Procedural explanations and choices: The undefended accused in a minefield

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1 INTRODUCTION

The South African Criminal trial process is governed by the provisions of the Criminal Procedure Act.[1] In essence a criminal trial is conducted through the medium of the spoken word and is therefore essentially oral in nature.[2] According to Steytler[3] the key element of an adversarial trial is its orality.

From the first appearance, of an undefended accused,[4] in court, until the imposition of a sentence in the event of a conviction, explanations are directed at the accused by the presiding officer. Even after the imposition of a sentence the presiding officer will give a further procedural explanation and choice to the undefended accused, namely the right to appeal. These explanations aim to explain the criminal trial process, at intervals, as it progresses[5] and are referred to as procedural explanations. During a criminal trial, the following procedural explanations must be explained to an undefended accused person: the right to legal representation,[6] the explanation of plea,[7] the right to

1 Act 51 of 1977. Hereinafter referred to as "the Criminal Procedure Act".

2 Exceptions to the predominantly oral process are the charge sheet (s 84(1) of the Criminal Procedure Act), the indictment (s 144 of the Criminal Procedure Act), documentary evidence (ss 95, 99, 179, 222, 233, 234, 246, 247, 251 and 338 of the Criminal Procedure Act), a copy of the statement made by the accused (s 335 of the Criminal Procedure Act) and copies of the content of the police docket (in terms of the decisions of *S v Fani* 1994 (3) SA 619 (E) and *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 (CC)).

3 Steytler N "Making South African criminal procedure more inquisitorial" *Law Democracy and Development* Vol 5 (2001) (1) 1 at 3.

4 In the case of an accused with legal representation none of the procedural explanations will follow, as the legal representative is presumed to know the process and exercises procedural choices in line with his instructions on behalf of the client.

5 In this research only the criminal trial process following on a plea of not guilty will be addressed. The reason for this limitation is the fact that, apart from the explanation pertaining to the right to legal representation, only the procedural explanation regarding the right to adduce evidence before sentence is explained to an accused who pleads guilty. Apart from this limited procedural explanation, the process in the case of the plea of guilty is inquisitorial in nature, as the presiding officer will put questions to the accused to ensure that the accused in fact pleads guilty to the offence he is charged with.

6 See s 73 of the Criminal Procedure Act and ss 35(3)(f) and (g) of the Constitution of South Africa, Act 106 of 1996 (hereinafter referred to as "the Constitution").

7 See s 115 of the Criminal Procedure Act.

cross-examination,[8] the rights at the close of the case for the prosecution,[9] the right to address the court on the merits of the case[10] and the right to address the court on sentence.[11]

The trial is therefore divided into stages. At the commencement of each stage the presiding officer explains the next procedural step to the accused. In the case of certain of these explanations, the accused is required to make a choice between given alternatives. These choices, that the accused has to make, are referred to as procedural choices.[12] It is imperative that an undefended accused makes informed procedural choices, as these choices have an important effect on the outcome of the trial. For instance, an undefended accused may elect to close his case without leading any evidence and face the risk of a conviction, due to the fact that there was a *prima facie* case against him at the close of the case for the prosecution.

In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*[13] it was stressed that "litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices."[14] This proposition is especially applicable in the case of an undefended accused, as he has to litigate against a legally trained opponent.[15] Bekker[16] correctly points out that rich people always have greater access to forensic skills than poor people. The concept of equality before the law, must at the very least mean, that a person should not be denied effective access to the courts as a result of poverty.

In 1998,[17] the researcher conducted a pilot study in order to determine the intelligibility of procedural explanations afforded to undefended accused persons. As part of the pilot study, 10 undefended accused persons were interviewed immediately after each procedural explanation was afforded to them. The information gathered were analysed according to psycholinguistic norms. It was determined that the respondents understood only 37% of what was explained to them.

In 1993, more than 80% of accused persons who appeared in the lower courts of South Africa were not legally represented.[18] Since that date, statistics pertaining to the number of undefended accused could not be supplied by the Department of Justice, despite relentless efforts to obtain these. The Legal Aid Board conducted a court roll coverage research project for the year

8 See s 166 of the Criminal Procedure Act.
9 See s 151 of the Criminal Procedure Act.
10 See s 175 of the Criminal Procedure Act.
11 See s 274 of the Criminal Procedure Act.
12 Compare *S v Nzimande* 1993 (2) SACR 218 (N) at 220c-*f* where Didcott J refers to "procedural choices open to an accused person".
13 1999 (2) SACR 51.
14 96*d–e*.
15 The majority of prosecutors has legal qualifications or has undergone training courses offered by the Justice College.
16 Bekker PM "The right to legal counsel and the Constitution" (1997) *De Jure* 217.
17 See D Erasmus Simplification of the South African Criminal Trial Process: A Psycholinguistic Approach (Unpublished LLD thesis) University of the Free State, November 1998 264.
18 Ibid 2.

2006 to 2007.[19] From the court roll coverage project the following statistics regarding undefended accused are relevant to the current discussion:

- In the District Court, the vast majority of accused are unrepresented at their first appearance in court;
- Between 30 and 45% of accused persons in the District Court do not have legal representation, although 90% of this group would have qualified for legal aid, if they applied;[20]
- In the Regional Courts 25% of accused persons on trial are undefended;[21]
- In specialized courts such as the Sexual Offences Court only 5% of accused persons are unrepresented;[22]
- In the High Court the number of unrepresented accused are very low.

From the above it is clear that although the number of undefended accused declined significantly since 1993, a substantially large number of accused persons in the District and Regional Courts are still undefended.

In this article those procedural explanations and choices following upon a plea of not guilty, by an accused, will be discussed. Particular attention will be afforded to the content of these explanations, as prescribed by case law and literature. Reference will also be made to roneod procedural explanations used in Magistrate's Courts.[23] These "standard" procedural explanations will be evaluated in light of case law and literature. It is submitted that it is important that each procedural explanation contains complete and correct information regarding the content of the explanation, so that the accused is properly informed of his rights and choices. Only when this takes place will an undefended accused be able to make informed procedural choices.

In the next section, the general duties of a presiding officer regarding the explanation of procedural explanations will be set out. In section 3, the different procedural explanations following upon a plea of not guilty will be discussed in turn. In section 4, some concluding remarks and recommendations will be made.

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19 The researcher wishes to thank Mr. Patrick Hundermark of the Legal Aid Board's National Operations office for supplying a copy of the Court Roll Coverage Project for the year 2006 to 2007 for purposes of this research. The project was an internal audit in order to better understand the demand for legal aid emanating from the various courts. Data was collected from all Justice Centres on a national level. The project will be referred to as "the Court Roll Coverage Project" hereinafter.

20 Most undefended accused do not apply for legal aid invariably because there is the perception that the application will cause a delay in the finalization of the matter, even in instances where the legal aid attorney is present in court at the time that the presiding officer advises the accused of his right to make application for legal aid.

21 This is in all likelihood attributable to the fact that the Courts will impress upon the accused that he is not trained and skilled in litigation and that should he be convicted the Court will impose a sentence of direct imprisonment. It also obviates the need to send the matter for automatic review.

22 Ibid.

23 There is no standardized set of procedural explanations available to magistrates on a national scale. The examples used in this article are those currently used in the Port Elizabeth Magistrate's Courts.

2 THE GENERAL DUTIES OF A PRESIDING OFFICER WHEN PROVIDING PROCEDURAL EXPLANATIONS

Presiding officers are obliged to facilitate the participation, of the accused, in the trial proceedings by advising them of their rights and duties and assisting them in the exercise of their procedural choices.[24] This assistancing of an unrepresented accused is part of the right of the accused to a fair trial.[25] In *S v Rapholo & others,*[26] it was held that the explanation of the rights of an accused person, at various stages of the proceedings must be comprehensive and the presiding officer must, in addition, be satisfied that the accused understood the explanation of their rights.

In *S v Kester*[27] the court held that it is the duty of a judicial officer to "diligently, deliberately and painstakingly" explain the rights of an unrepresented accused and to ensure and confirm that it was understood. The court then postulated the following guidelines to be employed when the explanation of rights takes place.[28] Firstly, the record must indicate and reflect in the case of an undefended accused whether or not his rights were explained to him in a proper manner, and that he understood the position. When explaining the position, a magistrate should sedulously inform the accused and confirm that the accused understands that he is entitled in an appropriate case, to close his case without leading any evidence or to apply for his discharge. The court commented that it is a salutary practice that the explanation of rights should appear on the record with adequate and satisfactory particularity, to enable a judgment to be made on the adequacy thereof. This duty should not be delegated to an interpreter, but is the duty of the presiding officer. If roneod forms are used, care should be taken to ensure that the said forms contain all the necessary explanations, together with the import thereof. Often, more needs to be explained than what appears on the form. In addition the presiding officer should ensure that the accused understands what he has been informed of, by a question or statement confirming the same. A presiding officer should assist an undefended accused in the conduct of his case, and must strive to ensure that the accused is at ease and is able to present his case to the best of his ability.

In *Makgaike v S,*[29] the rights of an unrepresented accused were explained at the commencement of his trial and he indicated that he understood them. The trial was then postponed for three months. On resumption of the case, his rights were not explained to him again. The court held that this was a serious irregularity, as it infringed upon his right to a fair trial. The conviction and sentence were set aside. It is therefore clear that a presiding officer should re-explain the rights of the accused after a long postponement.

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24 Steytler (fn 3 above) 7.
25 See *S v Simxadi* 1997 1 SACR 169 (C).
26 [2004] JOL13086 (T) 1.
27 1996 (1) SACR 461 (B) 472*j*-473*a*-*b*.
28 473c-474c.
29 [2000] JOL6541 (W) 8-9.

When affording procedural explanations, it is of the utmost importance that presiding officers should be cautious to use as a yardstick, the standard of a reasonable person who is literate and able to understand "the implications of a ritualistic legal incantation of constitutional rights". [30] Presiding officers should in addition bear in mind that the court environment might be stressful to an accused.[31]

In the following section, the content of the various procedural explanations, following upon a plea of not guilty, will be discussed. Guidance as to the content of these explanations will be sought from case law and literature. The standard procedural explanations available to magistrates, will be evaluated against the content criteria of the case law and literature.

3 PROCEDURAL EXPLANATIONS

3.1 The right to legal representation

Section 73 of the Criminal Procedure Act, affords no guidance as to the content of this particular procedural explanation. The section merely states that the accused is entitled to be legally represented. Our courts have explained this right to accused persons, even before the new constitutional order.

The following cases, decided prior to the new Constitutional dispensation, afforded some guidance as to the content of this particular procedural explanation:

It was held in *S v Radebe; S v Mbonani*[32] that there was a duty upon judicial officers, to inform unrepresented accused persons, of their right to legal representation, especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused. The accused should also be encouraged to exercise this right and be afforded a reasonable time within which to do so. In appropriate cases, the accused should be informed that he is entitled to apply to the Legal Aid Board for assistance. Failure on the part of the presiding officer to do this, may result in an unfair trial.[33] This approach was endorsed in *S v Masilela,*[34] and thereafter it was followed in: *S v Gwebu,*[35] *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v van Wyk NO and Another,*[36] *Nakani v Attorney General and Another,*[37] *S v Mthwana*,[38] and *S v Motsumi*.[39]

In the *Rudman* case,[40] it was held that knowledge of the right to legal representation, is of no value to an indigent accused, if he is unaware of his right to

30 S v Cloete 1999 2 SACR 137 (C) 148g-h.
31 Ibid.
32 1988 (1) SA 191 (T) at 196D-J.
33 1988 (1) SA 191 (T) 196D-J.
34 1990 (2) SACR 116 (T).
35 1988 (4) SA 155 (W).
36 1989 (3) SA 398 (E).
37 1989 (3) SA 655 (Ck).
38 1989 (4) SA 361 (N).
39 1990 (2) SACR 207 (O).
40 *Supra* at 381G.

apply for legal aid. It was held, that it is a corollary of a judicial officer's duty, to inform an undefended accused of his entitlement to legal representation and to inform an indigent accused of his right to apply for legal aid in terms of the Legal Aid Act.[41]

The following cases deal with the effect that the non-explanation or incomplete explanation of this right will have on the subsequent trial of the accused. In *S v Mpata,*[42] the view expressed in *Rudman*, was endorsed and the court came to the conclusion that a failure to explain these rights would amount to an irregularity. Each case will however have to be judged on its own merits in order to ascertain whether the irregularity warrants setting aside the conviction and sentence.

Since the implementation of section 25(3)(e) of the interim Constitution, the position is clear. In *S v Gouwe,*[43] it was held that failure to inform the accused of his right to legal representation will constitute an irregularity rendering the trial unfair. Referring to the case of *S v Masango,*[44] the court endorsed the following guidelines laid down by Stewart JP. It was held that a magistrate should advise the accused at the commencement of the case, before plea, that he is entitled to legal representation at his own expense. If the accused elects to obtain legal representation at his own expense, he should be given adequate time to do so. If the case is complex, or the consequences of a conviction serious, then the magistrate should enquire into whether the accused can afford legal representation, and, if he cannot, should refer him to the Legal Aid Board or, if legal funds are not available, to organizations such as a Law Clinic of a university or Lawyers for Human Rights.[45] Explanations given to the accused should be phrased in terms which are free of legal jargon and easily understood so that, at the end of the trial, the accused will feel that the magistrate has given him a fair hearing.

In the more recent decision of *May v S,*[46] it was reiterated that the Constitution firmly entrenches not only the right to legal representation, but provides that an accused person has the right to representation at state expense if substantial injustice would otherwise result. The accused must be informed about this right "promptly".[47] *In casu* it appeared from the record that the accused did have legal representation at the commencement of the trial, but that his representative withdrew from the proceedings before the trial actually commenced. The

41 Act 22 of 1969.
42 1990 (2) SACR 175 (NC) 181*a-b*.
43 1995 (8) BCLR 968 (B) 970C.
44 6 BSC 162 at 172.
45 It should be noted that the primary focus of the Law Clinics is clinical legal education (i.e. teaching and training of law students in preparation for practice) and their mandate is to attend to civil matters and not criminal matters. A few Law Clinics will, however, send candidate attorneys to specific courts (community and district) to attend to matters at the court. The Law Clinic, as a rule, does not have an "open door" policy in terms whereof it accepts all kinds of instructions. Lawyers for Human Right pursue matters that have the potential to create a precedent, but will not appear on behalf of accused persons in criminal trials. Under the current dispensation the Legal Aid Board will appoint an attorney or advocate to represent an indigent accused who qualifies in terms of the means test.
46 [2005] 4 All SA 334 (SCA).
47 337. Compare also ss 35(3)(f) and (g) of the Constitution.

matter was then postponed and a substantial period of time elapsed between the appearance with an advocate and the time when the accused confirmed that he would continue with the trial without a legal representative.

The court held the magistrate should have informed the appellant of his right to legal representation at state expense expressly in court and should have confirmed that he was aware of the right to have a different advocate or attorney appointed, at state expense.[48] The court held that it was apparently taken for granted that the appellant was aware of his rights. The court also cautioned that judicial officers should not assume that accused persons are fully aware of their rights and of the implications of acting in their own defence. It is incumbent on presiding officers to ensure that the accused is fully informed, in open court, not only of the right to legal representation but also of the consequences of not having a lawyer to assist in the defence.[49] It was however held that the absence of legal representation, *in casu*, did not result in prejudice to the appellant.[50] The court held that the crucial question is what the legal effect of the non-explanation of the right to legal representation will have on the proceedings.[51] The mere fact that a judicial officer does not inform an accused of his right to legal representation, if found to be an irregularity, does not *per se* result in an unfair trial, necessitating the setting aside of the conviction on appeal.[52] Regard must be held to the whole trial and the way in which it was conducted by the judicial officer, to the ability of the accused to represent himself adequately, as shown during the course of the trial, and to whether the evidence of the accused has led justifiably to the conviction and sentence. The legal position as set out in the *Gouwe* case, *supra*, was accordingly not followed.

As to the choice of the services of a particular legal practitioner, it was held in *S v Vermaas; S v Du Plessis*[53] that the right to be provided with legal representation at State expense, where substantial injustice would otherwise result, in terms of s 25(3)(e) of the interim Constitution, does not confer a right to be represented by a legal practitioner of the accused person's personal choice. Didcott J, however, cautioned that imparting such information will be an empty gesture that will make a mockery of the Constitution, if not backed by mechanisms that are adequate for the enforcement of the right.[54]

The standard form containing the procedural explanation regarding the right to legal representation available to magistrates in the Port Elizabeth Magistrate's Courts reads as follows:

"COURT TO ACCUSED NO.: _____

You are entitled to be represented by an Attorney or Advocate of your own choice whom you have appointed out of own funds. If you cannot afford a legal representative you may apply to the local Legal Aid Officer for assistance. If your application is successful, an independent legal representative will be appointed for you by the Legal Aid Officer.

48 338.
49 338.
50 351.
51 338.
52 *Hlantlala v Dyantyi NO* 1999 (2) SACR (SCA) at 545f-h.
53 1995 (7) BCLR 851 (CC) at 859G-H.
54 860B-C.

Rights of information contained in docket explained to accused.

DO YOU UNDERSTAND? _____

What do you wish to do? _____"

It is submitted that this form contains all the necessary information that an accused will have to consider in order to make the procedural choice regarding legal representation. The standard form goes even further than the content requirements of the Constitution. Provision is in addition made to explain the right to information and the right of the accused to access the police docket.[55]

This particular procedural explanation is not complicated, as it postulates two alternatives: either to appoint one's own legal representative, or to apply for legal aid. It is however submitted that this explanation should inform an undefended accused that a criminal charge is not easy to defend and that most laymen would benefit greatly from legal representation. The advantages of legal representation should be brought to the attention of the accused so that he can make an informed choice. The following *dictum* from the United States Supreme Court case of *Powell v Alabama*[56] is apt in this regard:

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

In the following paragraph the procedural explanation dealing with the explanation of plea will be discussed.

3.2 The explanation of plea

If an accused person has elected to plead not guilty to the charge against him, the procedure set out in section 115 of the Criminal Procedure Act is set in motion.[57] This procedure has become known as the explanation of plea[58] and aims to eliminate unnecessary evidence by establishing exactly what the accused wishes to place in dispute by his plea of not guilty.[59]

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55 The accused does not have access to the entire contents of the docket. The investigation diary in the docket contains a record of privileged communications between the prosecutor and the investigation officer.

56 287 US 45 (1932).

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

58 The term "pleitverduideliking" was suggested by Hiemstra. Compare 1977 TSAR at 118. The term was accepted by the (then) Appellate Division in *S v Imene* 1979 (2) SA 710 (A) 171G.

59 *S v Seleke* 1980 (3) SA 745 (A) at 753G. In terms of this section a presiding officer may ask an accused whether he wishes to make a statement indicating the basis of his defence. If the accused elects not to make such a statement or does so and it is not clear form the statement to what extent he denies or admits the issues raised by the plea, the presiding officer may question the accused in order to establish which allegations are in dispute. In addition the court may, in its discretion put any question to the accused in order to clarify any matter raised and shall ask the accused whether an allegation which is not placed in issued by the plea of not guilty may be recorded as an admission. If the accused consents the recorded admission shall be deemed to be an admission in terms of section 220 of the Criminal Procedure Act. Should a legal adviser act on behalf of an accused in terms of this section, the court must ask the accused whether he confirms what has been done on his behalf.

This section was introduced into the criminal trial process following upon proposals made by Hiemstra.[60] At the time of its introduction, this section was seen as a radical departure from the accusatory system of criminal procedure followed in South Africa. The judicial questioning of the accused was seen as the importation of inquisitorial elements into the criminal trial process.[61] Klopper[62] has however suggested that the plea explanation is really a *sui generis* procedure: judicial examination is employed to determine the issues and, once these issues are established, the two opposing parties are required to present their respective cases in accordance with accusatorial or adversarial principles.[63] The purpose of the section was outlined in *S v Moloyi,*[64] where it was held that the section aims to secure an early outlining of the dispute or *lis* and to make the proceedings more efficient and less costly.[65]

In the case of this procedural explanation, guidance as to the content and form of the explanation appears in the case law. The guidance emanated from the architect of the section, Hiemstra CJ. In *S v M en Andere,*[66] it was suggested that the explanation should be phrased as follows:

> "Do you wish to make a statement indicating the basis of your defence? The court is in any way entitled to ask you questions to determine what your defence is, but you are not obliged to answer thereto."[67]

This proposed explanation was endorsed in *S v Evans.*[68] *In casu* the court held that the magistrate was obliged to explain to the appellant at the start of the proceedings, that he had a choice whether or not to answer questions put to him by the court. The failure by the magistrate, constituted an irregularity serious enough to set aside the conviction and sentence.[69]

In *S v Ramokone,*[70] an illiterate, unrepresented juvenile accused, pleaded not guilty and indicated that he did not wish to say anything and did not wish to make a statement in terms of section 115. The court held that it was advisable that it be explained to him that the court is going to ask him questions which he need not answer. The questions which the court asks, must be directed at limiting the issues in the case and not at inducing the accused to tell the court what had happened.

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60 Compare generally the views of Hiemstra in 1963 *SALJ* at 187 and 1965 *SALJ* at 85.
61 See Kriegler *op cit* at 292 and 318.
62 1978 *CILSA* 320 at 321.
63 Compare Du Toit E, De Jager FJ, Paizes A, Skeen A St Q and Van der Merwe S *Commentary on the Criminal Procedure Act* (1987) Juta at 18-1.
64 1978 (1) SA 516 (O) 519H-520D.
65 The advantages of this process include the following: State witnesses do not have to stay present at the proceedings unnecessarily; the leading of evidence will be shorter and unnecessary remands will be avoided. This entire process can however only take place with the consent of the accused. This procedure is now well entrenched in our criminal trial process, and as pointed out above is inadvertently followed when an accused pleads not guilty. Compare also *S v Bepela* 1978 (2) SA 22 (B).
66 1979 (4) SA 1044 (BH).
67 At 1050B. My translation.
68 1981 (4) SA 52 (C) at 59B-C.
69 60B.
70 1995 (1) SACR 634 (O) 636*f-g*.

Schabort J correctly pointed out in *S v Mahlangu,*[71]that a presiding officer should not merely ask an undefended and uneducated accused what had happened. This question would urge such an accused to tell the court what had indeed happened, instead of indicating his defence. The questioning in terms of this section should not lead to an enquiry into the evidence to be led and should be limited to the establishment of the defence of the accused. Any further questioning would merely create material that could be used against the accused in cross-examination.[72]

Regarding the recording of admissions in terms of section 115(2), it was held in *S v Mayedwa,*[73] that where this procedure is adopted, it is desirable that the presiding officer clearly indicates to the accused, and records, that he intends to act in terms of this section. He should also record *verbatim*, the questions put by him to the accused and the reply to each question. Meticulous care in recording both such questions and answers will leave no doubt as to what facts have been formally admitted by the accused and what facts still remain to be proved by the leading of evidence.

According to Du Toit,[74] the warnings and explanations contained in this section should contain the following:

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

Kriegler and Kruger[75] state that the majority of undefended accused do not understand the difference between the explanation of plea and evidence in chief. He suggests that the presiding officer should explain to the undefended accused that the admissions made by him stand as proof of the facts contained therein, but that the exculpatory portions of his explanation of plea are not evidence in his favour.

The relevant part from the standard form available to magistrates in Port Elizabeth reads as follows:

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71 1985 (4) SA 447 (W) 451I-J.
72 *S v Msibi* 1992 (2) SACR 441 (W).
73 1978 (1) SA 509 (E) at 511D-F.
74 Du Toit *et al op cit* (fn 63 above) at 18-7 – 18-9.
75 Kriegler J and Kruger A *Hiemstra Suid-Afrikaanse* Strafproses 6th ed (2002) 326.

"COURT TO ACCUSED

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

ACCUSED IN REPLY: _____

Questioning of the accused in terms of Section 115(2)(a) of Act 51 of 1977 in order to establish which allegations in the charge are in dispute. The accused is informed that he is not obliged to answer the questions.

_____

Admissions in terms of sections 115(2) of Act 51 of 1977.

COURT TO ACCUSED

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

_____

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

This is a lengthy procedural explanation and contains involved legal concepts. The explanation starts off by asking the accused whether he wishes to make a statement indicating the basis of his defence. It is submitted that the explanation should start off by informing an accused that he does not have to say anything at this stage. Although it is later conveyed that the statement is voluntary, it is submitted that, the manner in which the explanation is phrased currently, the accused is almost induced to speak.[76] The term "basis of your defence" would be understood with difficulty by most laymen. It is suggested that the accused is simply asked if he wishes to tell the court the reason why he pleads not guilty, if he wants to at all.

It is submitted that the judicial questioning in terms of section 115(2)(a), is an oddity, in view of the fact that the accused is informed at the outset of the procedural explanation that he does not have to make a statement. Immediately after assuring the accused that he has a right to silence, the presiding officer informs him that he may still ask him questions to determine the basis of his defence. Immediately thereafter, the accused is informed that he does not have to answer these questions. It is submitted that most laymen are terrified by a court appearance and may be intimidated to such an extent that they consent to answer questions being put to them. In *S v Maswanganyi,*[77] it was held that it is irregular for a presiding officer to question an accused in terms of section 115(2) of the Criminal Procedure Act, if the accused indicated that he is not prepared to reply to questions put by the court. The presiding officer must convey essential warnings regarding the disclosure of his defence to the accused.[78]

The part of the explanation dealing with admissions in terms of sections 115(2) and 220 of the Criminal Procedure Act is problematic, in the sense

76 It is advanced that this is not in line with the right of an accused to silence in terms of section 35 (3) (h) of the Constitution.

77 [2006] JOL 16571 (T).

78 11.

that laypersons might not understand the effect of making these admissions. It is suggested that the presiding officer should here again at the start of the procedural explanation, warn the accused that he is under no obligation to make admissions, and not later during the explanation.

Steytler[79] correctly concludes that the disclosure of a defence by an accused holds no specific advantages for an accused. If the accused does not repeat an exculpatory statement under oath, it will not be evidence. On the other hand, an incriminating statement may be used as evidence against an accused. There might even be the danger that the court may compromise its impartiality as the inquisitorial participation operates primarily in favour of the state.[80]

3.3 The right to cross-examination

The accused has the right to cross-examine every witness called by the prosecution.[81] Once a witness is called in a trial and a party makes that person his witness, he may be cross-examined by the other side and a denial of that right of cross-examination, constitutes an irregularity.[82] The right to cross-examination is explained to the accused after the first state witness has testified, so that the accused is in a position to cross-examine the witness. It is suggested that this right should be explained to the accused, even before the leading of evidence. The advantage of this practice would be that the accused can look out for and remember or write down aspects of the evidence he wishes to dispute. Normally this right is not explained again to the accused after the close of the case for the prosecution, unless the accused needs to cross-examine a co-accused or his witnesses.

In the *May*[83] case, the appellant contended that the nature of cross-examination and its importance were not fully explained to him. He further contended that when he did attempt to ask questions to state witnesses, his questioning was curtailed. The reason for the limitation was the fact that at the outset of the trial, the magistrate instructed the appellant to put all questions through the presiding officer, and when the appellant did ask questions, admittedly repeating the same questions again and again, the magistrate became impatient.[84]

Lewis JA referred to the case of *S v Wellington,*[85] where the importance of cross-examination as part of a fair trial was emphasised. In this case, Frank AJ held that an accused person is entitled to an explanation that covered the following: that he had a right to cross-examine; that he had a duty to put to the state witnesses, any points on which he did not agree with such witnesses,

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79 Steytler NC The undefended accused (1988) 125.
80 Ibid at 126.
81 Compare s 166 of the Criminal Procedure Act.
82 Compare *R v Ndawo and Others* 1961 (1) SA 16 (N) at 17E and *S v Mcolweni* 1973 (3) SA 106 (E) at 107A in this regard.
83 fn 46 supra.
84 339–340.
85 1991 (1) SACR 144 (Nm) at 148e-c, where the case of *S v Tyebela* 1989 (2) SA 22 (A) at 31ff was quoted with approval and further elucidated.

and that the purpose of cross-examination was to elicit evidence favourable to himself and to challenge the truth and accuracy of the state evidence.[86] It was further held, that a failure to explain to an unrepresented accused his rights relating to cross-examination would be tantamount to a failure to allow cross-examination, which amounts to a gross irregularity.[87]

In the *May* case, the explanation regarding the right of cross-examination by the regional magistrate consisted of the following:

> "Namely that the accused should listen carefully to the testimony of the state witnesses; after the witness had testified the magistrate will ask the accused if he differs with the version supplied by the witness; the accused must ask questions regarding the aspects he differs with the witness; an "arrangement" is made whereby the accused must put all questions through the court, so that the questions may be well formulated in order for all to understand the questions; the court will inform the accused that many of the questions the accused may ask, may not make sense or are irrelevant or meaningless, and that the accused will have to accept such a ruling."[88]

The Cape High Court concluded that the appellant's rights to cross-examination had been adequately explained. Lewis AJ agreed with this view, but held that the explanation might have been fuller and that the purpose of questioning might have been made clearer.[89] The court held that the fact that the magistrate insisted that he puts questions on behalf of the appellant, was not inherently inappropriate.[90]

Little guidance as to the content of the explanation of the right to cross-examination is found in section 166 of the Criminal Procedure Act. Cross-examination has been described by Wigmore[91] as "the greatest legal engine ever invented for the discovery of the truth". Zeffertt, however, correctly remarked that "(he) probably never saw the engine in action in a case in which the witness speaks in Afrikaans, counsel English, and the accused understands nothing but Xhosa."[92]

The objectives of cross-examination were set out in *Caroll v Caroll,*[93] as the following:

> "To impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness and to detect; and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party."

In *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO*[94] Cooper J sets out the following principles applicable to the right to cross-examination:[95] During the State case the presiding officer is obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences

86 148e-c.
87 148d-f.
88 14.
89 15.
90 15.
91 Wigmore JH *Evidence in Trials at Common Law* Volume 5 (1974) 32 – 36.
92 Zeffertt DT, Paizes AP and St Q Skeen A *The South African Law of Evidence* (2003) 750.
93 1947 (4) SA 37 (D&CLD) 40.
94 1989 (3) SA 368 (E).
95 The approach of Cooper J was adopted and approved in *S v Mkwedi* 1994 (1) SACR 216 (Tk) at 218*a*-c.

difficulty in cross-examination, the presiding judicial officer is required to assist him in formulating his questions, clarify the issues and properly put his defence to the state witnesses.[96] Where, through ignorance or incompetence, an undefended accused fails to cross-examine a state witness on a material issue, the presiding officer should question (but not cross-examine) the witness on the issues as to reduce the risk of a possible failure of justice.[97] The presiding officer should assist an undefended accused whenever he needs assistance in the presentation of his case and should protect him from being cross-examined unfairly.[98]

In *S v Tyebela,*[99] the principles set out above were expanded, as it was held that after the first State witness had finished his evidence in chief, there should have been an explanation to the appellant and his co-accused as to their right to cross-examine and some indication as to how they should conduct the cross-examination. It should furthermore, be pointed out to them that it was their duty to put to the State witnesses any points on which they did not agree with the State witnesses, and to put their version to the State witnesses. The court commented that, *in casu*, this was not done until a later stage and then only in a rough and summary manner.

In *S v Kibido*[100] the court focused on the aspect of the quality of the cross-examination by an undefended accused. The accused after pleading not guilty gave a full detailed explanation of his defence, and some cross-examination was ineptly done by him. It appeared from the record that the accused did not know how to cross-examine properly or how to put questions. The magistrate drew an adverse inference against the accused for his failure to cross-examine fully. The court held that this constituted a failure of justice and that the accused did not have a fair trial.[101]

In *S v Khambule*[102] it was held, that, presiding officers should assist undefended accused when they cross-examine. The court observed that the presiding officer must not only see that the rules of the game are observed but he must actively see to it that the version of the accused has been properly put to the state witnesses so that his search for the truth could bear some fruit. The court referred to the case of *S v Sebatana,*[103] where it was pointed out that an illiterate accused person often only asks a few irrelevant questions or none at all, to a state witness and later delivers testimony himself, which conflicts in material aspects with the evidence of a state witness. This is a result of ignorance, despite the explanation of the rights to cross-examination. The court held, that, a presiding officer should in fact ask an undefended accused whether he agrees with every allegation made against him by the witness. In this way, it will be clear which aspects of the evidence of a witness is placed

96 378C-D.
97 379E-F.
98 378J-379A.
99 1989 (2) SA 22 (A) at 32A-C.
100 1988 (1) SA 802 (C).
101 804H-J.
102 1991 (2) SACR 277 (W) 281*d*.
103 1983 (1) SA 809 (O) 812G-813A.

in dispute, and create an impression in the accused that he is receiving a fair trial.

It is of the utmost importance that an accused puts his version to the state witnesses for their comments thereon. It is no reason for not doing so to argue that the answer of the witness would almost always be a denial. The court is entitled to see and hear the reaction of a witness to every important allegation.[104]

The effect of a failure to explain the right to cross-examination to an undefended accused was considered in *Namib Wood Industries (Pty) Ltd v Mutiltha NO and Another,*[105] it was held that a failure to explain to rights with regards to cross-examination would be tantamount to a failure to allow cross-examination, which would constitute a gross irregularity.[106] The court held that such a failure would further result in the accused not having a fair trial.[107]

A presiding officer must further ensure that an undefended accused understands his rights to cross-examination. In *S v Mngomezulu,*[108] the court on review assumed that a full and correct explanation as to cross-examination was given. The court commented that it does not follow, however, that an accused understood what was really required of him, or that he had any idea of how to achieve it. Even trained lawyers sometimes merely resort to "putting" perfunctorily to the witness that he is not speaking the truth. The performance of laymen could only be worse, as few have the legal wit to appreciate every point they should challenge or make, and to sort the relevant from the irrelevant. Few have the memories to store every detail of the evidence and the means to take it down in writing. When a layman is trying to cross-examine, he is often interrupted as his questions are labelled as irrelevant, repetitive or argumentative. The court commented that too much is expected, too frequently of laymen defending themselves in criminal trials. Too much is also read into their failure to cross-examine or to do so thoroughly.

The following standard form is used in the Port Elizabeth Magistrate's Courts with regard to the explanation of the right to cross-examination:

"**EXPLANATION OF ACCUSED'S RIGHTS TO CROSS-EXAMINATION**

Accused you have heard the evidence of the witness. It is now your opportunity to cross-examine the witness. The purpose of cross-examination is:–

a. to destroy the evidence of the witness;

b. to diminish the value thereof where it cannot be destroyed;

c. to elicit facts which are favourable to your version and;

d. to show that the witness is unsatisfactory in that he testifies about facts of which he has incorrect or insufficient knowledge.

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

105 1992 (1) SACR 381 (Nm) 384*d-f*.

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

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

108 1983 (1) SA 1152 (N) at 1153B-F.

> It is further expected of you to place your version before the witness where it differs from his version, so that he has the opportunity to answer to it. The court will then be entitled to accept that you agree with all the undisputed facts in the evidence of this witness."

As indicated above, the entire concept of cross-examination is foreign to, and difficult to apply, for laypersons. The standard explanation above is a brave attempt and includes all the essential elements of cross-examination. It is however advanced that concepts such as "destroy the evidence", "diminish the value thereof" and "elicit facts which are favourable" would be difficult for a lay person to comprehend. The acceptance of undisputed facts by the court is once again a difficult concept for a layperson to understand.

In this regard Steytler correctly points out that even if the accused is given a full and correct explanation, the chances of utilizing the opportunity effectively remain small.[109]

3.4 Rights at the close of the case of the prosecution

Section 151 of the Criminal Procedure Act determines that if an accused is not discharged, in terms of section 174, at the close of the case for the prosecution, the presiding officer shall ask the accused whether he intends adducing any evidence on behalf of the defence. If he answers in the affirmative, he may address the court for the purposes of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence. The presiding officer must also ask the accused whether he himself intends giving evidence on behalf of the defence. If the accused answers in the affirmative, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence. If the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the conduct of the accused as may be reasonable in the circumstances. The accused may then examine any other witness for the defence and adduce such evidence on behalf of the defence as may be admissible.

From the case law it is clear that an established practice has evolved that presiding officers must inform accused persons of the procedural rights at the close of the case for the prosecution.[110] Not much guidance as to the specific form of the explanation is however found in the case law.

In *R v Sibia*[111] Schreiner JA stated the following:

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

109 Steytler (fn 76 above) 145.
110 This practise became established long before the coming into operation of the interim Constitution and the Constitution.
111 1947 (2) SA 50 (A) 54.

be asked both whether he wishes to give evidence himself and, separately, whether he wishes to call any other witnesses."

The court referred to the case of *R v Read,*[112] where Tindall J stated, that, it was desirable for presiding officers in every case to ask the accused expressly whether he desires to give evidence himself under oath or wishes to call witnesses. The court held that it had become established practice to explain these rights and that this practice should be maintained without relaxation.[113]

The explanation of these rights should be sufficiently recorded. In *R v Nqubuka*[114] the magistrate noted the following on the record:

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

The court commented that there is no note in the record that the magistrate warned or informed the appellant of the courses which are open to him at the close of the case for the prosecution, in regard to the question of whether he should give evidence under oath, or merely make a statement from the dock not subject to cross-examination. According to the court, it is the duty of a magistrate to give such explanation to an accused person of his position, and that it is desirable that the fact that such explanation had been given, should be noted on record.

In reasons requested for the conviction, the magistrate advanced that the accused called no witnesses and gave no evidence. The magistrate stated that it is generally explained to all undefended accused through the interpreter about calling witnesses and giving evidence under oath, as well as the value thereof compared to an unsworn statement.[115] The court, however, found the reasons of the magistrate unacceptable and set the proceedings aside, ordering that the matter be re-tried before a different magistrate.[116] In *S v Modiba*[117] it was held that the explanation of the rights of an accused ought to appear on the record with sufficient particularity to enable the court of review or appeal to make a judgment on the adequacy of the explanation.

As to the content of the explanation, it was held In *S v Vezi*[118] (the court referring to *Sibia's*[119] case), that practice requires that an accused who is unrepresented at his trial should be afforded an explanation of the courses open to him at the close of the prosecution case, namely that he may give evidence on oath or make an unsworn statement from the dock, that if he decided upon the latter course he may not be cross-examined nor questioned by the court. As to the explanation of these two courses the court added that a third course is available to an accused, namely to remain silent if he so wishes.

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112 1924 TPD 718.
113 55.
114 1950 (2) SA 363 (T) 364.
115 365.
116 365.
117 1991 (2) SACR 286 (T) 286.
118 1963 (1) SA 9 (N) 11C-D and G-H.
119 *Supra*.

In the more recent decision of *S v Motaung,*[120] it was held as imperative that the rights of an accused in terms of section 151 of the Criminal Procedure Act, in respect of the adducing of evidence on behalf of the defence, be explained by the magistrate. Not only should this be done, but the magistrate should see to it that the fact is properly recorded. This is a material part of the proceedings and cannot be omitted from the record.

The failure of a presiding officer to adequately explain the rights of an accused person, may constitute an irregularity serious enough to set aside a conviction.[121] Regarding the use of standard or roneod forms, the courts have held the use of these forms as not irregular, as long as they contain all the relevant information that needs to be given to an accused.

In *S v Makhubo,*[122] a roneod form that was used by the magistrate was found to be inadequate, in that it did not contain an explanation that the failure to testify under oath may be to the detriment of the accused.[123] The court held that the continued use of the form be ceased, alternatively that the form be altered.[124] In *S v Pretorius,*[125] the court recommended that, in principle, there was nothing wrong with the use of roneod forms, as it limits the amount of writing. Care should however be taken that, undefended accused persons are informed properly and fully regarding the choices they have, as well as the consequences and implications the different choices have. The court pointed out that often during a review, it is noticed that the failure of an accused to testify may be ascribed to the fact that an accused "had finished talking" during his explanation of plea or during cross-examination of the state witnesses. Often in such cases there was only a single state witness, and if the accused had merely repeated his explanation of plea under oath, a conviction would not have followed.

The court pointed out that it could not give a general opinion regarding the use of standard forms, but emphasised that it remains the duty of the presiding officer to see to it that the undefended accused properly understands his rights. This function should be exercised with patience, so that justice is not only done, but also seen to be done.[126]

According to case law, a further procedural explanation (and choice) should be explained to an undefended accused at the close of the case for the prosecution. This explanation must direct the mind of the accused to the fact that he may apply for his discharge, at the close of the case for the prosecution in terms of section 174 of the Criminal Procedure Act. In terms of this section, if at the close of the case for the prosecution at any trial, the court is of the opinion that there is no *prima facie* evidence that the accused committed the

120 1980 (4) SA 131 (T) 133A.
121 *R v Parmanand* 1954 (3) SA 833 (A).
122 1990 (2) SACR 321 (O).
123 Compare in this regard *S v Mahooa* 1991 (1) SACR 261 (T) at 265*b* where it was held that an accused should be informed that if he declines to testify, an adverse inference may be made against him.
124 322.
125 1990 (2) SACR 519 (O) 521*i* -522*a*.
126 522*b*.

offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

A presiding officer should not phrase this explanation in a way so as to invite an undefended accused to testify, when there is no need to do so. In *S v Zulu,*[127] the court on review set aside a conviction and sentence where it appeared that the accused, a black woman who was not legally trained, against whom there was not a shred of evidence at the end of the case for the prosecution, had had her rights explained to her in such a way that she was invited to enter the witness-box and thereby fill the gaps in the state's case. The court remarked that a mere setting out of the various procedural alternatives, without coupling it meaningfully to the case of the state, was no explanation of the rights of an accused. The purpose of the explanation was in fact to counteract the lack of skill of an accused.[128]

The above-mentioned case emphasises the duty of a presiding officer to assist an undefended accused. In *S v Amerika*[129] the court remarked as follows:

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

In order to achieve this duty, a presiding officer should act *mero motu* in some instance. In *S v Zimmerie en 'n Ander,*[130] it was held that a presiding officer should *mero motu* apply the provisions of section 174 where the accused is undefended. In the *Amerika*-case,[131] it was held that the magistrate should *mero motu* have discharged the accused. The court commented that the explanation of the rights of the accused *in casu* was a "meaningless exercise". The rights were expressed in language, "totally inappropriate to the situation when there was not one tittle of evidence against her". The court labelled the effort as "a tongue in cheek exercise calculated to inveigle the accused into going into the witness-box so that she could convict herself."[132]

Du Toit[133] comments that in order to ensure that the accused receives a fair trial, he should be informed by the presiding officer of these rights. He advances that the following guidelines should be considered:

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

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127 1990 (1) SA 655 (T).
128 664A-C.
129 1990 (2) SACR 485 (N).
130 1989 (3) SA 484 (C) 409C-D.
131 *Supra*.
132 At 484*j*-485*a*.
133 *op cit* (fn 63 above) at 22-3.

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

Kriegler[134] states that it is the duty of the presiding officer to guard against the helplessness of the undefended accused leading to injustice. Care should be taken that the accused is informed and understands his rights at each stage of the proceedings. The requisite degree of instruction will depend on the facts of each case.[135]

In the Port Elizabeth Magistrate's Court the following standard explanation is used:

"**EXPLANATION OF ACCUSED'S RIGHTS**

Accused, you have heard the evidence tendered by the State to prove the charge preferred against you. You now have the opportunity of putting your case before the court. You can do this by giving evidence yourself and by calling witnesses to give evidence on your behalf. Evidence is tendered under oath where after the prosecutor (and your co-accused) will have the right to cross-examine you. The court may also put questions to you. According to Section 151 you must first testify under oath, thereafter you may call witnesses, except if you can show good cause why your witness must testify before you. If you call witnesses, they may also be cross-examined by the prosecutor and the court may also put questions to them if deemed necessary. You are not compelled to give evidence or to call witnesses, but if you elect not to testify, which is your constitutional right to do so, the court must inform you that the consequence of remaining silent, is that the State's *prima facie* case that you committed the offence remains uncontested (*S v Brown* 1996 (2) SACR 49 (NC)).

Q. Do you understand this explanation?

A. _____

You are also informed that Section 112(1)(b) / Section 115 explanation, tendered together with your plea and the propositions advanced by you to the State witnesses have no probative or evidential value in you favour and if you want the court to take notice thereof you should confirm to under oath (*S v Dreyer* 1987 (2) SA 183 (NCD) and *S v Afrika* 1982 (3) SA 1066 (CPD))

Q. Do you understand these explanations?

A. _____

Q. What do you prefer to do?

1. Do you want to testify under oath?

   _____

2. Do you wish to call (a) witness(es)?

   _____

3. What is/are the names(s) of the witness(es)?

   _____"

This procedural explanation, once again, is complex and it contains different alternatives that an accused has to choose from. In addition it contains

134 Kriegler and Kruger (fn 72 above) 385.
135 *Ibid*.

legal concepts, such as "the State's *prima facie* case" and "no probative or evidential value", which if advanced, will not be easily understood. Steytler correctly points out that it is an unfamiliar and daunting task for undefended accused to present their defence, as they seldom understand the legal procedure and their role in it.[136]

3.5 The right to address the court on merits

Both the accused and the prosecution have the right to address the court on the merits of the case. In this regard, section 175 of the Criminal Procedure Act determines that after all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court. The prosecutor may reply on any matter of law, raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address.

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

Regarding the effect on a failure to explain this right, it was held in *R v Parmanand,*[137] that it constituted an irregularity to deprive an accused of the right to address the court.[138] In *S v Mabote and Another,*[139] this right was labelled as a fundamental principle of our criminal law. Failure to afford this opportunity, would result in the manifestation of a gross irregularity. In *S v Kwinda,*[140] Liebenberg J held that the failure to afford an accused the opportunity to address the court before judgment is a gross irregularity which will result in the setting aside of the proceedings, unless it is clear that the accused was not prejudiced thereby or that the failure was due to his own fault or if it is clear that he had waived his right to address the court. The presiding officer must afford the accused the opportunity to address the court, by enquiring from him whether he wishes to avail himself of his right to do so and must record the response of the accused. *In casu*, the court held that there was nothing on the record to show that the accused had not been prejudiced by this irregularity or that the omission had been due to his fault, or that he had waived his right to address the court. The proceedings were accordingly invalid.

This right forms part of the right to a fair trial. In *S v Zingilo,*[141] the court held that a failure to afford an accused this opportunity, would amount to a denial of the right to a fair trial as guaranteed by section 25(3) of the interim

136 Steytler (fn 76 above) 168.
137 *Supra* 839C.
138 Compare in this regard *S v Bresler* 1967 (2) SA 451 (A) 455H.
139 1983 (1) SA 745 (O).
140 1993 (2) SACR 408 (V) 411*e-f*.
141 1995 (9) BCLR 1186 (O) 1189G.

Constitution. *In casu*, the conviction was set aside on review, without regard to the question of whether but for the irregularity the accused would inevitably have been convicted.

The order of the address on the merits is important. Didcott J was of the view in *S v Dlamini,*[142] that section 175(1) of the Criminal Procedure Act and the *audi alteram partem* rule require, that, at the conclusion of the evidence, the prosecutor addresses the court before the accused. *In casu* the accused addressed the court before the prosecutor. The court held that an irregularity was committed.

Steytler points out that the explanation of this right should be more than asking the accused whether he has anything to say before judgment, as this will not explain the purpose of the address.[143] In most cases, such an explanation will result in a repetition of evidence already given or silence, and it would serve no purpose to attempt to transform the accused into a trained lawyer.[144]

3.6 The right to address the court before sentence

The competency of the court to receive evidence on sentence is contained in section 274 of the Criminal Procedure Act. From this section, it is clear that the accused has a choice whether to address the court on evidence received by it prior to sentence. The section does not clearly stipulate whether the accused has a right to testify or call witnesses before the passing of sentence.

In *S v Bresler,*[145] it was held, that, it is a fundamental principle in both civil and criminal matters that every litigant should be given a fair opportunity of addressing the court, either himself or through his representative. The mere failure on the part of the court to hear argument on behalf of a party, would not necessarily constitute a fatal irregularity. The court furthermore held, that, in terms of the 1955 Criminal Procedure Act,[146] there was no legal right for an accused to address the court in mitigation of sentence, but that there was, nevertheless, a rule of practice whereby the defence is generally afforded an opportunity to address in mitigation before sentence is passed.[147] This statement of the law applicable, was approved and confirmed in *S v Booysen and Another*.[148]

This right developed as a rule of practice. In *S v Leso and Another,*[149] it was held, that, although an accused does not have a statutory right to address the court before sentence, a mandatory rule of practice had developed in this regard. The mere fact that a convicted person, was not afforded an opportu-

142 1992 (2) SACR 533 (N) at 534*b-d*.
143 Steytler (fn 76 above) 180.
144 Ibid.
145 *Supra* at 355B-G.
146 Act 56 of 1955.
147 456D-E.
148 1974 (1) SA 333 (C) 334H.
149 1975 (3) SA 694 (A) 695G-H.

nity to address the court prior to sentencing, albeit *per incuriam*, will amount to an irregularity.

As to the method of proving facts in mitigation, the court pointed out in *R v Shuba,*[150] that it is desirable that facts in mitigation should be proved in the ordinary manner and that the State should be in a position to cross-examine, if necessary.

In *S v Taylor,*[151] the following guidelines were laid down regarding the duties of a court when an undefended accused qualifies for the imposition of a compulsory sentence:

> "... when sentencing an undefended convicted person who qualifies for a compulsory sentence, the trial court must –
>
> (a) inform the convicted person that he is entitled to lay before the court evidence of circumstances which if accepted may persuade the court to impose a lighter sentence than the compulsory sentence;
>
> (b) ask the convicted person whether he wishes to lead such evidence, or make submissions, to persuade the court to impose such lighter sentence;
>
> (c) whether the convicted person leads evidence and/or makes submissions or not, *mero motu* consider whether mitigating circumstances exist, and if it finds that they do exist in the particular case; and where the convicted person does not lead evidence or make submissions, question him in order to elicit whether such circumstances exist;
>
> (d) in all cases, record in the record of proceedings whether or not in its opinion such circumstances exist, and if it finds that they do exist, state what they are. It is not sufficient, in my view, only to enter the circumstances upon the record if and when such circumstances have been found to exist. The court should record that it has considered the matter ..."

In the case of undefended accused persons it was decided in *S v Sithole,*[152] that, a duty rests on presiding officers to gain evidence before sentence, should none emanate from the accused. The court rightly pointed out that these mitigating factors could be obtained by asking a few pertinent questions. The position under the 1955 Criminal Procedure Act was changed with the implementation of the current Criminal Procedure Act. In *S v Louw,*[153] it was stated that section 247(2) of the Criminal Procedure Act, makes it imperative for the court to afford the accused an opportunity to address it before sentence. The rule of practice thus became a right.

There is a duty on a presiding officer to try and elicit such extenuating circumstances as he can from an undefended accused. This duty should however not be misused to obtain aggravating circumstances, as this would not amount to just and fair treatment.[154]

In *S v Masina and Others,*[155] the accused refused to participate in the proceedings. Application was made by counsel for the defence, on behalf of the

150 1958 (3) SA 844 (C) 845A.
151 1972 (2) SA 307 (C) 312C-F.
152 1969 (4) SA 286 (N) 287G-H and 288E-G.
153 1978 (1) SA 459 (C) 460A-B.
154 Compare *S v Kiewiets* 1977 (3) SA 882 (O) 883.
155 1990 (1) SACR 390 (T) 391*a-f*.

family of the accused, to present evidence in extenuation on behalf of the family. The State alleged that there is no authority for such a procedure to be adopted. The court however held, that, it would be in the interests of justice that both sides be heard. The family of the accused had an interest based on blood relationship to the accused and the evidence was of vital importance. The court accordingly allowed the evidence to be led.

In the *May*[156] judgment, the appellant advanced that the court failed to explain to him his right to adduce evidence of his personal circumstances before sentence was passed. Lewis JA held, that, this complaint relates in essence to whether the appellant was prejudiced because he did not have a legal representative.[157] There was nothing on the record to show that the magistrate explained before sentence was passed, that the appellant was entitled to give evidence, or to lead witnesses, on his personal circumstances which might have been taken as mitigating factors.[158] The record however indicates that the magistrate explained the following to the appellant: That the appellant knows the procedure regarding the issue of sentence; that the appellant may place mitigating factors before the court, should he so wish and that he can testify or call witnesses.

The appellant responded to this by indicating that he wanted to appeal, but the magistrate explained that he could do so once sentencing had been passed. The appellant's response was he had nothing to say.[159] Lewis AJ, however, held that the absence of legal representation, and the failure to adduce evidence in mitigation, did not result in prejudice to the appellant.[160]

As to the way in which evidence before sentence should be placed before the court, Du Toit[161] sets out the present position of our law as follows:

It is highly desirable that mitigating or aggravating factors are placed before the court through evidence under oath, as such evidence can be tested in cross-examination and will place the court in a position to make a decision based on facts; In order to receive such evidence the opportunity will always be afforded the parties to call witnesses and lead evidence; Mitigating or aggravating facts can also be placed before the court from the bar or by way of *ex parte* statements, but will not weigh more than mere argument, unless admitted by the other party; When admitted, the statements will be afforded the same weight as accepted evidence under oath; Where the court doubts *ex parte* statements, the party will be informed accordingly, and afforded the opportunity to present evidence; and in *S v Martin*[162] it was decided that in determining sentence, particularly for more serious crimes, no question to the accused is more important than "why did you do it?"

156 fn 46 supra.
157 34.
158 34.
159 34.
160 35.
161 *op cit* (fn 63 above) at 28-2.
162 1996 (1) SACR 172 (W).

An accused person therefore assumes some risk by not testifying in that no answer to that question would then be forthcoming and in the absence of an answer, the Court may deduce that the accused acted without reason or remorse, thereby leading to a harsher sentence than what may have been appropriate.

No specific standard form, for the purposes of section 274, is used in the Port Elizabeth Magistrate's Courts. However in the standard forms with the pleas of guilty in terms of section 112 subsections (a) and (b) of the Criminal Procedure Act, the following relevant part appears:

"Rights explained to the accused. He understands.

Accused elects to/not to testify under oath.

Accused calls/does not wish to call witnesses.

Accused states in mitigation of sentence: _____"

It is clear that this procedural explanation is not particularly involved. As was set out above, it is of the utmost importance that presiding officers should explain to an undefended accused the importance of placing factors in mitigation of sentence before the court. In this respect the standard explanation is not acceptable.

In the next section some conclusions and recommendations will be made.

4 CONCLUSIONS AND RECOMMENDATIONS

As has been pointed out in paragraph 1 above, there are still a large number of undefended accused appearing in our courts. Presiding officers are tasked with affording procedural explanations to undefended accused. It has also been pointed out that some of these procedural explanations are difficult for lay persons to understand. Some of the explanations contain various procedural choices which will have important consequences on the trial and the eventual outcome thereof. It is also evident that when an undefended accused makes a procedural choice, this decision must be an informed decision.

It is submitted that the following will improve the position of undefended accused and improve the intelligibility of procedural explanations:

- It should at the outset, in general, be appreciated that the criminal trial process is in essence a communicative process. If this fact is accepted, a climate will be created wherein suitable remedial action may be implemented. It must be respected that procedural explanations contain important and difficult concepts that must be conveyed to an undefended accused.
- If it is appreciated that the problem at hand is not strictly speaking a legal problem, but indeed a communication problem, it will more readily be accepted that an interdisciplinary approach to solving the problem should be followed. Experts, other than lawyers, should be consulted to assist in solving the problems relating to the intelligibility of procedural explanations.
- Magistrates, prosecutors and interpreters, should receive training in the communicative process employed in a criminal trial. It is submitted that

lawyers, too readily, assume that lay persons understand the criminal trial process, as they themselves are familiar with the process.

- A uniform set of procedural explanations should be compiled. This uniform set should be available in all the official languages. In drafting the uniform set, extensive input should be given by experts, other than lawyers, such as language practitioners, linguists and psycholinguists. This will ensure, that, what is contained in the uniform set is properly understood by undefended accused. Another advantage of such a uniform set is that all the necessary information that must be conveyed to the undefended accused will be contained therein.
- Although state resources are stretched, the ideal position would be to afford legal aid to all accused who cannot afford to pay for it. Any criminal conviction has adverse consequences for an accused, even if that accused is not sentenced to imprisonment. From the Court Coverage Project it emerged that 77% of accused persons whose matters are finalized at their first appearance in court are undefended. This is, with respect, an alarming statistic, as these undefended accused in all probability pleaded guilty to the charges against them. If they were legally represented, the matter would in all probability have been postponed at the request of the defence counsel in order to consult with the accused.

The remarks of Didcott J in *Vermaas; S v Du Plessis*[163] are apt to conclude with:

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

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