tried solely on the evidence before the court, and not on any information received outside that context."⁴⁰

convergence 27 (noting that the requirement that a court must give reasons for its decision "acts as a safeguard against departures from impartiality"); Hill 2001 *SAJHR* 567; Cameron *Justice: A personal account* (2014) 185. From a reasoned decision justice can be seen to be done, and a reasoned decision is also the foundation of judicial accountability – see, eg, Meyerson "Why should justice be seen to be done?" 2015 *Criminal Justice Ethics* 67; Gibbs "Judgment writing" 1993 *Australian LJ* 494; O'Leary "Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia" 2011 *Criminal LJ* 31 (Bond University ePublications@bond), available at <https://bit.ly/2G6uw9V>; Ho "The judicial duty to give reasons" 2000 *Legal Studies* 50; *R v Sheppard* (2002) 162 CCC (3d) 298 (SCC) para 15 (Westlaw); Spigelman "The principle of open justice: A comparative perspective" 2006 *Univ of New South Wales LJ* 154. A reasoned verdict moreover encourages rational or deliberative decision-making in a traditional and more normative sense because it allows depth of review and recourse to decisional tools, where precedent is followed and established evidential rules and principles are applied with regard to the admissibility and evaluation of evidence and the assessment of the guilt or innocence of an accused against the required burden and standard of proof – see, eg, Waye 2003 *Melbourne Univ LR* 441; Gravett "The myth of rationality: Cognitive biases and heuristics in judicial decision-making" 2017 *SALJ* 76 (suggesting that the discipline of opinion writing may enable judicial officers to overcome any intuitive or cognitive biases or heuristics and to assess a decision more carefully, logically and deductively); Guthrie *et al* "Blinking on the bench: How judges decide cases" 2007 *Cornell LR* 36–37; Corbett "Writing a judgment" 1998 *SALJ* 117–118.

37 See, eg, Cameron *Justice* 185; *Banana* 1999 1 BCLR 27 (ZS) 38I. It is beyond the scope of the article to discuss or amplify all the various safeguards that can protect the fairness of an accused's trial in the face of pre-trial publicity. These safeguards and judicial mechanisms are fully considered in the author's thesis, mentioned above, on which this article is based.

38 See *Ferreira v Levin*; *Vryenhoek v Powell* 1996 1 SA 984 (CC) para 246; *S v Manamela* (*Director-General of Justice intervening*) 2000 1 SACR 414 (CC) para 23; Steytler *Constitutional criminal procedure* 215.

39 1999 1 BCLR 27 (ZS) 38G–H.

40 *Banana* 1999 1 BCLR 27 (ZS) 31D.

The nature of the South African criminal trial has broadly been described as

“a state-sponsored public, judicial and primarily oral hearing in terms of which the alleged criminal liability of an accused must in the public interest be determined by an impartial adjudicator on the basis of constitutional, statutory and common-law rules and principles of fairness which promote reliable and acceptable outcomes in convicting and punishing the guilty, while protecting the innocent from incorrect conviction and wrongful punishment”.⁴¹

This trial process “must of necessity be regulated by detailed and perhaps very technical rules”, which in turn “must always be interpreted and applied in the context of at least seven [interrelated] fundamental principles” governing a criminal trial, namely, “trial fairness”, “legality”, “judicial impartiality”, “equality of arms”, “judicial control”, “orality”, and “finality”.⁴² Van der Merwe points out that these principles “are also interwoven with or closely linked to the adversarial (accusatorial) nature of [the South African] trial system”.⁴³ Steytler writes that “[f]air trial proceedings should be adversarial, guaranteeing the autonomy [or legal *laissez-faire*] of each party to the dispute and their full participation in the proceedings”.⁴⁴

Herrmann observes that “[i]n most countries the administration of criminal justice follows one of two models: the adversary or accusatorial model, or the inquisitorial model”, and that “[w]hile the former is the model of the Anglo-American countries, ie the Common Law world, the latter can be found on the European continent, that is, in the Civil Law countries”.⁴⁵ Snyman notes that South African criminal procedure is to “a large extent based on, or derived from, the English model of criminal procedure, which is mainly accusatorial in character”. South Africa is described by the author as forming part of the “Anglo-American accusatorial system”.⁴⁶ It has similarly been pointed out elsewhere that in our legal system, “the way the trial is conducted, the methods of proof, the treatment of precedents, as well as the courts structure and the activities and position of judges and lawyers are all clearly based on English models”.⁴⁷

According to a leading expounder, and recognised as one of the most incisive and influential voices in the comparative study of adversarial and inquisitorial models of trial process, Damaška, “[t]he term *adversary system* sometimes characterizes an entire legal process, and sometimes it refers only to criminal procedure”, and “[i]n the latter instance it is often used interchangeably with

41 Van der Merwe “Trial principles and the course of the criminal trial” in Joubert (ed) *Criminal procedure handbook* (2017) 331.

42 *Idem* 331–332.

43 *Idem* 331.

44 Steytler *Constitutional criminal procedure* 215.

45 Herrmann “Various models of criminal proceedings” 1978 *SACC* 3.

46 Snyman “The accusatorial and inquisitorial approaches to criminal procedure: Some points of comparison between the South African and continental systems” 1975 *CILSA* 101. See also Van der Merwe “An introduction to the history and theory of the law of evidence” in *Principles of evidence* 8 (para 1 4), indicating that the South African law of evidence belongs to the Anglo-American common-law family.

47 Zweigert and Kötz *Introduction to comparative law* (1998) 235. See also Roodt “A historical perspective on the accusatory and inquisitorial systems” 2004 *Fundamina* 138ff; Steytler *The undefended accused on trial* (1988) 1.

‘accusatorial procedure,’ and is juxtaposed to the ‘inquisitorial,’ or ‘non-adversary,’ process”.⁴⁸ Damaška defines the adversary mode of trial as follows:⁴⁹

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

Damaška, elsewhere, outlines adversarial criminal procedure as follows:⁵⁰

“[S]everal characteristics are commonly associated . . . with the adversary criminal process. These include a relatively passive tribunal . . . ; the presentation of evidence by the parties through their lawyers, who proceed by direct questioning and cross-examination of witnesses; the representation of state interests by one of the parties, the prosecutor; a presumption that the defendant is innocent until proved guilty; and the principle that he cannot be forced to testify against himself.”

The “hallmark” of the adversarial trial “is that it is the parties who determine which issues will be tried and what evidence the court will hear”.⁵¹ In this sense, the trial that follows the adversary model is essentially “party-centered”;⁵² the parties are in control of the litigation – they are pre-eminent in choosing the trial forum, designating the proofs, and running the process.⁵³ The parties independently present their respective cases to the trial court for decision.⁵⁴ Each party calls his or her own witnesses and tries to obtain from them information favourable to his or her case.⁵⁵ Cole observes in this respect: “Each party calls its witnesses and cross-examines the witnesses of the opposing side. Cross-examination is vital in the adversarial process as each party calls witnesses who testify in their favour.”⁵⁶ In the accusatorial trial, it is the two parties, the prosecution on behalf of the state and the accused who are responsible for the collection and presentation of evidence.⁵⁷ They determine what evidence will be produced and in what order.⁵⁸ They delineate the area of contest between the state and the defence through the plea and any admissions.⁵⁹ During the pre-trial

48 Damaška “Adversary system” in Dressler (ed in chief) *Encyclopedia of crime & justice: Vol 1* (2002) 25.

49 Damaška *Evidence law adrift* 74 (footnote omitted).

50 Damaška in *Encyclopedia of crime & justice* 25.

51 McEwan “Ritual, fairness and truth: The adversarial and inquisitorial models of criminal trial” in Duff *et al* (eds) *The trial on trial: Vol 1: Truth and due process* (2004) 56. See also Van der Merwe “An introduction to the history and theory of the law of evidence” in *Principles of evidence* 11–12 (para 1 5 2) (capturing the contours of the adversarial trial); Herrmann 1978 *SACC* 4–6 (crisply contrasting the essential characteristics of the adversarial, or more particularly accusatorial, and inquisitorial models of trial procedure); Snyman 1975 *CILSA* 103; Damaška “Evidentiary barriers to conviction and two models of criminal procedure: A comparative study” 1973 *Univ of Penn LR* 506; Damaška “Presentation of evidence and factfinding precision” 1975 *Univ of Penn LR* 1088–1091.

52 Herrmann 1978 *SACC* 5.

53 Landsman *The adversary system: A description and defense* (1984) 44.

54 Herrmann 1978 *SACC* 5, 6.

55 Damaška 1975 *Univ of Penn LR* 1090.

56 Cole “Recognising the centrality of disclosure to the realisation of equality of arms in criminal proceedings in Botswana” 2010 *SACJ* 333.

57 See, eg, Steytler *The undefended accused on trial* 4.

58 *Ibid.*

59 *Ibid.*

phase, each party conducts his or her own investigation and in a partisan way builds a case.⁶⁰ As notably illustrated in the Oscar Pistorius criminal case, each party in the accusatory trial

“tries to destroy the case of the other party by pointing out its weaknesses. Thus, both parties constantly demonstrate to the judge that different answers can be given to the charge. The judge, so to speak, gets a stereoscopic view of the alleged offence. The essence of the adversary trial may be called dialectic dispute and challenge”.⁶¹

For present purposes, it should be stressed that the “classical feature” of the aforementioned adversarial trial arrangement “dictates that the judicial officer is disengaged from the contest and allows the parties to present their case”; in other words, the presiding officer maintains a relatively passive role “while the parties discharge the responsibility of proof”.⁶² Cole explains that

“[s]ince it is the responsibility of the parties to present their evidence, the judicial officer serves as a gatekeeper and ensures that the rules of evidence and procedure are observed. The judicial officer guides the process by way of procedural and evidential rules. Questions relating to the admissibility of evidence are primarily raised by the parties and determined by the judicial officer. This means that proof lies with the parties”.⁶³

The primary function of the judicial officer, in a trial with no jury, is to listen to the evidence and arguments presented by the parties and to make decisions when called upon to do so and to give judgment on the merits.⁶⁴ “The judge’s role is to evaluate the merits of the case based on the evidence and submissions presented by counsel.”⁶⁵ The judicial officer 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*.”⁶⁶ As the Supreme Court of Appeal for instance held in *Take and Save Trading CC v Standard Bank of SA Ltd.*⁶⁷

“[A] Judge is not simply a ‘silent umpire’. A Judge ‘is not a mere umpire to answer the question “How’s that?”’ Lord Denning once said. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.”⁶⁸

60 Steytler “Making South African criminal procedure more inquisitorial” 2001 *Law, Democracy & Development* 3.

61 Herrmann 1978 *SACC* 6.

62 Cole “Between judicial enabling and adversarialism: The role of the judicial officer in protecting the unrepresented accused in Botswana in a comparative perspective” 2010 *Univ of Botswana LJ* 83–84; Cole 2010 *SACJ* 333.

63 Cole 2010 *Univ of Botswana LJ* 84.

64 Steytler *The undefended accused on trial* 5. See also, eg, Eckhoff “Impartiality, separation of powers, and judicial independence” 1965 *Scandinavian Studies in Law* 40.

65 Cosman “Trial and court procedures in Canada” in Platto (ed) *Trial and court procedures worldwide* (1991) 217.

66 Steytler *The undefended accused on trial* 5. See also, eg, Cole 2010 *SACJ* 334–335.

67 2004 4 SA 1 (SCA) para 3 (footnotes omitted).

68 See also *S v Legote* 2001 2 SACR 179 (SCA) para 8; *R v Hepworth* 1928 AD 265 277.

Judicial officers have a duty to ensure that trials are fair.⁶⁹ Where the accused is undefended greater judicial intervention is required:

“The neutral role of the judge requires adjustment, especially if the accused is unrepresented. Basic notions of fairness could require the judge to enter the arena in order to assist the accused, to ensure and facilitate the accused’s participation in the proceedings, to advise the accused of his or her rights and duties or to assist with the exercise of these rights.”⁷⁰

Nonetheless, in such instances the presiding judicial officer would still be primarily dependent on the parties, including the undefended accused, for the information or evidence needed to reach a decision. Moreover,

“[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.”⁷¹

In essence, the South African criminal trial is predominantly an adversary proceeding, as described above, which is characterised by a contest between the prosecution, for the State, and the accused (or defence), over which an impartial judicial officer is to preside and keep the scales even.⁷² There is no jury system. The accusatory trial structure may therefore be regarded as a triad comprised of the presiding judge or magistrate at the vertex (as the arbiter or decision-maker), and the prosecutor and the accused who is either defended or undefended. The judicial officer is required to be independent of the parties and relatively passive (detached or aloof from the contest) and to conduct the trial and adjudicate on the case impartially. This is the trial arrangement in criminal cases that come before the courts, except in those “rare” instances where the presiding officer may be assisted by one or two assessors, who are in a different position to a jury.⁷³

The primary responsibility for gathering evidence and presenting it before court, on which the court must then base its decision, lies with the prosecutor and the accused. The tendering of evidence is left almost entirely to the parties in

69 See Cole 2010 SACJ 334; *S v Thebus* 2003 2 SACR 319 (CC) paras 106–107; *S v Sebofi* 2015 2 SACR 179 (GJ) para 81; *Moussa v The State* 2015 2 SACR 537 (SCA) para 29; *S v Du Toit* (2) 2004 1 SACR 47 (T) 65b; *R v Sole* 2001 12 BCLR 1305 (Les) 1342B–C.

70 Roodt “Fact finding, fairness and judicial participation in criminal proceedings” 2003 (2) *Codicillus* 80–81 (footnote omitted). See also Steytler *The undefended accused on trial* 146–151 168–177 222–225; Skeen “Descending into the arena: *Rall* 1982 1 SA 828 (A)” 1982 SACC 181–182; Cole 2010 *Univ of Botswana LJ* 85; Schwikkard *Possibilities of convergence* 22 25; Steytler “Die onverdedigde beskuldigde: Die inkwisatoriese rol van die voorsittende beampte” 1982 SACC 282–283; *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v Van Wyk* 1989 3 SA 368 (E) 378A–379C; *S v Mosoinyane* 1998 1 SACR 583 (T) 595b–c.

71 *S v Sigwahla* 1967 4 SA 566 (A) 568G–H.

72 *S v Mamabolo (E TV and Others intervening)* 2001 1 SACR 686 (CC) para 55. See *S v Rudman*; *S v Mthwana* 1992 1 SA 343 (A) 348F: “The essential characteristic of the adversary system is that the presiding judicial officer appears as an impartial arbiter between the parties.”

73 Schwikkard *Possibilities of convergence* 21.

placing their respective cases before court,⁷⁴ with the onus on the State to prove its case against the accused beyond a reasonable doubt.

The trial court may in certain limited circumstances, in terms of section 167 and 186 of the Criminal Procedure Act, put supplementary questions to witnesses and the accused (in order to “elicit or elucidate the truth more fully in respect of relevant aspects of the case” or to clear up any points that are still obscure)⁷⁵ and itself call a witness whose evidence is essential to the just decision of the case (in which case the presiding officer is obliged to call the witness) or whose evidence is desirable for the purpose of assisting the court to arrive at a right decision.

The purpose of such judicial questioning and calling of witnesses is “to ensure a just decision in the case”, or to assist an undefended accused,⁷⁶ but importantly its purpose is to supplement evidence already adduced by the parties in the interests of justice (to bring, for example, evidence before the court which has been omitted by mistake or is necessary to cure a technical deficiency or to clear up any obscurity, uncertainty or confusion in the evidence). A court may not, for instance, call witnesses from the outset and it may not take over the role of the prosecutor or abandon its impartiality and make or build up a case for the prosecution where none existed before.⁷⁷ The court’s power to elicit and elucidate the truth more fully must be seen as “subsidiary, complementing the parties’ efforts in searching for the truth”.⁷⁸ The accusatorial element remains the dominant element.⁷⁹

3 THERE IS LITTLE OPPORTUNITY FOR THE JUDICIAL OFFICER TO PURSUE HIS OR HER OWN AGENDA AT TRIAL

“Adversarial justice presupposes that decision makers will reach their conclusions based solely on the evidence and arguments that the parties properly present.”⁸⁰

74 See, eg, Steytler *The undefended accused on trial* 4; Erasmus “Ontslag van ’n beskuldigde na die sluiting van die vervolgingsaak: Openbare mening en die reg op ’n billike verhoor ingevolge die akkusatoriese strafprosesregstelsel” 2015 *LitNet Akademies* 859 870; Zeffertt and Paizes *The South African law of evidence* (2017) 1044–1046; *S v Van den Berg* 1996 1 SACR 19 (Nm) 65a–b f–g; Dugard *South African criminal law and procedure: Vol IV: Introduction to criminal procedure* (1977) 122: “The trial is accusatorial by nature and the judge acts as an impartial arbiter of the evidence adduced by prosecution and defence.”

75 *S v Rall* 1982 1 SA 828 (A) 831C; *S v Mseleku* 2006 2 SACR 237 (N); Erasmus “Ensuring a fair trial: Striking the balance between judicial passivism and judicial intervention” 2015 *Stell LR* 669; Paizes “Conduct of proceedings” in *Commentary on the Criminal Procedure Act* 22–89; Cowling “Criminal procedure” 2006 *Annual Survey of South African Law* 718–720; Kruger *Hiemstra’s criminal procedure* 22-61–22-62.

76 See *S v Rall* 1982 1 SA 828 (A) 831F–G. See also Steytler *The undefended accused on trial* 146–151 169 171 174 176–177.

77 Schwikkard *Possibilities of convergence* 25–26; Paizes “Conduct of proceedings” in *Commentary on the Criminal Procedure Act* 22–89; Steytler *The undefended accused on trial* 176; Kruger *Hiemstra’s criminal procedure* 23-15–23-16; Steytler 2001 *Law, Democracy & Development* 23; Steytler 1982 *SACC* 282; *S v Masooa* 2016 2 SACR 224 (GJ) paras 17–28; *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 2 SACR 217 (SCA); *R v Hepworth* 1928 AD 265 277; *R v Omar* 1935 AD 230 232; *S v Jada* 1985 2 SA 182 (E) 184G; *S v Kwinika* 1989 1 SA 896 (W) 902B–C; *R v Singh* 1948 3 SA 554 (N) 556–557; *R v Beck* 1949 2 SA 626 (N); *S v Hlalele* 1978 1 PH H20 (O); *R v Singh* 1943 *NPD* 232 236; *Naidoo v Rex* 1934 *NPD* 393 395.

78 Steytler *The undefended accused on trial* 173.

79 *S v Van den Berg* 1996 1 SACR 19 (Nm) 65g.

80 Zacharias “Structuring the ethics of prosecutorial trial practice: Can prosecutors do justice?” 1991 *Vanderbilt LR* 88.

The relative passivity on the part of the judicial officer, which the adversary trial structure demands,⁸¹ has two important consequences. Firstly, it “serves to enhance the principle of impartiality”.⁸² Cole observes that judicial passivity in this context “symbolises an impartial and disinterested umpire”.⁸³

Secondly, which is the focus or emphasis of this article, “[i]n the accusatorial ethos, the adjudicator’s task is to establish the facts *on the basis of what the parties have presented, challenged, examined and cross-examined during the trial hearings*”.⁸⁴ In the main, the accusatorial model does not allow the adjudicator to take any independent steps to ascertain the truth.⁸⁵ The trial court relies primarily on the parties to unearth the truth.⁸⁶ This “dependence” by the court on the parties and their legal representatives to arrive at its verdict “is a consequence of the arrangement of court procedure as a contest between two parties, each represented by a counsel, with the court in an intermediate and relatively passive position except for its rendering of the decision”.⁸⁷

A leading feature of the adversary system is that “a court’s decision *rests primarily on the evidence and argument advanced by the parties*”.⁸⁸ In principle, the presiding judicial officer or arbiter in the adversary system merely adjudicates upon a matter in the light of the evidence placed before him or her by the parties. He or she is merely “bound” to search for the “formal” truth, because on the whole he or she merely relies upon what he or she is told by the parties despite the fact that they can “manipulate” the “truth” to favour their own cases.⁸⁹

The evidence which the judicial officer or arbiter “accepts” to decide the case has been called the “procedural” or “formal” truth – as opposed to “material” truth – “in the sense that it is based *solely upon the evidence which the parties have decided to put before the court*”.⁹⁰ Paradoxically, the arbiter in the accusatory system is required to accept responsibility for a judgment while at the mercy of the information supplied to him or her by the parties.⁹¹ Given therefore that it is axiomatically in the nature of the accusatorial trial to focus the mind of the court on the evidence put before it by the parties rather than on prior publicity detrimental to the accused,⁹² and that it is incumbent on a court with no jury to furnish reasons for its decision, it is submitted that it is unlikely that the court’s decision in such a system would be based in any way on pre-trial publicity.

81 Schwikkard and Van der Merwe “Judicial notice” in Schwikkard and Van der Merwe (eds) *Principles of evidence* (2016) 515 (para 27 1).

82 *Ibid.*

83 Cole 2010 *Univ of Botswana LJ* 83–84.

84 De Smet “A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC” in Stahn and Sluiter (eds) *The emerging practice of the International Criminal Court* (2009) 409 (own emphasis).

85 *Ibid.*

86 Erasmus 2015 *Stell LR* 664.

87 Eckhoff 1965 *Scandinavian Studies in Law* 40 (own emphasis).

88 Steytler *Constitutional criminal procedure* 302 (own emphasis).

89 Snyman 1975 *CILSA* 103, 108 (own emphasis).

90 Steytler *The undefended accused on trial* 5; Van der Merwe “An introduction to the history and theory of the law of evidence” in *Principles of evidence* 12 (own emphasis).

91 Damaška *Evidence law adrift* 91.

92 *Banana* 1999 1 *BCLR* 27 (ZS) 38G–H.

In the South African accusatory trial, as in other common law jurisdictions, it is the prosecutor and the accused who determine what issues will be tried and what evidence the court will hear, which the court is then bound by in reaching its verdict. The court's judgment must be confined to the issues before court as raised by the parties to the litigation. The court is not to decide on matters not germane or relevant or on "extraneous issues".⁹³ A court may not create new factual issues.⁹⁴ In our adversarial system, the judicial officer sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens in some foreign jurisdictions.⁹⁵ Judicial officers "must base their decisions solely upon evidence heard in open court in the presence of the accused".⁹⁶

While judicial officers as members of civil society are entitled to hold views about issues of the day and may express their views provided they do not compromise their judicial office, "they are not entitled to inject their personal views into judgments or express their political preferences".⁹⁷ An accused must also "be tried solely on the evidence before the court, and not on any information received outside that context", such as pre-trial publicity.⁹⁸ One court stated that:

"It is the litigants who must be heard and not the judicial officer. It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions."⁹⁹

It should be emphasised that in sharp contrast to the adversary system, the presiding judicial officer in the inquisitorial trial, who is responsible for leading the evidence and for questioning the accused (who is ordinarily called first) and the witnesses, is not bound by any evidence tendered to him or her by the parties, but forges his or her own path to understanding and establishing the truth (it is the duty of the court to ascertain the facts or to unearth the truth). The judicial officer is effectively free to find out what he or she wants to know: the judicial officer is in no way bound merely to consider the facts and evidence adduced by the parties, but must him- or herself see to it that the information and considerations necessary to decide the issues are investigated and borne out at the trial.¹⁰⁰ In the adversarial process, the presiding judicial officer has little, if anything, to say about the choice and arrangement of the information on which his or her decision will turn; in his or her quest for the truth, the judicial officer is primarily restricted to the material presented by the parties.¹⁰¹ The arbiter in the

⁹³ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) paras 15–19.

⁹⁴ *Idem* para 15; *Kauesa v Minister of Home Affairs* 1996 4 SA 965 (NmS) 973H–974A.

⁹⁵ See *Ndlovu v Road Accident Fund* 2014 1 SA 415 (GSJ) para 106, citing with approval *Jones v National Coal Board* [1957] 2 All ER 155 (CA) 159A–B. See also *City of Johannesburg Metropolitan Council v Ngobeni* 2012 JDR 0534 (SCA) para 30, where it was pointed out that this principle, as enunciated in *National Coal Board*, governs trials in South Africa.

⁹⁶ Basdeo *et al* "The trial courts" in *Criminal procedure handbook* 268.

⁹⁷ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 16.

⁹⁸ *Banana* 1999 1 BCLR 27 (ZS) 31D.

⁹⁹ *Kauesa v Minister of Home Affairs* 1996 4 SA 965 (NmS) 973H–I.

¹⁰⁰ Certoma "The accusatory system v The inquisitorial system: Procedural truth v fact?" 1982 *Australian LJ* 288–289; Steytler *The undefended accused on trial* 5–6; Herrmann 1978 *SACC* 5; Damaška *Evidence law adrift* 89; Devlin *The judge* (1979) 61; Snyman 1975 *CILSA* 103.

¹⁰¹ Damaška *Evidence law adrift* 89; Devlin *The judge* 61.

adversary system is thus “confined” while the judicial officer in the inquisitorial system is not.¹⁰²

Advocacy in accusatorial process “has the potential to keep judicial idiosyncrasies in check” and is an important controlling mechanism of the judicial authority.¹⁰³ When the litigants in the adversary system direct the proceedings

*“there is little opportunity for the judge to pursue his own agenda or to act on his biases. Because the judge seldom takes the lead in conducting the proceedings, he is unlikely to appear to be partisan or to become embroiled in the contest. His detachment preserves the appearance of fairness as well as fairness itself”.*¹⁰⁴

4 CONCLUSION

Damaška points out that in the adversarial trial, the court’s judgment is “a decision *between* the parties”, more than a pronouncement on the “true facts” of the case.¹⁰⁵ However, it is submitted that accusatorial process remains a vital procedural safeguard in the face of adverse pre-trial publicity, in that (i) the parties shape the issues and the basis of the case; (ii) it is inherent in such proceedings that the parties would focus the court’s mind on the evidence which they determine the court should hear, rather than on the prejudicial publicity; and (iii) the court is principally dependent on, and bound by, the evidence produced by the parties in reaching its decision on the merits.

The parties therefore have far greater influence in the court’s decision than they do in the inquisitorial system.¹⁰⁶ Partisan advocacy enables the trial court to see the controversy from the litigants’ perspectives and affords the arbiter the advantage of seeing what each litigant believes to be his or her most consequential proof, making, more likely, a decision tailored to their needs.¹⁰⁷ The court’s vision is limited to what the parties want the arbiter to see – “possibly a mere torso of larger configurations”.¹⁰⁸ There is accordingly little room in adversarial process for the arbiter to pursue his or her own agenda or to act on any biases, thereby making it less likely that the court would be influenced by pre-trial publicity in its quest for a fair trial.

102 Devlin *The judge* 61.

103 Roodt 2004 *Fundamina* 139; Labuschagne 1993 *De Jure* 356.

104 Landsman *The adversary system* 44–45 (own emphasis).

105 Damaška 1973 *Univ of Penn LR* 581–582.

106 Steytler *The undefended accused on trial* 6.

107 Landsman *The adversary system* 4; Zacharias 1991 *Vanderbilt LR* 54.

108 Damaška *Evidence law adrift* 115.