

**PRE-TRIAL PUBLICITY:
FREE SPEECH VERSUS FAIR TRIAL**

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TABLE OF CONTENTS

Declaration	v
Abstract	vi
Acknowledgments	vii
Keywords	viii
Acronyms and Abbreviations	ix
CHAPTER ONE: RESEARCH FRAMEWORK	
1.1 Introduction	1
1.2 Problem Statement	3
1.3 Research Question	4
1.4 Literature Review	5
1.5 Outline Of Chapters	5
CHAPTER TWO: FREEDOM OF EXPRESSION	
2.1 Introduction	7
2.2 South African Law	7
2.3 International Law	10
2.3.1 Madrid Principles	10
2.3.2 Summation	12
2.4 Rationale of Freedom of Expression	13
2.4.1 Freedom of Expression and Democracy	14
2.4.2 Truth and the Marketplace of Ideas	16
2.4.3 Self-fulfilment and Audience Autonomy	17
2.5 Rights and Obligations of the Media	17
2.6 Trial by Media	19
2.7 Trial by Media and Industrial Journalism	22
2.8 Conclusion	24
CHAPTER THREE: RIGHT TO A FAIR TRIAL	
3.1 Introduction	26
3.2 South African Law	26
3.3 International Law	32

3.4	South African Law versus International Law	36
3.5	The Purpose of the Right to a Fair Trial	38
3.6	The Nature of the Right to a Fair Trial	41
3.7	Presumption of Innocence	45
3.8	Right to a Public Trial	50
3.9	Right to a Trial before an Impartial and Independent Court	56
3.10	Conclusion	62
CHAPTER FOUR: STAY OF CRIMINAL PROCEEDINGS		
4.1	Introduction	64
4.2	South African Law	64
4.3	Foreign Law	68
4.4	The Cases of Brown and Banana	70
4.5	Conclusion	74
CHAPTER FIVE: PRIOR RESTRAINT AND THE <i>SUB JUDICE</i> RULE		
5.1	Introduction	76
5.2	Prior Restraint	77
5.3	The <i>Sub Judice</i> Rule	83
5.4	Conclusion	87
CHAPTER SIX: CONCLUSION		
6.1	Closing Remarks	89
6.2	Recommendations	90
BIBLIOGRAPHY		93

DECLARATION

I, **Shawn Marvin Flowers**, declare that **Pre-trial Publicity: Free Speech versus Fair Trial** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: _____
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Prof Raymond Koen

ABSTRACT

News coverage of high profile criminal matters has increased in South Africa. Such matters are of public concern, as every citizen has a right to receive and impart information and to debate openly and frankly matters which are of public concern, including matters before the courts. The legitimacy of the courts is dependent on robust media reportage and public scrutiny of judicial matters which such reportage stimulates. However, criminal trials of high profile accused persons such as Oscar Pistorius, Shrien Dewani and J Arthur Brown, turn easily into a show with strong entertainment value, giving the media strong profitmaking reasons to cover it. In their pursuit of profit and in seeking to satisfy the curiosity of their readers, listeners or viewers, the media regularly resort to trial by media or adverse pre-trial publicity. Trial by media is nothing more than commercially motivated expression which does not warrant constitutional protection.

At the receiving end of such coverage are accused persons. Public censure of crime and of accused persons which follows trial by media should not be imposed on the innocent. The right to a fair trial requires that an accused be treated fairly from the inception of the criminal process, from which point the person suspected of committing the crime in question is considered innocent. Any pre-trial process which implies that the accused is guilty, including any such process influenced by media reports surrounding criminal offences, violates the presumption of innocence.

Despite the availability of remedies, the media in South Africa usually are not held to account for their actions and persist with adverse, biased and irresponsible pre-trial reporting. Courts have shown a tendency to protect the media in these cases, despite the effect of such reporting on the judicial process, the administration of justice and the fair trial rights of accused persons. The reason for this is usually the hesitation on the part of judges to recognise their susceptibility to extraneous matters. Judges should not be placed in a position where their independence and impartiality are questioned as a result of media sensationalism. Where the media create mistrust in the integrity of the judiciary, the rule of law is in peril.

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KEYWORDS

Adverse Pre-Trial Publicity

Contempt of court *ex facie curiae*

Freedom of Expression

Impartiality

Judicial Independence

Prior Restraint

Right to a Fair Trial

Stay of Criminal Proceedings

Sub Judice Rule

Trial by Media

ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
African Principles and Guidelines	Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)
Bangalore Principles	Bangalore Principles of Judicial Conduct (2002)
CC	Constitutional Court
ICCPR	International Covenant on Civil and Political Rights
Madrid Principles	Madrid Principles on the Relationship between the Media and Judicial Independence (1994)
NPA	National Prosecuting Authority
SCA	Supreme Court of Appeal
Siracusa Principles	Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Basic Principles	United Nations Basic Principles on the Independence of the Judiciary (1985)

CHAPTER ONE

RESEARCH FRAMEWORK

1.1 Introduction

The media coverage of the criminal trials of Oscar Pistorius, Shrien Dewani and J Arthur Brown illustrated well the role of the media in pre-trial reporting. The case of Oscar Pistorius, in particular, attracted enormous media attention from the outset and elicited public outrage, which included protest action at the court where he appeared. The facts and circumstances of the case, as well as the forensic investigations and Pistorius's arrest, were covered extensively in both the electronic and print media prior to his bail application and subsequent trial. Such coverage included stories on Pistorius's sporting achievements and sensationalised his participation in any social activities after the death of his girlfriend. Media reports tended to speak also to the character of Pistorius, reflecting on his supposed temper outbursts as perceived by friends. These reports affected Pistorius's public image significantly and led to the publication of various views pertaining to his guilt prior to the actual trial.

Further, the media were allowed complete coverage of the Pistorius trial as it unfolded in court. This was accompanied by twenty-four hour news programming, which covered discussions on evidence, strategy and opinions in all media forms on every trial day. This coverage spawned further views pertaining to his guilt during the trial. Pistorius was not given the benefit of being presumed innocent until proved guilty and this was due largely to the media attention given to his trial.

John J Smyth QC, Director of the Justice Alliance of South Africa, felt it necessary to declare that:

Trial by media is always an antithesis of the rule of law. It is difficult to escape the conclusion that the licence permitted to the media in the Pistorius case is hardly likely to encourage the English courts to extradite Dewani.¹

1 *Legalbrief Today* (28 February 2013).

The murder of Anni Dewani also attracted extensive media coverage. Murder accused, Shrien Dewani, opposed the extradition application brought by South African authorities. One of the grounds upon which he relied was that he would not receive a fair trial in South Africa. The extensive media coverage detailing Shrien Dewani's alleged involvement contributed greatly to his opposing the extradition application. This led to lengthy court battles to have him extradited to and face trial in South Africa. The then Police Commissioner, General Bheki Cele, was quoted by the media at the time as saying:

A monkey came all the way from London to have his wife murdered here. Shrien thought we, South Africans, were stupid when he came all the way to kill his wife in our country. He lied to himself.²

Cele had apportioned guilt to Dewani prior to any formal hearing of the matter. It was views such as these, reflected in the local and international media, which Dewani's legal team cited as the pre-trial mentality which may influence the independence and objectivity of the judiciary and the fair trial rights of their client. Dewani eventually stood trial and was acquitted, which prompted public questioning of the objectivity of the presiding judge. The general public, influenced by the media coverage of the matter, already had convicted Dewani and expected the judge to do likewise.

The corruption and fraud case of J Arthur Brown also enjoyed extensive media attention. The media launched scathing attacks on Brown during their pre-trial coverage of his case. Whilst proclaiming his innocence, Brown alleged that the media portrayal had resulted in the general public, some judicial officers and certain lawyers viewing him as a fraudster and thief who stole billions from widows and orphans. The media created a perception that there already had been a verdict on the allegations against him, a fact confirmed by Henny J in *Brown*.³

The cases of Pistorius, Dewani and Brown enjoyed extensive media coverage and, more often than not, depending on the reporting source, the accused were at the receiving end of adverse pre-trial publicity. Such publicity tends to diminish the integrity of the accused and may

2 *The Telegraph* (9 December 2010).

3 *Brown v National Director of Public Prosecutions and Others* (2012) 1 All SA 61 (WCC) 76.

affect his ability to defend himself in a trial arena which may have become tainted by such reporting.

1.2 Problem Statement

Freedom of expression is not a right of the media as such, but a right of every person to hear, form and express opinions and views freely on a wide range of matters.⁴ Therefore, as the primary source of information and news, it is the duty of the media to provide citizens both with information and a platform for the exchange of ideas which is crucial to the development of a democratic culture.⁵ The media must disseminate information and ideas with strength, courage, integrity and responsibility.⁶ This is their constitutional obligation, and the media are protected in the performance of their obligations to the broader society by the provisions of section 16 of the Constitution, which guarantees the right to freedom of expression. It is crucial, therefore, that the media disseminate information and news in the public interest.

Irresponsible, inaccurate and biased pre-trial publicity presents or may present a problem for accused persons in South Africa. The cases of Pistorius, Dewani and Brown are key examples of the pre-trial publicity to which high-profile matters are subjected. Such publicity has the potential to undermine the administration of justice, the rights of an accused and the interests of the victims of crime.⁷

However, the argument by an accused that he or she will not receive a fair trial due to adverse pre-trial publicity or an application by an accused to restrain the media is unlikely to succeed under current South African law.⁸ In *Brown*, the court held that although the pre-trial publicity was adverse to the accused and created the impression with the public that there already had been a verdict in the matter, the applicant was unable to prove that the adverse media coverage led to any trial related prejudices. The court's reasoning was that judges are

4 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) 535.

5 *Khumalo and others v Holomisa* 2002 (5) SA 401(CC) 417.

6 *Khumalo v Holomisa* 417.

7 Law Commission of India (2006: 15).

8 See *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* (2007) 3 All SA 318 (SCA) and *Brown v National Director of Public Prosecutions and Others* (2012) 1 All SA 61 (WCC).

unlikely to be influenced by extraneous matters and will decide issues only on the facts before them. In *Midi Television*, the court rejected the argument by the Director of Public Prosecutions (DPP) that the broadcasting of a documentary relating to a pending criminal trial would prejudice the administration of justice.⁹ According to both De Vos¹⁰ and Stevenson,¹¹ *Midi Television* effectively put an end to the *sub judice* rule in South African law.¹² They view the case as a victory for press freedom.

It is evident from the strict tests laid down in *Midi Television* and *Brown* that our courts are reluctant to limit freedom of expression. This is because the right to freedom of expression is not only a media right but also a general public right to information about court cases. However, the media, in providing this vital information to the public, use this platform to produce adverse pre-trial reporting and trial by media, knowing that they likely will be protected by the courts. It is a case, therefore, of the courts not seeing the proverbial fox in the hen house.

1.3 Research Questions

Is the right to freedom of expression unduly favoured by the courts at the expense of the right to a fair trial? Do the media exploit the right to freedom of expression to produce adverse pre-trial publicity and conduct trial by media? And do the media rely upon their excesses being indulged by the courts who consider freedom of expression to include the right of the general public to receive information? These questions will be assessed by considering, firstly, the obligations of the media under section 16 of the Constitution; secondly, the relationship between adverse pre-trial publicity and speech in the public interest; and, lastly, the efficacy of the current remedies available to accused persons when adverse pre-trial publicity threatens the right to a fair trial.

9 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* (2007) 3 All SA 318 (SCA) 325. See further §5.2 below.

10 *Constitutionally Speaking* (18 February 2013).

11 Stevenson (2007).

12 *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* 2007 (9) BCLR 958 (SCA).

1.4 Literature Review

There is little academic writing in South Africa which deals with the limitation of the right to freedom of expression in order to protect fair trial rights. The writing which is available tends to emphasise the right of the press to freedom of expression and to promote the importance of a free press. For example, as noted above, Stevenson welcomes the decision in the *Midi Television* case and concludes that it was a victory for press freedom and freedom of expression.¹³ So, too, does De Vos.¹⁴

Swanepoel's is the only academic essay supporting the view that freedom of the press should be limited and that the administration of justice and the right of the accused to a fair trial should be protected. She argues in favour of the *sub judice* rule "as a mechanism to limit the prejudgment of issues in pending or imminent criminal litigation, which when offended may constitute contempt of court *ex facie curiae*".¹⁵ She considers that the *sub judice* rule allows for protection of the authority of the courts, as required by sections 7, 165(3) and 165(4) of the Constitution, and for the protection of the right to a fair trial.

Vast international academic writing exists on this topic.¹⁶ Here the focal argument is that freedom of speech is not an absolute right, and should be limited when it threatens the right of an accused to a fair trial or when it threatens the administration of justice. Some of these writings will be referred to later.

1.5 Outline of Remaining Chapters

Chapter Two will discuss the rights and obligations of the media in terms of section 16 of the Constitution. The chapter will assess whether adverse pre-trial publicity can be deemed information in the public interest. It will consider also whether the media are failing in their constitutional obligations when they resort to publicity purely in their own interests. This will be done with reference to the pecuniary interest of the media in pre-trial publicity.

13 Stevenson (2007).

14 *Constitutionally Speaking* (18 February 2013).

15 Swanepoel (2006: 3).

16 See, for example, Battaglia (2012), Duncan (2008), Freedman & Burke (1996), Hudon (1966), Rollings & Blascovich (1977), Brusckhe & Loges (2003), and Leaffer (2007).

Chapter Three will discuss the right of an accused to a fair trial and will highlight specific rights in section 35 of the Constitution which may be affected by adverse pre-trial publicity. It will assess the effect of pre-trial publicity on the integrity of an accused and on his ability to defend himself. It will examine also whether the negative impact of pre-trial publicity may affect the accused's trust in the fairness of the trial. Reference will be made to South African and foreign case law.

Chapters Four and Five will examine the mechanisms available to an accused who may wish to protect his fair trial rights against pre-trial publicity or limit the negative impact of media coverage. **Chapter 4** will focus on applications for stay of criminal prosecution as a possible mechanism against adverse pre-trial publicity. The chapter will explore the approach of the courts to such applications in the *Banana*¹⁷ and *Brown* cases. The *Shaik* cases will be considered also.¹⁸ In **Chapter 5**, prior restraint orders and the *sub judice* rule will be discussed in order to assess whether they constitute justifiable and proportional limits upon freedom of speech. The *Midi Television* case will be analysed critically.

Chapter 6 will conclude the study and suggest an alternative approach, with the *sub judice* rule at its core. The chapter will consider a statutory enactment to ensure that the fair trial rights of an accused are not sacrificed at the altar of freedom of express.

17 *Banana v Attorney General* (1998) JOL 2265 (ZS).

18 *S v Shaik and Others* [2005] 3 All SA 211 (D) and *Shaik v The State* (2007) 2 All SA 9 (SCA).

CHAPTER TWO

FREEDOM OF EXPRESSION

2.1 Introduction

Responsible journalism is supported by the Constitution and should be endorsed and encouraged by society and government institutions, including the judiciary.¹

This chapter deals with the right to freedom of expression. The focus of the chapter is on the rights and obligations of the media when they report on pending criminal cases, as these cases often bring into conflict the right to freedom of expression and the right to a fair trial. The chapter will reflect also on the pecuniary interest of the media in pre-trial reporting. Their coverage of several high profile criminal matters will be analysed in an effort to determine whether the information disseminated is information in the public interest or whether said coverage is motivated primarily by profit, with the information being provided for entertainment purposes.

An attempt will be made also to ascertain whether or not adverse pre-trial publicity or trial by media qualifies as responsible journalism which should be protected by the Constitution, especially when it is on a collision course with the fair trial rights of an accused or the administration of justice.

2.2 South African Law

In South Africa freedom of expression is a fundamental right guaranteed by the section 16 of the Constitution. The section reads:

- (1) Everyone has the right to freedom of expression, which includes—
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research
- (2) The right in subsection (1) does not extend to—
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or

1 Stevenson (2007: 618).

- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

As is evident, section 16 is divided into two parts.² Section 16(1) deals with expression which is protected by the Constitution while section 16(2) deals with expression that is excluded from constitutional protection.

Pre-trial publicity is the coverage by the media of pending criminal trials. Coverage starts within hours of the arrest of suspects and will continue throughout the investigation until the accused appears and pleads in a court of law. It is expression protected by section 16(1)(a) & (b) of the Constitution. The media are the bearers of this right in terms of section 16(1)(a). According to section 16(1)(b), the media are free to disseminate news on pending criminal trials to the public which, accordingly, has a right to receive such news.

The question is whether adverse pre-trial publicity and trial by media are speech which is protected by section 16(1) or whether they constitute speech which is excluded from constitutional protection by section 16(2). According to Milo, Penfold & Stein, section 16(2) is definitional in the sense that:

Certain expression does not deserve constitutional protection because, among other things, the expression has the potential to impinge adversely on the dignity of others and cause grave harm.³

Adverse pre-trial publicity could harm the rights of an accused. The dignity of an accused could be harmed also, in that the consequences of adverse pre-trial publicity for its victims often include the destruction of private lives and of innocence.⁴ Further, such publicity could lead to threats of physical harm once news of the arrest of a suspect is disseminated to the public.

On 9 July 2014, a pastor was arrested for the suspected killing and dismembering of the body of a four-year-old boy in Pongola, KwaZulu-Natal.⁵ The community was outraged and some of its members proceeded to torch the church and house of the suspect. They demanded also that the suspect be released to them. Fifteen community members were arrested for public violence after they set fire to the courthouse. Although the suspect was released later

2 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC) 308.

3 Milo, Penfold & Stein (2013: 6).

4 Greer & McLaughlin (2012: 399).

5 *The Times Live* (9 July 2014).

without charge and another suspect was arrested,⁶ it is such news coverage that put him at real risk of physical harm, even death. The suspect was condemned even before being tried by a court of law. The coverage detailed the circumstances of the murder, which included evidence found at the supposed scene of the crime. Anybody reading this news story could conclude easily that the pastor was the perpetrator of the crime. Is this the kind of speech which should be excluded from constitutional protection?

The news coverage itself does not incite violence, but describing the circumstances of the offence in such a manner that the lay public inevitably concludes that the suspect is guilty may lead to violence which could see the community kill an innocent man. It could be argued, therefore, that speech such as this could incite violence and should be denounced under section 16(2) of the Constitution. However, it is doubtful that this argument will succeed as it is expression which is not identified specifically by section 16(2). Potential incitement of imminent violence is not the same as actual incitement of imminent violence and the courts will be loath to accept that it is.

In *Islamic Unity*, the court held that any expression that is not specifically excluded under section 16(2) enjoys protection.⁷ Even expression such as child pornography⁸ or nude dancing⁹ that does not serve any of the values underlying the protection of freedom of expression, *prima facie*, is protected.¹⁰ Thus, it was held in *De Reuck* that all and any expression, save for that which is clearly excluded under section 16(2), is protected¹¹ and any restriction must be justified under the section 36 limitations enquiry.¹² In *Phillips*, the lower court held that expressive activity, such as nude dancing, *prima facie* is protected no matter how repulsive, degrading, offensive or unacceptable society might consider it to be.¹³ Subsequently, the Constitutional Court put the judgment of the lower court into context, holding that the right to freedom of expression is not absolute and that it may be limited by a law of general application

6 *News 24* (21 July 2014).

7 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 309.

8 *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC).

9 *Phillips and Another v Director of Public Prosecutions, WLD, and Others* 2003 (4) BCLR 357 (CC) 363.

10 Milo, Penfold & Stein (2013: 7).

11 *De Reuck v Director of Public Prosecutions* 429-430.

12 *De Reuck v Director of Public Prosecutions* 430.

13 *Phillips and Another v Director of Public Prosecutions (WLD) and Others* 2002 (2) SACR 375 (W) 379.

that complies with section 36 of the Constitution.¹⁴ In other words, expression that is repulsive, degrading, offensive or unacceptable may be limited to the extent that the limitation is justifiable in terms of section 36.¹⁵

Adverse pre-trial publicity or trial by media constitutes a form of expression that *prima facie* is protected by section 16(1) as it is not excluded expressly by section 16(2). It is subject, however, to limitation in terms of section 36 of the Constitution.

2.3 International Law

Freedom of expression is recognised in international law as a fundamental right and is protected by various international and regional conventions, charters and covenants. For example, Article 19 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of opinion and expression. Freedom of expression is protected also by Article 9 of the African Charter on Human and People's Rights (ACHPR). In other words, adverse pre-trial publicity and trial by media fall within the forms of expression which enjoy protection under international law.

However, under international law, as under South African law, freedom of expression is not absolute. It is a right that may be limited. Thus, Article 19(3) of the ICCPR allows for restrictions which are¹⁶ provided by law and are necessary. Also, article 9(2) of the ACHPR requires that the right to express and disseminate opinions be exercised within the law. What is more, the meaning and extent of the right to freedom of expression in international law should be comprehended with reference to the Madrid Principles on the Relationship between the Media and Judicial Independence.

2.3.1 Madrid Principles

In 1994, a group of 40 legal experts and representatives of the media met in Madrid, Spain. The purpose of the meeting, firstly, was to examine the relationship between the media and judicial

14 *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC) 364.

15 *Phillips v Director of Public Prosecutions* 2003 (3) SA 345 (CC) 364.

16 Article 19(3) of the ICCPR and Article 9(2) of the ACHPR.

independence and, secondly, to formulate principles addressing the relationship between freedom of expression and judicial independence.

The preamble to the Principles states that freedom of the media is important in a democratic society, that it is the responsibility of judges to recognise and give effect to freedom of the media, and that any restrictions on that freedom should be permitted only if they are authorised by the ICCPR and are specified in precise law. However, it was recognised by the participants that, in exercising this freedom, the media have an obligation to respect the rights of individuals and the independence of the judiciary.

The meeting formulated a Basic Principle as a minimum standard to govern the relationship between freedom of expression and judicial independence. This Basic Principle provides that:

- (1) Freedom of expression, including freedom of the media, is one of the essential foundations of a democratic society. It is the function and right of the media to gather and bring information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
- (2) This principle can be departed from only in the circumstances envisaged in the ICCPR, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.
- (3) The right to comment on the administration of justice shall not be subject to any special restrictions.

In relation to criminal proceedings, the Basic Principle may be limited, where necessary, to prevent serious prejudice to an accused and to prevent harm to or improper pressure being placed upon a witness, a member of a jury or a victim.¹⁷

Further, paragraph 2 of the Basic Principle provides for departures only in terms of section 38 of the Siracusa Principles, which stipulates that:

- All trials shall be public unless the Court determines in accordance with law that:
- (a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open court showing that the interest of private lives of the parties or their families or of juveniles so requires; or

17 Section 10 of the Madrid Principles.

- (b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order or national security in a democratic society.¹⁸

Overall, the Madrid Principles, as read with the Siracusa Principles, may be taken to establish a minimum international standard as regards the relationship between freedom of expression and the right to a fair trial.

2.3.2 Summation

Freedom of expression, including freedom of the press and the freedom to receive and impart information, is recognised in international law as essential for a democratic society. Belsey argues that only ethical journalism, that is, journalism which exhibits honesty, accuracy, truth, objectivity, fairness, balance and respect for the autonomy of ordinary people is part of the democratic process.¹⁹ Kelly opines that one of the roles of a free press in a democratic society is to analyse judicial performance and the exercise of judicial discretion, to be critical where appropriate, and to disseminate this analysis.²⁰

The media have a right to report, therefore, on pending criminal matters and the public has a right to receive such information to be able to appreciate and understand the rule of law in society.²¹ This includes coverage by the media of cases before, during and after trial. When providing such coverage, however, the media should avoid commentary which threatens judicial independence or violates the presumption of innocence.

Adverse pre-trial publicity or trial by media cannot be considered to be ethical journalism in Belsey's terms, as it challenges not only the independence of the judiciary but also could violate the presumption of innocence. In such cases, the information disseminated by the media and received by the public cannot be said to serve the values underlying freedom of expression. Unfounded criticism of the rule of law may ensue. Freedom of expression for the media is extensive but not absolute and therefore may be limited in circumstances where pre-trial publicity becomes unethical journalism.

18 See also Article 14(1) of the ICCPR.

19 Belsey (2014: 10).

20 Kelly (1995: 5).

21 Kelly (1995: 5).

2.4 Rationale of Freedom of Expression

According to Curry & De Waal, the interpretation of constitutional rights must be generous and purposive and must give expression to the underlying principles of the Constitution.²² In *Shabalala*, the Constitutional Court supported this view.²³ This approach to interpretation requires an assessment of the purpose of freedom of expression to establish whether said purpose articulates the underlying principles of the Constitution. Once this is established, the limits of the right to freedom of expression will be appreciated.²⁴ The values underlying the Constitution are summarised in *Shabalala* as follows:

The Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is “justifiable in an open and democratic society based on freedom and equality”. It is premised on a legal culture of accountability and transparency.²⁵

In a word, the Constitution provides the shift away from a past based on conflict, untold suffering and injustice to a future which is to be founded on the recognition of human rights.²⁶

The underlying core values of the Constitution are openness, transparency, accountability, democracy and the culture of universal human rights for all South Africans. The interpretation of the right to freedom of expression, therefore, must be purposive and should give effect to these constitutional values. Expression which does not articulate these values should not be protected constitutionally.

South Africa broke recently with a past where thought control, censorship and enforced conformity to governmental theories were the norm. The majority of the citizenry, including

22 Currie & De Waal (2005: 360). See also *S v Makwanyane* 1995 (3) SA 391 (CC) 403.

23 *Shabalala and others v Attorney-General, Transvaal, and another* 1996 (1) SA 725 (CC) 740.

24 Currie & De Waal (2005: 360).

25 *Shabalala v Attorney-General, Transvaal* 740.

26 *Shabalala v Attorney-General, Transvaal* 740.

the media, were not allowed a platform for the free and open exchange of ideas. Langa J, in *Islamic Unity Convention*, explains:

We have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours".²⁷

The media, therefore, play an important role in society. They give effect to the principles of openness, transparency and accountability which underlie our Constitution. They keep checks on the state and call it to account for its actions or omissions. It is through the media that the public is able to hear, form and express opinions on a wide array of matters and in this way a platform for the exchange of ideas is created.²⁸ Any restriction upon a free press threatens the values underlying the Constitution.

2.4.1 Freedom of Expression and Democracy

Our courts consider freedom of expression to be a guarantor of democracy. Thus, in *South African National Defence Union*, the court held that:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy.²⁹

In *Phillips*, the court held that freedom of expression is integral to democracy.³⁰ It is a right which promotes accountability, transparency and openness. These are values of a democratic state.³¹ The importance of these values, in relation to the role of the media, is summarised in *Holomisa*:

In a system of democracy dedicated to openness and accountability the important role of the media, both publicly and privately owned, must be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens ... strong and independent

27 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 307.

28 *South African National Defence Union v Minister of Defence and another* 1999 (4) SA 469 (CC) 477.

29 *South African National Defence Union v Minister of Defence* 477.

30 *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2003 (3) SA 345 (CC) 365.

31 Milo, Penfold & Stein (2013: 23). See also *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) 608-9.

newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide.³²

In democratic states, governments are accountable to the electorate. Democratic governments do not operate behind closed doors. Their actions are transparent and are subject to public scrutiny and debate. The media, in this context, become the watchdog of the people, to ensure that governments are held accountable for their actions and that they make good their undertakings.

The judiciary is called to account in the same manner. The principle of open justice is entrenched firmly in our law and the media, by virtue of the values of transparency and accountability, have a right to report on court matters, whether before, during or after the trial, thereby monitoring the exercise of judicial power. It is the right of every person to be informed about matters before our courts. This view is supported by *Mamabolo*, in which Kriegler J held that:

It has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see ... vocal public scrutiny performs another important constitutional function. It constitutes a democratic check on the Judiciary. The Judiciary exercises public power and it is right that there be an appropriate check on such power.³³

Van der Westhuizen opines that the legitimacy of the courts is dependent on reports, comments and discussion in the media.³⁴ Public understanding of and confidence in the judiciary are essential elements of a democracy. Therefore, it is crucial that the media act responsibly when covering matters before courts. If they act irresponsibly, the very legitimacy of our courts are at risk, because the people may call into question the credibility of the judiciary and hence of the administration of justice.

Van der Westhuizen points out further that the legitimacy not only of our courts but also of our constitutional order is dependent on media discussion and debate.³⁵ In other words,

32 *Holomisa v Argus Newspapers Ltd* 608-9.

33 *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) 426.

34 Van der Westhuizen (2008: 268).

35 Van der Westhuizen (2008: 268).

irresponsible, biased and adverse media reporting places the legitimacy of both our courts and our constitutional order at risk.

2.4.2 Truth and the Marketplace of Ideas

Freedom of expression is important in the search for truth.³⁶ This search is pursued most productively in the marketplace of ideas, which essentially means that truth may emerge from unrestricted and open discussion and dialogue. In *Case*, the court supported the idea that “the search for truth is best facilitated in a free 'marketplace of ideas'”³⁷ and held that both the supply and the demand side of the market should be unrestricted. In other words, both the right to impart and the right to receive information and ideas should be unimpeded. This is particularly important given the past of South Africa, when the only truth was that of the Apartheid government and opinions of people were made to conform to government ideology. In this connection, the court in *Mamabolo* held that:

Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.³⁸

The principle is that freedom of expression will promote open and free discussion and debate. Whether or not it leads to the truth is not as important as safeguarding this free flow of information. The court expounded the principle that all are free to say what they want when they want as one which must be protected lest we want to return to the censorship and thought control of the past.

It could be argued that the current protection afforded to freedom of expression by our courts and the strict test laid down to limit this right exist because our courts are driven by the fear that South Africa may revert to prohibitions of the Apartheid era. It stands to reason,

36 Milo, Penfold & Stein (2013: 17).

37 *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) 630.

38 *S v Mamabolo (E TV and Others Intervening)* 429.

therefore, that the courts will favour the right to freedom of expression over the right to a fair trial.

2.4.3 Self-fulfilment and Audience Autonomy

Freedom of expression promotes individual self-fulfilment and personal growth. The free flow of information and ideas allows everybody to develop freely their intellect, interests, tastes and personality.³⁹ This is articulated clearly in *Case*, where the court found that:

Freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power ... the right to receive others' expressions has more than merely instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development.⁴⁰

Self-fulfilment is achieved when individuals decide for themselves what is good or bad, without intrusion. This encourages the free development of opinions and thoughts on a wide array of matters which, in turn, enables self-development and growth.

In addition, the court in *Case* declared that freedom of expression, together with freedom of conscience, religion, thought, belief and opinion, the right to privacy and the right to dignity, strengthens the entitlement to participate in an ongoing process of communicative interaction, which has influential and fundamental value.⁴¹ This view is supported by *South African National Defence Union*, in which the court emphasised that the ability to form and express opinion is important both for a democratic society and for individuals personally, irrespective of whether such opinion is formed and expressed individually or in a group and even where such opinion is controversial.⁴²

2.5 Rights and Obligations of the Media

As noted earlier, freedom of the press is recognised specifically in section 16(1)(a) of the Constitution. The media are the bearers of this aspect of the constitutional right to freedom of

39 *Gardener v Whitaker* 1995 (2) SA 672 (E) 687.

40 *Case v Minister of Safety and Security* 630.

41 *Case v Minister of Safety and Security* 631.

42 *South African National Defence Union v Minister of Defence* 477.

expression. Importantly, the right comes with a corresponding constitutional obligation to impart news and information to the citizenry. Indeed, in *South African Broadcasting Corporation Limited v National Director of Public Prosecutions*, the court held that freedom of expression is not a right of the media to exercise, but a right of every person to hear, form and express opinions and views freely on a wide range of matters. It is the duty of the media to inform, impart and disseminate information and ideas to every person.⁴³

The role of the media and their obligations are articulated clearly in the matter of *Khumalo*. The findings of the court may be summarised as follows:

- (a) The media must ensure that every citizen's right to freedom of the press and the media and the right to receive information and ideas are respected.
- (b) They must carry out their mandate in such a manner that will enable every citizen to be a responsible and effective member of society.
- (c) The media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require.
- (d) They must provide citizens both with information and with a platform for the exchange of ideas, which are fundamental to the development of a democratic culture.
- (e) The media, as the primary source of information, are powerful institutions and they therefore have a constitutional duty to act with vigour, courage, integrity and responsibility.⁴⁴

The Constitution protects the media in the performance of their obligations to the broader society. Media that are independent, responsible, reliable and trustworthy will strengthen our democracy and our constitutional order.⁴⁵ Viewed in this light, any restriction on the media will be difficult, if not impossible, to justify.

Needless to say, adverse pre-trial publicity and trial by media do not suggest media responsibility, reliability and integrity, as envisaged by section 16 of the Constitution. When the media act unscrupulously, irresponsibly and without integrity, they merely are asserting the right to freedom of expression, and are no longer fulfilling their obligations to the broader society. Media of this calibre do nothing to promote the values underlying freedom of

43 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 535-536.

44 *Khumalo v Holomisa* 417.

45 *Khumalo v Holomisa* 417.

expression, thereby undermining the administration of justice and jeopardising the constitutional order.

2.6 Trial by Media

The media are relatively free to report on a wide range of matters without restriction,⁴⁶ including pending criminal cases. In the case of *Worm* it was held that, while courts are the fora for pronouncing on guilt or innocence, this does not mean that there can be no prior or concurrent discussion of the subject matter of criminal trials elsewhere, whether in specialised journals, in the general press or amongst the public at large.⁴⁷ The problem arises when the media pronounce on the guilt of an accused prior to the case being tried in a court of law. Here the media, as the primary source of information, dictate and influence public opinion, and lead to the accused being tried in the court of public opinion, commonly known as trial by media.

With the advent of modern technology, society has become media-saturated and the potential for adverse pre-trial publicity has increased exponentially.⁴⁸ Newspapers, facing competition from online sources, social media and live blogging, are under increasing pressure to cover major crimes and tend to push the boundaries with the content they publish.⁴⁹ Today's media influence and dictate the public's opinions about criminal cases long before they are tried in a court of law.⁵⁰ Often, the media's influence begins hours after a crime has been committed,⁵¹ as occurred in the Oscar Pistorius murder case.⁵²

Was Oscar Pistorius being tried in the court of public opinion? Does this not amount to trial by media? Certainly, one cannot deny that the role of the judge in the case was made so much harder by the daily barrage of discussion of evidence, strategy and opinions in the media. In *Harber*, Van Dijkhorst J held that even a careful discussion of the outcome of a case may lead

46 See Freedom of Expression Institute (2007: 1).

47 *Worm v Austria* 25 EHRR 454 (1998) par 50. See also McBride (2009: 180).

48 Sambrooks (2013: 1).

49 Sambrooks (2013: 2).

50 Sambrooks (2013: 2).

51 Sambrooks (2013: 2).

52 See *Mail & Guardian* (13 February 2013); *Mail & Guardian* (15 February 2013); *Mail & Guardian* (19 February 2013); *The Independent* (19 February 2013); *Mail & Guardian* (20 February 2013); *Mail & Guardian* (14 February 2013).

to trial by media.⁵³ His argument holds water, as many media reports included speculation about the guilt or innocence of Pistorius by legal experts. In the circumstances, trial by media was unavoidable and, unsurprisingly, both the judgment and the judge were criticised by those who believed that Pistorius was guilty of murder. The media were quick to report on these criticisms in such pieces as *Pistorius judgment not well reasoned*,⁵⁴ *Donald Trump slams Oscar Judge on Twitter again*,⁵⁵ *Not the right judgment — Reeva's mom*⁵⁶ and *Legal experts taken aback by Pistorius judgment*.⁵⁷ The media did cover opinions which expressed overwhelming support for the judge and the judgment in reports such as *Legal organisations condemn attack on Masipa*⁵⁸ and *COPE slams 'unwarranted' attack on Judge Masipa*.⁵⁹ What is certain, however, is that Oscar Pistorius was tried in the court of public opinion. Significantly, in *Multichoice* it was held that only one court would have the duty to pass judgment on Pistorius. It was held further that trial by media cannot be in the interests of justice and potentially could undermine court proceedings and the administration of justice.⁶⁰

However, the problem goes much further than the potential undermining of court proceedings. The coverage of high profile criminal cases will perform a useful purpose only if it serves democracy. In other words, the public has a right to be informed about the functioning of the courts which, in turn, will strengthen their understanding of and confidence in the judicial system. The media keep a check on the exercise of public power by the judiciary and such media scrutiny will increase the accountability of the judicial process. However, the media reports on pending matters invariably speculate on guilt or innocence and rarely cover the administration of justice or the exercise of public power by the judiciary. The reports focus on the individual charged with the crime. Pre-trial publicity or trial by media therefore is of little merit as it serves none of the values underlying freedom of expression. Instead, it threatens the

53 *S v Harber; In Re S v Baleka* 1986 (4) SA 386 (T) 393.

54 *News 24* (24 October 2014).

55 *Channel 24* (21 October 2014).

56 *SABC News* (11 October 2014).

57 *SABC News* (12 September 2014).

58 *SABC News* (16 September 2014).

59 *SABC News* (15 September 2014).

60 *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* 2014 (1) SACR 589 (GP) 602.

legitimacy of the judiciary and undermines the administration of justice. The dangers of trial by media are articulated in *Harber*:

Trial by newspaper is intrinsically objectionable as it would lead to disrespect for the law. There will always be a section of the mass media that is ill-informed or prejudiced and which, regardless of the truth, attempts to sway public opinion to its purposes. If the mass media are allowed to usurp the function of the courts and judge the issues which are to be tried, not only will unpopular causes not get a fair trial, but the public will be led to believe that it is easy to find the truth, viz in the popular press, and disrespect for the process of the law could follow. Wild speculation in the press about the outcome of a case would tend to lower the esteem in which our courts are held. Should the judgment conform to the speculation the impression might be created that the Judge was influenced by the press. Should the judgment differ from the speculative expectation false hopes will have been raised and the public will not accept the correctness of the court's finding.⁶¹

The media coverage of the judgment and sentence in the Pistorius murder trial bears testimony to the dangers of pre-trial publicity and trial by media, as expressed in *Harber*.

The question to be considered next is why the media report only on high profile matters? The media do not find it necessary to report on all cases but carefully choose the ones that are newsworthy. If the media claim the right to report on criminal matters, then surely all matters before courts ought to be covered. The public has a right of access to this information to foster greater understanding of and confidence in the judicial system. This, however, is not the case in South Africa. As Hopkins notes:

Oscar Pistorius and Shrien Dewani may be getting the VIP treatment in court, but on the ground, hundreds – if not thousands – of ordinary South Africans are fighting for their lives in a criminal justice system that is bent at best; or completely broken. No lengthy bail hearings or deep analysis of the evidence for them: they languish in jail, waiting for justice that never comes.⁶²

If the true intent of the media is to foster better understanding of the justice system, to reinforce public confidence in the administration of justice and to enable the public to call to account the judicial exercise of public power, then they should not devote most of their coverage to high profile cases. They need to assist in addressing many of the issues raised by Hopkins.

61 *S v Harber; In Re S v Baleka* 393.

62 *Daily Maverick* (14 April 2014).

2.7 Trial by Media and Industrial Journalism

It is trite that the guilt or innocence of a person ought to be determined by an independent and impartial court of law. Trial by media, as defined by Greer & McLaughlin:

is the market-driven form of multi-dimensional, interactive, populist justice in which individuals are exposed, tried, judged and sentenced in the court of public opinion. The media usurp the functions of the courts in these cases and will pass judgment in articles pertaining to matters before courts of law.⁶³

The influence of the media is not to be denied. As Swanepoel indicates, the press is a powerful medium that has the right to publish information about legal proceedings.⁶⁴ With the advent of social media networks and online news networks, the influence of the media has been strengthened considerably. The media now are empowered to perform their constitutional obligations. However, there is an inherent danger as well. The Law Commission of India is of the view that technological advancement has increased media coverage of crimes, suspects and accused to alarming proportions.⁶⁵ Indeed, such increased publicity may lead to innocents being condemned for no reason or to those who are guilty not receiving a fair trial or being given a heavier sentence than they deserve.⁶⁶ The media fail in their constitutional obligations when they act in this manner. The mass media can influence negatively the opinion of the masses regarding the administration of justice and the legitimacy of the judiciary by usurping the functions of the courts when exposing, trying, judging and sentencing people in the court of public opinion.

Trial by media, according to Swanepoel, arises when inflammatory details that would be inadmissible as evidence in court become public knowledge before the trial has begun, and tabloids are willing to pay witnesses to tell their stories before they have testified even.⁶⁷ Sambrooks describes trial by media as:

The process whereby the media creates a widespread perception of an individual's guilt of a criminal offence by disseminating prejudicial material and due process

63 Greer & McLaughlin (2012: 398). See also Greer & McLaughlin (2011: 278) and Greer & McLaughlin (2012: 138).

64 Swanepoel (2006: 4).

65 Law Commission of India (2006: 11).

66 Law Commission of India (2006: 11).

67 Swanepoel (2006: 4).

gives way to moral speculation and a verdict is arrived at in the court of public opinion.⁶⁸

She considers that pre-trial publicity may expose jurors to prejudicial information which will be taken into account in determining an individual's guilt, thereby rendering the trial unfair.⁶⁹ However, it is naïve to think that judges are not exposed likewise to prejudicial information which they might take into account, despite the argument that judges are not influenced by extraneous matters.⁷⁰ When the media disrupt a criminal trial in this way, they pervert the judicial process and threaten the administration of justice.⁷¹

As noted above, not all criminal trials attract media coverage. The media focus on high profile matters, where the accused are famous individuals, such as sports personalities, celebrities and political figures, or the crime warrants publicity. In other words, the media cover only newsworthy criminal trials, suspects or accused persons. These coverage choices may be linked directly to the pecuniary interest that the media have in reporting on high profile criminal matters. According to Belsey, the role of the media as distinctive facilitators of the democratic process gives way to considerations such as pursuing career and promotion opportunities, meeting deadlines, and satisfying pressure from media managers to meet growth targets.⁷² In this way, the search for profit and expansion of media houses distorts the role of the media as facilitators of the democratic process. This distortion is aggravated by competition amongst media houses to increase audiences, to make greater profit, to obtain greater market share and to secure greater global influence.⁷³ Such competitive coverage reports on what the "public is interested in" rather than "what is in public interest".⁷⁴ Belsey describes this as industrial journalism.⁷⁵

Greer & McLaughlin provide a reason for this increased coverage of newsworthy criminal trials:

68 Sambrooks (2013: 2).

69 Sambrooks (2013: 1).

70 *Brown v National Director of Public Prosecutions and Others* (2012) 1 All SA 61 (WCC).

71 Sambrooks (2013: 2).

72 Belsey (2014: 12).

73 Belsey (2014: 4).

74 Belsey (2014: 12).

75 Belsey (2014: 3). See also *Financial Mail v Sage Holdings* 1993 (2) SA 451 (A) 464.

Proliferating multi-platform news sites that provide networked consumers with an abundance of choice are challenging both the relevance and viability of the traditional printed press ... The result has been intensified pressure on newspapers to deliver dramatic “must-have” stories that demonstrate relevance by setting the news agenda. It is the press who are forced to take the biggest risks, testing legal, cultural and political boundaries in an attempt to deliver profitable print and online exclusives.⁷⁶

It is clear that the media, therefore, cannot simply disseminate trivial information on matters before courts. The public is responsive to headline stories, and in order to make a profit the media have to present stories which attract readers and listeners. The media cover high profile matters because, unlike the run-of-the-mill criminal cases, these stories mean increased profit margins.

Adverse pre-trial publicity and trial by media arguably amount to industrial journalism, for which the primary concern is making profit, increasing audience targets and pursuing global expansion of media houses. Belsey argues, correctly, that democracy cannot be served by media that tolerate lies, bias, scurrility, obscenity, triviality, distortion and invasion of privacy, all of which are characteristics of industrial journalism.⁷⁷

2.8 Conclusion

Pre-trial publicity must be measured against the values underlying freedom of expression. Those values include the search for truth, the proper functioning of democracy and individual self-fulfilment. Reporting on pending criminal matters gives effect to the principle of open justice and allows the public to keep a check on the exercise of public power by the judiciary. In this manner, the values underlying freedom of expression are enhanced.

Adverse pre-trial publicity or trial by media is simply irresponsible behaviour on the part of the media, and therefore it cannot be said to enhance any of the values underlying freedom of expression. Van der Westhuizen considers that our constitutional right to receive information entitles us to expect at least a basic level of accuracy, understanding of the relevant issues and procedures, and fairness.⁷⁸ Belsey is of the view that only ethical journalism,

76 Greer & McLaughlin (2012: 397).

77 Belsey (2014: 12).

78 Van der Westhuizen (2008: 268).

which exhibits honesty, accuracy, truth, objectivity, fairness, balance and respect for the autonomy of ordinary people, is part of the democratic process.⁷⁹ This view is both meritorious and defensible.

Some of the consequences for the victims of trial by media include the destruction of private lives and of innocence, and subjection to prolonged, post-trial attack journalism for those who are acquitted or no longer prosecuted.⁸⁰ The values underlying freedom of expression never could have been intended to include such consequences.

Trial by media is tantamount to industrial journalism motivated by profit. The media merely assert the right of freedom of expression, but no longer fulfil their obligations to the broader society, and do not promote the values underlying freedom of expression. Trial by media thus may be equated to irresponsible journalism not worthy of constitutional protection.

79 Belsey (2014: 12).

80 Greer & McLaughlin (2012: 398).

CHAPTER THREE
RIGHT TO A FAIR TRIAL

3.1 Introduction

The right to a fair trial is a cornerstone of any civilised criminal justice system and it is the duty of every presiding officer to ensure that this right is not unjustifiably infringed upon during the course of a criminal trial.¹

This chapter deals with the right to a fair trial, in particular the right to be presumed innocent and the right to a public trial, before an ordinary court which is independent and impartial.²

In criminal trials, the state must prove the guilt of an accused beyond reasonable doubt. The right to be presumed innocent requires this. Judicial officers have to be impartial and independent in hearing matters brought before them. The right to a fair trial is threatened if a court is not independent, is partial to the case of either party before it, and does not function free from interference.³ The question that this chapter seeks to answer is whether adverse pre-trial publicity renders a trial unfair. In the process, an attempt will be made to determine whether such publicity influences or potentially influences the outcome of cases, in other words, whether they tend to cause presiding officers to become partisan to the state or the defence.

When a court convicts an accused despite the existence of a reasonable doubt, the prosecution is relieved of its duty to prove the guilt of an accused beyond reasonable doubt and the right to be presumed innocent and, thus, the right to a fair trial will be infringed.

3.2 South African Law

The right to a fair trial is a fundamental right guaranteed by section 35(3) of the Constitution. Section 35(3) reads:

1 Van der Walt (2006: 316). See also *S v Jaipal* 2005 (4) SA 581 (CC) 592.
2 See section 35(3)(h), section 35(3)(c), section 165(2) and section 165(4) of the 1996 Constitution.
3 *S v Jaipal* 594.

- Every accused person has a right to a fair trial, which includes the right—
- (a) to be informed of the charge with sufficient detail to answer it;
 - (b) to have adequate time and facilities to prepare a defense;
 - (c) to a public trial before an ordinary court;
 - (d) to have their trial begin and conclude without unreasonable delay;
 - (e) to be present when being tried;
 - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - (i) to adduce and challenge evidence;
 - (j) not to be compelled to give self-incriminating evidence;
 - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (o) of appeal to, or review by, a higher court.

As is evident, section 35(3) lists 15 sub-rights as elements of the general right to a fair trial. This list sets out the minimum requirements for a fair trial and all criminal trials ought to be conducted in such a manner as to give effect to these rights. Section 35(3) is procedural in nature, prescribing the manner in which all criminal trials are to be conducted. However, it potentially becomes a tick box for criminal courts. In *Brown*, for example, the court held that the applicant did not show that the adverse pre-trial publicity would lead to any trial related prejudices.⁴ The tick box effect of section 35(3) is evident in this judgment, as the court required the applicant to show that specific sub-rights were infringed. However, *Brown* did not rely on any of the sub-rights listed in section 35(3), arguing instead that the presiding officer would be biased against him due to the adverse pre-trial publicity. In other words, he contended that the case against him would be pre-judged. Sadly, the court in *Brown* concerned itself only with the procedural aspects of section 35(3).

4 *Brown v National Director of Public Prosecutions* 81.

The manner in which the court in *Brown* approached section 35(3) reproduced the way in which courts approached fair trial rights prior to 1994. Thus, for example, in the 1992 case of *Rudman*, the court held that:

The entitlement to a fair trial presupposes that it be conducted in accordance with the rules and principles in the procedure which the law requires. The enquiry is whether there has been an irregularity or illegality, that is, a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.⁵

It went on to pronounce that a court of appeal:

(D)oes not enquire whether the trial was fair in accordance with “notions of basic fairness and justice”, or with the “ideas underlying the concept of justice” which are the basis of all civilised systems of criminal administration.⁶

And with regard to equity in law, the court found that:

When the question concerns the law as it should be ideally (*de lege ferenda*), notions of basic fairness and justice, of common and fundamental ideas of fairness and right, are of course a prime consideration. But where, as now, the enquiry concerns the law as it is (*de lege lata*) this is not so.

Rudman is representative of the pre-1994 approach. The courts agreed that the right to a fair trial concerned only the question of whether there was compliance with the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. The focus was upon the law as it is and not upon whether the trial complied with notions of fairness and justice. In other words, there was no serious consideration given to equity, of the law as it should be.⁷

This is no longer the position in South African law. Already in 1995 the Constitutional Court held, in the case of *Zuma*, that the constitutional right to a fair trial included substantive fairness, which requires that all criminal trials be conducted in accordance with the notions of basic fairness and justice.⁸ It added that all courts hearing criminal trials or criminal appeals must give content to those notions. Similarly, the court in *Bogaards* held that:

5 *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343(A) 299-300.

6 *S v Rudman* 299 -300.

7 *S v Rudman* 301.

8 *S v Zuma and Others* 1995 (4) BCLR 401 (SA) 411.

This Court must not merely examine the law as it stands. This is because, as will be demonstrated below, the right to a fair trial under the Constitution has a normative component which requires courts not merely to follow existing rules of procedure but to conduct proceedings in a substantively fair manner.⁹

The right to a fair trial, therefore, is not limited to the 15 sub-rights contained in section 35(3).

Again, in *Zuma* the court held that:

The right to a fair trial conferred by section 25(3) [of the 1993 Constitution] is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.¹⁰

Subsequently, the court in *Dzukuda* held that:

Elements of this comprehensive right are specified in paras (a) to (o) of ss (3). The words “which includes the right” preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified elements of the right to a fair trial, the specified elements being those detailed in ss (3).¹¹

Therefore, the fact that a court gives effect to all the sub-rights listed in section 35(3) does not guarantee or imply that the trial was fair. Also, a case based on an infringement of the right to a fair trial need not aver an infringement of any of the sub-rights listed in section 35(3), since the right to a fair trial is broader than those sub-rights. The court in *Dzukuda* held that the norm prescribed by section 35(3) is a fair trial.¹² This norm, according to *Bogaards*, prescribes what would be expected in a properly conducted criminal trial, which includes the section 35(3) procedural safeguards and substantive fairness.¹³ Any deviation from this norm results in a failure of justice and, consequently, in an unfair trial.

Section 35(3), therefore, has both a procedural and substantive component. The procedural component encompasses the list of sub-rights which must be satisfied. The

9 *Bogaards v S* 2012 (12) BCLR 1261 (CC) 1273.

10 *S v Zuma* 411.

11 *S v Dzukuda and Others; S v Tshilo* (11) BCLR 1252 (CC) 1261. See also *S v Jaipal* 593.

12 *S v Dzukuda* 1261.

13 *Bogaards v S* 1273. See also *Snyckers & Le Roux* (2015: 101).

substantive component requires every criminal trial to be conducted in accordance with the notions of basic fairness and justice. In other words, section 35(3) requires consideration both of the law as it is, that is, whether the trial was conducted according to the formalities, rules and principles of procedure, and the law as it should be, that is, whether the trial accorded with notions of basic fairness and justice.

The issue to be determined here is whether adverse pre-trial publicity or trial by media amounts to an “irregularity” which results or could result in a failure of justice. This determination needs to be made taking into account both the procedural and substantive aspects of the right to a fair trial entrenched in section 35(3) of the Constitution.

Pre-trial publicity or trial by media occurs primarily at the inception of the criminal process, from the time of arrest until the suspect is charged formally and subsequently appears in court. Depending on the nature of the crime and the person involved, as highlighted in Chapter Two above, it will continue for the duration of the criminal trial. During this period the media discuss evidence to be heard by the courts and speculate on the outcome of cases. They may project irrelevant and inadmissible evidence as the truth, thereby convincing the people of the guilt of the accused. The impact of such media coverage can be dire for an accused. The accused faces the reality of a court refusing bail and, as a result, could spend a lengthy period incarcerated while awaiting trial. His freedom of movement thus could be curtailed and his privacy invaded by media bent on publishing a headline story.

In the case of Oscar Pistorius, for example, evidence to be used at trial was published widely and there was a public clamour for him to be denied bail.¹⁴ Protesters, who included members of the ANC Women’s League, expressed concern about the level of violence against women and called for Pistorius not to be granted bail.¹⁵ His legal team discharged the onus of showing that he would stand trial, that he was not a flight risk and that there were exceptional circumstances. The magistrate did grant Pistorius bail but proceeded to set very stringent bail conditions, which conditions the High Court later found to be tantamount to a denial of bail. Was the magistrate influenced in his decision by all the protest and calls for Pistorius to be

14 See *Mail & Guardian* (17 February 2013); *The Independent* (6 August 2015).

15 See *Times Live* (20 February 2013); *News 24* (19 February 2013).

denied bail? It does appear to be the case, as the High Court later relaxed the bail conditions and warned that a bail application is not a trial and is not concerned with the innocence or guilt of an accused. Bam J dismissed all the reasons given by the magistrate for setting the stringent bail conditions, saying that bail conditions cannot be used as a form of anticipatory punishment, that all should be treated equally before the law and that an accused is innocent until proved guilty.¹⁶

This decision of the High Court is criticised by Magnay, who states that:

I still can't fathom a judicial system that allows Pistorius, who has admitted to killing his girlfriend, Reeva Steenkamp, not once with a stray bullet, but with multiple shots through a locked door, to enjoy his freedom. How many other South Africans without the connections, money and status of Pistorius enjoy such benefit?¹⁷

She goes on to make the following suggestion:

Perhaps, ladies, our only hope in the relentless battle to combat violence against women is to have a female judge.¹⁸

A female judge indeed was appointed to preside over the trial of Oscar Pistorius. Media coverage of the protest outside the court where Pistorius appeared and stories such as Magnay's exemplified the plight of women facing male violence in South Africa. If it is accepted that the appointment of a female judge was influenced by the enormous publicity which the case of Pistorius attracted, then it goes without saying that adverse pre-trial publicity could influence the outcome of criminal cases.

The trial of Shrien Dewani attracted similar levels of publicity. The ANC Women's League was reported by the media as saying that Shrien Dewani must be extradited from England to stand trial in South Africa for the murder of his wife. Its call for his extradition came during South Africa's celebration of the 16 days of activism for no violence against women and children. The League was quoted in the media as declaring that:

16 *Sunday Tribune* (31 March 2013).

17 *The Telegraph* (22 February 2013).

18 *The Telegraph* (22 February 2013).

It must be made clear to the international community that South Africa is not a slaughterhouse where people can come to our country and commit crimes against women or anyone else.¹⁹

Again, a female judge was appointed to hear the matter.

The Pistorius and Dewani matters are good examples of the effect of pre-trial publicity on the administration of justice. The influence of the media in this arena is not to be denied. What is more, if the media can have a powerful impact on the pre-trial stage. Imagine the media pressure faced by the judges who presided over the trials of Dewani and Pistorius. The question is whether such media attention renders the subsequent trial unfair?

3.3 International Law

The right to a fair trial is recognised in international law as a fundamental right and is protected by various international and regional legal instruments. International law highlights four components of the right to a fair trial, namely, equality before the law, the presumption of innocence, the right to a public hearing and the right to be heard by an independent, impartial and competent tribunal.

The UDHR enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal established by law. In this regard, Article 10 states that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

And Article 11(1) of the UDHR provides that:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

The right to a fair trial is protected similarly by Article 14 of the ICCPR. The relevant provisions stipulate that:

19 *The Star* (28 November 2012).

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The ACHPR follows suit, protecting the right to a fair trial in Article 7 as read with Article 26. In terms of Article 7(1), “every individual shall have the right to have his cause heard” which includes:

the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to defence, including the right to be defended by counsel of his choice; the right to be tried within a reasonable time by an impartial court or tribunal.

Article 7(1) is supplemented by Article 26 which provides that:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts.

In addition, in 2003 the African Commission on Human and Peoples’ Rights adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Principles and Guidelines).²⁰ These Principles and Guidelines elaborate extensively upon Article 7(1) of the ACHPR and give content to it. It sets out a detailed procedure to ensure the fairness of trials. The right to a fair and public hearing is set out in Section A(1), which provides that:

In the determination of any criminal charge against a person, or of a person’s rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

The right to be presumed innocent until proved guilty is contained in Section N(6), which states that:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

These components of the international right to a fair trial are strengthened by minimum “guarantees” which represent procedural safeguards to which all courts must adhere. The words “all the guarantees necessary” in Article 11(1) of the UDHR, “minimum guarantees” in Article 14(3) of the ICCPR and “essential elements” and “include” in the African Principles and

20 African Commission on Human and Peoples' Rights (2003).

Guidelines indicate that the list of guarantees, safeguards or elements of a fair trial is not exhaustive. Thus, Paragraph 5 of General Comment 13 of the ICCPR states that the requirements of Article 14(3) of the ICCPR are minimum guarantees, the fulfilment of which is not always sufficient to ensure the fairness of a trial.²¹

The presumption of innocence and the right to a public hearing by an independent and impartial court stand apart from the “minimum guarantees”. While the presumption of innocence is considered fundamental to the protection of human rights,²² the right to a public trial in criminal proceedings serves the general interest in the open administration of justice.²³ The right to an impartial and independent judiciary is considered essential to any fair and just legal system.²⁴ These rights are substantive in nature and are essential elements of a fair trial. The minimum guarantees or safeguards which follow these fundamental rights are procedural in nature. As is the case in South African law, compliance with the procedural safeguards does not mean that the trial was fair *per se*. Even if a violation falls outside these procedural safeguards, it still may amount to an infringement of the right to a fair trial.

International law recognises instances where it will be necessary to exclude the media and the public from a trial, an exception which is not found in section 35(3) or in section 16 of the South African Constitution. Thus, in terms of Article 14(1) of the ICCPR, the press and the public may be excluded from the whole or part of a trial should the court consider that their presence would prejudice the interests of justice. Similarly, Article 8(5) of the American Convention on Human Rights (ACHR) limits the right to a public hearing insofar as it may be necessary to protect the interests of justice. In terms of Article 6(1) of the European Convention on Human Rights (ECHR):

the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the

21 Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994).

22 Udombana (2006: 312).

23 Udombana (2006: 319).

24 Kelly (1996: 1).

extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

According to Section A(3)(f) of the African Principles and Guidelines:

The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be

1. in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence
2. for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.

Article 14 of the ICCPR, Article 6(1) of the ECHR, Article 8(5) of the ACHR and Article 7 of the ACHPR should be read with the Madrid Principles,²⁵ which allow the media the right to comment on cases before, during and after trial, without violating the presumption of innocence. However, these principles may be departed from:

in the interests of the administration of justice to the extent necessary in a democratic society, to prevent serious prejudice to an accused and, where necessary, to prevent harm to or improper pressure being placed upon a witness, a member of a jury or a victim.²⁶

The Madrid Principles, in turn, should be read with section 38(a) of the Siracusa Principles which provides that:

the press or the public will be excluded from all or part of a trial on the basis of specific findings, announced in open court, showing that the interests of the private lives of the parties or their families or of juveniles so require or where the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial.

The Madrid Principles, as read with the Siracusa principles, require the media to respect the rights of individuals — specifically the right to a fair trial, privacy and dignity — and the independence of the judiciary. Where the media fail in this obligation, the limitation of the right to freedom of expression is justified in international law. However, these provisions limit the right to a public hearing only insofar as the media are concerned and are not generally an exception to the right to a fair trial.

In addition, Section N(6)(e)(2) of the African Principles and Guidelines provides that:

25 Madrid Principles on the Relationship between the Media and Judicial Independence.
26 Section 10 of the Madrid Principles.

Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.

It may be concluded that, in cases where the prosecution or any public official does express views on the guilt of a suspect, the right to be presumed innocent is violated.

The media, in their coverage of and reporting on criminal cases, could infringe the right of an accused to a fair trial and threaten the administration of justice. Where the interests of justice are prejudiced, procedural safeguards in the ICCPR, ACHR, ECHR and the ACHPR allow for restrictions to be placed upon the media, including debarment of the media from criminal trials and from reporting on them. Thus, protection is afforded both the rights of the accused and the proper administration of justice.

3.4 South African Law versus International Law

In South African law, there is no hierarchy of the rights contained in section 35(3) of the Constitution. All these rights are trial related and procedural and follow generally the outline of a criminal trial, starting with the right to be informed about the charges and ending with the right of appeal or review. There is no distinction between the presumption of innocence, the right to a public hearing and other procedural safeguards. The right to an independent and impartial judiciary is not part of the Bill of Rights but is to be found in section 165 of the Constitution.

The procedural and evidentiary nature of fair trial rights in South African law is the reason why some commentators argue that section 35(3) only operates within the context of the criminal trial itself, and is not applicable from the inception of the criminal process.²⁷ As argued below, this narrow interpretation of the right to a fair trial is unsound, and the generous and purposive interpretation, which extends the application of the right to the inception of the criminal process is preferred and in keeping with the spirit and purport of the Constitution. The presumption of innocence is an accepted principle of international law and is a fundamental right which should stand apart from what is considered procedural. Similarly, the right to a

27 See De Villiers (2002: 96), Schwikkard (1998: 397) and Currie & De Waal (2013: 755).

public trial by an independent, unbiased court should be distinguished from procedural trial related safeguards.

South African law does not afford the same sort of protection as international law to those who are subjected to adverse pre-trial publicity or trial by media. South African media are allowed absolute freedom to speculate on the guilt or innocence of accused persons. Public officials in South Africa, likewise, are allowed to speak their minds and express freely their views on the guilt of an accused. As noted in §1.1 above, former Police Commissioner, Beke Cele, expressed his view on the certain guilt of Shrien Dewani, openly equating him to a “monkey” who believed South Africans were “stupid. Similarly, the former National Director of Public Prosecutions, Mensi Similane, was quoted in the media as saying:

This is purely a criminal matter of somebody who murdered his wife while he should be celebrating his honeymoon and the facts here are that the accused, who is sought to be extradited, came to the country and committed what is a very heinous crime.²⁸

These proclamations amounted to publicity which was prejudicial to the fairness of Dewani’s trial. The fair administration of justice was infringed upon by the media and the public officials involved. The comments by Cele and Similane also contravene Section N(6)(e)(2) of the African Principles and Guidelines, in that the right to be presumed innocent until proved guilty according to law includes an obligation upon public officials to uphold the presumption of innocence. Thus, whilst they are allowed to inform the public about criminal investigations or charges, they may not express a view as to the guilt of any suspect.

Dewani’s fear that he would not receive a fair trial should he return to South Africa and be prosecuted for the unlawful killing of his wife was justified. No action was taken against the media and the courts did not hold them to account for contempt of court. The eventual acquittal of Shrien Dewani was met with surprise and the presiding judge was criticised for the manner in which she handled the trial and for her treatment of the prosecutor who presented the state’s case.²⁹ Was the judge influenced in her decision by the media reports on this matter or was this the correct judgment? Whatever the answer, the criticism of the judge was inevitable as the case was tried and a guilty verdict was expected in the court of public opinion.

28 *The Star* (21 February 2011).

29 *Daily Mail* (10 December 2014); *News 24* (14 December 2014); *Toronto Star* (9 December 2014).

In South African law too much reliance is placed on the limitations clause in the Constitution to restrict the media's right to freedom of expression and to protect an accused's right to a fair trial. The narrow interpretation given to the operation of the right to a fair trial and the strict tests laid down in *Brown and Midi Television* to determine whether media coverage of those matters would render the trials unfair and would prejudice the administration of justice do not take the matter any further. Adverse pre-trial publicity is of little value, serves none of the values underlying the Constitution and is entertainment for the masses. Nevertheless, the courts are likely to protect this free flow of information because of the very narrow and restrictive interpretation of the right to a fair trial to which they adhere.

3.5 The Purpose of the Right to a Fair Trial

The interpretation of constitutional rights must be generous and purposive, must give expression to the underlying principles of the Constitution, and the relevant provisions must be construed so as to give effect to the purposes for which they were enacted.³⁰ The right to a fair trial thus should be interpreted with a view to operationalising the core constitutional values, namely, openness, transparency, accountability, democracy and the culture of universal human rights for all South Africans.

The criminal justice system was a vehicle of the apartheid regime which allowed the state extensive scope to investigate, charge and prosecute adversaries of the governing party. Those accused of crimes were subjected to long terms of awaiting-trial incarceration, the Attorney-General was vested with authority to prevent bail being considered, and prohibitive bail conditions were imposed with the intention of invading and criminalising the lives of accused persons. The administration of justice often occurred behind closed doors and was not particularly transparent. The rights to dignity, equality and liberty hardly were afforded accused persons, and the indignities they suffered and the moral harm they endured were immense.

Section 35 of the Constitution was enacted to address the violations and inequalities of the past and to engender confidence in the criminal justice system. Procedural safeguards were included in section 35 to ensure the fairness of trials, such as the right to a speedy trial, the

30 See Currie & De Waal (2005: 360); *S v Makwanyane* 403; *Shabalala v Attorney-General, Transvaal* 740.

right to a public hearing and the right to be presumed innocent. Although not part of the Bill of Rights, the right to be tried by an impartial and independent court was enacted to give effect to the rights under section 35. The court in *Jaipal* articulates clearly the importance of the right to a fair trial as being:

essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness.³¹

The right to a fair trial therefore upholds other constitutional rights, such as the right to dignity, liberty and equality. The purpose of the right to a fair trial is to protect the rights of accused persons and to ensure that the innocent are not convicted. In *Sanderson*, the court held that:

In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial.³²

Similarly, in *Dzukuda* the court held that:

At the heart of the right to a fair criminal trial and what infuses its purpose is for justice to be done and also to be seen to be done ... In considering what ... lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.³³

However, the right to a fair trial is not limited to upholding the rights of an accused. The trial must be fair overall, as Yacoob J explains in the case of *Thebus*:

Although a principal and important consideration in relation to a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure

31 *S v Jaipal* 592.

32 *Sanderson v Attorney-General Eastern Cape* 1997 (12) BCLR 1675 (CC) 1684.

33 *S v Dzukuda* 1261-1262.

that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice.³⁴

This extended notion of the right to a fair trial is followed by Van der Westhuizen J in the case of *Jaipal*:

The right of an accused to a fair trial requires fairness to the accused as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of the crime.³⁵

An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracisation from the community, as well as other social, psychological and economic harms.³⁶ Those who are victims of crime may face the same indignity, social stigma and ostracisation, as is evident from the criticism levelled at the woman who accused Jacob Zuma of raping her. She was censured and humiliated publicly, and Julius Malema was quoted by the media as saying that she “enjoyed it”.³⁷ Until an accused is convicted or acquitted, he or she is presumed innocent. Members of the public ought to have confidence in the state representing them. This is the interest sought to be protected by the right to a fair trial and is the purpose of its existence, that is, “for justice to be done and also to be seen to be done”.

The media report regularly on criminal matters pending before courts. Such reporting accords with their constitutional obligation to keep the public informed of matters before courts. In this way there is exchange of ideas and conversations are stimulated, particularly around the functioning of the criminal justice system. Adverse pre-trial publicity exacerbates the grave consequences for those accused of crime and for those who are victims of crime. Confidence in the criminal justice system will be diminished and the right to a fair trial violated by reporting which affects negatively the dignity, liberty and equality rights of both accused and victims.

34 *Thebus and another v S* 2003 (10) BCLR 1100 (CC) 1139.

35 *S v Jaipal* 594.

36 De Villiers (2002: 96).

37 *IOL News* (26 May 2009).

3.6 The Nature of the Right to a Fair Trial

The right to a fair trial inscribed in section 35(3) of the Constitution accrues only to an accused person, that is, a person who has been charged with a criminal offence. Fair trial rights do not accrue to those who have been detained or arrested or who are suspects. Once an arrested or detained person is charged with a criminal offence, he or she becomes an accused person who then is entitled to protection under section 35(3).

Given that the formal ambit of the right to a fair trial in section 35(3) literally is very narrow and routinely interpreted as such, the courts are reluctant to limit freedom of expression. The right to a fair trial ought not to find application solely during the trial phase of a criminal matter but should apply from the inception of the criminal process.³⁸ This interpretation lends credibility to the purpose of this right.

Persons are arrestees, detainees or suspects during the investigation phase of a criminal matter. They eventually may become accused persons if the evidence against them makes out a *prima facie* case. Prior to becoming accused persons, arrestees and detainees may invoke the protection afforded them by section 35(1) and section 35(2) respectively of the Constitution. However, a suspect is not afforded similar protection and this suggests that the provisions of section 35 are irrelevant in relation to such a person. This position was confirmed in the case of *Van der Merwe*, where the court held there was nothing in the 1993 Constitution which obligated the police to warn a suspect of his constitutional rights.³⁹ Similarly, in *Ndlovu* the court held that the provisions in the 1993 Constitution dealing with the rights of accused, detained and arrested persons are irrelevant where the person making an incriminating statement had not been arrested or detained.⁴⁰ These cases were followed by the decision in *Mthethwa*, where the court held that:

(A)t the time he was questioned appellant was neither an arrested nor an accused person. In these circumstances, the provisions of s 35 of the Constitution of the Republic of South Africa Act 108 of 1996, which deal with the rights of “everyone who is arrested for allegedly committing an offence (s 35(1));” “everyone who is

38 See *S v Sebejan and Others* 1997 (8) BCLR 1086 (T) and *S v Orrie and another* [2005] 2 All SA 212 (WC).

39 *S v Van der Merwe* (1997) 4 All SA 87 (O) 91.

40 *S v Ndlovu* 1997 (12) BCLR 1785 (N) 1791.

detained” (s 35(2)); and “every accused person” (s 35(3)), are not, in my view, of relevance.⁴¹

In all the cases quoted above, the persons approached by the police were not arrested, detained or accused but were questioned as possible suspects and, inevitably, they incriminated themselves, thereby becoming accused persons. Initially, they were not informed of their constitutional rights, but as soon as they implicated themselves they were advised accordingly.

These decisions were founded on the restrictive interpretation of section 35(3) of the Constitution and do not sit well with the expansive notion of the right to a fair trial. In this regard, the judgments in *Sebejan* and *Orrie* are to be preferred as in keeping with the spirit and purport of the Constitution. In *Sebejan*, the court held that:

If the suspect is deprived of the rights which have been afforded to an arrested person then a fair trial is denied the person who was operating within a quicksand of deception while making a statement. *That pretrial procedure is a determinant of trial fairness is implicit in the Constitution and in our common law ...* The requirements of due process extends to the pretrial conduct of law enforcement authorities ... The constitutional right of an accused person does not only relate to fundamental justice and fairness in the procedure and the proceedings at his trial. It also includes the right to be treated fairly, constitutionally and lawfully by policing authorities and State organs prior to the trial.⁴²

The learned judge based her finding on the particular vulnerability of a suspect, positing that:

A suspect did not know that he or she was at risk of being charged and had not been placed on terms. Such a person was in jeopardy of making an incautious statement or committing some incautious act which would subsequently be used at the trial against him or her. For an investigating officer to take a statement from a suspect in those circumstances without a warning was contrary to the imperatives of the Constitution and inimical to fair trial procedure. It amounted to taking advantage of the suspect's ignorance.⁴³

This judgment was followed by the court in *Orrie* which held that:

An interpretation of the relevant provisions of section 35 which extends them to suspects is, to my mind, in keeping with a purposive approach which has regard to

41 *S v Mthethwa* 2004 (1) SACR 449 (E) 453.

42 *S v Sebejan* 1095. Emphasis added.

43 *S v Sebejan* 1094.

the interests which the rights were intended to protect. Moreover it accords with the views expressed by the Constitutional Court in *S v Zuma and others* that the "right to a fair trial" embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. It was held further in *Zuma* (supra) that all courts hearing criminal matters must give content to the notion of "basic fairness and justice".⁴⁴

While the question of whether or not the right to a fair trial extends to a suspect may be a debatable, it has been held that as far as arrested and detained persons are concerned, it does not relate to the criminal trial only, but includes pre-trial fairness. Thus, in *Melani* the court declared that:

Sections 25(2) and 25(3) of the [1993] Constitution make it abundantly clear that this protection exists from the inception of the criminal process that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the entire criminal process: in the "gatehouses" of the criminal justice system (that is the interrogation process), as well as in its "mansions" (the trial court).⁴⁵

This finding is in keeping with the purposive and generous interpretation of the fair trial rights protected by section 35(3) of the Constitution.

As a rule, the right to a fair trial will find application only where the object of the proceedings is the determination of the guilt or innocence of the accused person.⁴⁶ This means that an *accused* in a bail application does not have a right to a fair trial in terms of section 35(3).⁴⁷ In South African law, it may be accepted that where a person applies to a court to be released on bail, such a person is already an accused person charged with a criminal offence. To say that this right is not applicable during a bail application is to accept that the accused's right to a fair trial is suspended during such an application. This is an unsound approach. It is trite that the objective of a bail application is to determine whether the interests of justice permit the release of the *accused* pending

44 *S v Orrie* 218.

45 *S v Melani and Others* 1996 (2) BCLR 174 (E) 188.

46 See Currie & de Waal (2005: 744) and Schwikkard (1998: 402).

47 See Currie & de Waal (2005: 744) and Schwikkard (1998: 402).

trial.⁴⁸ Whereas a bail application is not concerned with the guilt or innocence of an accused, one of the factors taken into account concerns the “question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail”.⁴⁹ When considering whether to release the applicant on bail, the court, therefore, does consider evidence to be used at trial, in particular the strength of the prosecution’s case and the likelihood of a conviction on the facts placed before it.⁵⁰ The court considers also the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her.⁵¹ In addition, section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 provides that:

The record of bail proceedings ... shall form part of the record of the trial of the accused following upon such proceedings: provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any such proceedings.

Whatever testimony the applicant/accused provides at the bail hearing may become evidence at the subsequent trial. If an applicant/accused admits guilt at his bail application and later changes his plea to one of not guilty, it may be a factor which inadvertently could assist the state in proving its case against him at the subsequent trial. The fact that an applicant/accused is warned by the court of the consequences of testifying about the merits of the case during a bail application is not sufficient to safeguard his rights in terms of section 35(3).

There is no justification, therefore, in South African law to find that an accused in a bail application does not have a right to a fair trial in terms of section 35(3), especially when one of the factors to be considered relates to his culpability. Canadian law has the following to say about the operation of the presumption of innocence, which is part of the right to a fair trial, outside the trial context:

The presumption of innocence is therefore an active principle throughout the criminal justice process. The fact that it comes to be applied in its strict evidentiary sense at trial pursuant to section 11(d) of the Charter, in no way diminishes the

48 *S v Dlamini* 1999 (4) SA 623 (CC) 641. See also Currie & de Waal (2005: 744).

49 *S v Dlamini* 641.

50 Section 60(6)(g) of the Criminal Procedure Act 51 of 1977.

51 Section 60(6)(h) of the Criminal Procedure Act 51 of 1977.

broader principle of fundamental justice. The starting point of any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be that the person is innocent.⁵²

This view is supported by South African cases such as *Acheson* and *Crossberg*. In *Acheson*, the court held that:

An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court.⁵³

The court in *Crossberg* followed the decision in *Acheson* and held that the “presumption of innocence operates in favour of an accused until his guilt has been established in court”.⁵⁴

The right to a fair trial ought to commence, therefore, from the inception of the criminal process, and bail applications are part of that process. Canadian law offers protection at all stages of the criminal process because the right to a fair trial upholds other fundamental rights such as the rights to dignity, privacy, liberty and equality. This approach would include those who are considered suspects, arrested persons and detained persons, as well as accused persons, and is the approach which ought to be followed in South Africa.

Pre-trial publicity starts within hours of the arrest of suspects and will continue throughout the investigation until the accused appears and pleads in a court of law. Adverse pre-trial publicity speaks inevitably to the guilt or innocence of those implicated in crime, whether they are suspects or detainees or arrested persons or accused persons and where such publicity violates the presumption of innocence or influences the outcomes of trials or bail applications, the right to a fair trial is infringed.

3.7 Presumption of Innocence

The presumption of innocence requires the state to prove the guilt of an accused beyond reasonable doubt. According to Schwikkard:

[T]he presumption of innocence contains two components,
(a) a rule requiring the state to bear the burden of proof,

52 De Villiers (2002: 96).

53 *S v Acheson* 1991 (2) SA 805 (Nm) 822.

54 *Crossberg v S* (2007) SCA 93 (RSA) 4 (unreported judgment).

(b) a directive that the burden will only be discharged when the guilt has been proved beyond reasonable doubt.⁵⁵

This principle was expounded in the English case of *Woolmington* in which the court held that the golden thread in criminal law is that it is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt.⁵⁶ It was followed in the cases of *Ndhlovu* and *Zuma*, and was held to reflect the position in South African law.⁵⁷ It is for the state to establish the guilt of a person and not for the accused to establish his innocence. The presumption of innocence operates in favour of the accused and must be rebutted by the state.

The presumption of innocence operates either as a rule of procedure and evidence inside the trial context or as a principle of fundamental justice throughout the criminal process. There is much debate in South African law as to whether the presumption of innocence operates outside the trial context. Section 35(3)(h) of the Constitution guarantees the right to be presumed innocent. Given its enactment as a constitutional right, Schwikkard argues that the presumption of innocence does not operate outside the trial context and that it is a rule of evidence and procedure in the trial context only. This view is supported by Currie & De Waal who opine that the presumption of innocence is a constitutional right that operates only in the context of an accused's right to a fair trial.⁵⁸ According to De Villiers:

As the Constitution forms the basis of these rights in contemporary South Africa, the effect of the presumption of innocence at trial must be limited to an understanding that the presumption is violated if conviction is possible despite the existence of reasonable doubt about guilt. This procedural and evidentiary rule only applies at trial, where the innocence or guilt of the accused is decided.⁵⁹

This argument implies that the presumption of innocence was limited by its enactment as a constitutional right and that the common law presumption of innocence no longer exists in South African law. It is a rule of evidence and procedure which operates within the trial context only.

55 Schwikkard (1998: 396).

56 *Woolmington v DPP* (1935) AC 462 (HL).

57 See Schwikkard (1998: 397); *S v Zuma* 416; *R v Ndhlovu* 1945 AD 369.

58 Currie & De Waal (2005: 748).

59 De Villiers (2002: 196).

If this approach is followed then it does not matter whether the media speculate on the guilt of the accused, no matter how irresponsible and prejudicial such speculation. Thus, trial by media is acceptable expression even in a situation where such publicity infringes the presumption of innocence, and the trial would not be unfair since the right to be presumed innocent operates only as a rule of evidence and procedure during the trial where the object is to determine the guilt or innocence of an accused. Anything that happens prior to the trial would be irrelevant insofar as the trial itself is concerned.⁶⁰ This approach is a result of a very narrow interpretation of the right to be presumed innocent, and the origin of this narrow interpretation lies in the perception that the onus on the state to prove the guilt of an accused beyond reasonable doubt is a “mere” rule of evidence applicable during trial proceedings only.

However, as already noted, constitutional rights ought to be interpreted generously and purposively to give expression to the values underlying the Constitution. The purpose of the presumption of innocence is described cogently in the Canadian case of *Oakes*, where the court held that the enactment of the presumption as a Charter right does not diminish its broader purpose as a fundamental right, which dictates that the starting point of any proposed criminal prosecution is that the person charged with or *suspected* of committing an offence is innocent.⁶¹ This approach was followed in the South African cases of *Sebejan*, *Orrie* and *Melani*.⁶² The presumption of innocence protects and preserves other fundamental rights and to restrict its operation to the criminal trial context will confound its fundamental purpose.

The right to a fair trial requires, therefore, that an accused be treated fairly throughout the criminal process. The right to be presumed innocent under section 35(3)(h) of the Constitution ought to apply across the criminal process and thereby become a principle of fundamental justice, as applied in international law. The presumption of innocence as a principle of fundamental justice requires that any person facing possible criminal prosecution be treated as innocent throughout the criminal process.

60 See Danay & Foster (2006: 564).

61 *R v Oakes* [1986] 1 SCR 103.

62 *S v Melani* 188; *S v Sebejan* 1095; *S v Orrie* 218.

The rationale of the presumption of innocence is set out by Ashworth, whose exposition may be summarised as follows:

- (1) To protect the innocent from wrongful conviction. It recognises that public censure of a person for criminal conduct and state punishment should not be imposed on the innocent.
- (2) To minimise errors in fact finding during criminal trials.
- (3) To neutralise the disparity between the armoury and resources of the state and that of an accused. An accused in a criminal matter comes off second best in this contest but the presumption of innocence levels the arena by requiring the state to prove its case beyond reasonable doubt.
- (4) Proof beyond reasonable doubt. This rationale for the existence of the presumption of innocence serves to reinforce the other three values.⁶³

Adverse pre-trial publicity or trial by media speaks to the guilt or innocence of an accused. Evidence to be used at trial is publicised widely, inviting the public to speculate on the merits of the criminal prosecution. Public censure for criminal suspects and for arrested, detained and accused persons is exacerbated by such reporting, resulting often in the public calling for convictions or acquittals, as the case may be.

Public censure of crime and of persons accused of committing crime should not be imposed on the innocent for, if it is, it infringes their right to dignity and also may affect negatively their right to liberty. In *Mthimunya*, the media reported that the plaintiff had been found guilty of sexually harassing a co-worker, which claim was incorrect and the plaintiff was awarded damages.⁶⁴ In *Brown*, the court found that the media had created the perception that there already had been a verdict on the allegations against the accused, but refused the accused's application for a stay of the criminal prosecution. In both cases the individuals were subjected to public censure when, in fact, neither had been tried for or convicted of the crimes of which they were accused. The bail application of Pistorius is also an example of how pre-trial publicity prompted widespread calls for him to be denied bail. The court responded by setting stringent bail conditions, which conditions were relaxed by the High Court on appeal. The remarks by Bam J, noted in §3.2 above, suggest clearly that the magistrate who presided over

63 See Ashworth (2006: 71-75).

64 *Mthimunya v RCP Media & another* [2012] JOL 28254 (T).

the bail application had been influenced in his decision by the adverse pre-trial publicity and especially by the public censure of the both the crime committed and of Pistorius himself.⁶⁵

It is submitted that the presumption of innocence operates from the inception of the criminal process, and from that point the person suspected of committing the crime in question is considered innocent. Any pre-trial process which implies that the accused is guilty, including any such process influenced by media reports surrounding criminal offences, infringes the presumption of innocence.⁶⁶ Pistorius was treated as if he were guilty of murder, hence the stringent bail conditions imposed by the magistrate. That the magistrate had been influenced by the adverse pre-trial publicity is implicit in the judgment of Bam J.

If the result of media coverage of criminal trials leads to widespread censure by the public of accused prior to conviction, then the presumption of innocence is violated. If a court convicts an accused of a crime despite the existence of reasonable doubt, the presumption of innocence likewise is infringed. Media coverage of the murder of the well-known Van Breda family in Stellenbosch sparked debate on the guilt of the accused, Henri van Breda. Media reports on the evidence to be used by the state against the accused was publicised widely, in articles with titles such as *Shocking details emerge as State builds case against Henri van Breda*, *The Van Breda murders: Horrific evidence emerges surrounding Henri and Van Breda killings: what happened that night*.⁶⁷ These reports describe the evidence to be used at trial and how the accused supposedly is linked to the murders. One report goes so far as to suggest that the accused faces life imprisonment if convicted.⁶⁸ Detailed accounts of the circumstances surrounding the crime and evidence found at the crime scene are given. Fuelled by media coverage, this case is discussed on all social media platforms where the members of the public freely pronounce on the guilt of Henri van Breda. There is little doubt that pre-trial publicity infringes Henri van Breda's right to be presumed innocent which led to the state's and his opposing the application by the media to televise the trial. This application by the media to broadcast live the trial of van Breda was successful as the court found that the respondents did

65 *Sunday Tribune* (31 March 2013).

66 *S v Sebejan* 1095.

67 *EWN* (14 June 2016); *The South African.Com* (13 February 2015); *IOL News* (15 June 2016).

68 *EWN* (15 June 2016).

not show how the fair trial rights of the accused would be compromised by such broadcast.⁶⁹ The tick box application of section 35(3) by the court in *Brown* clearly was followed in this instance and, not surprisingly, van Breda and the NDPP are challenging this decision in the SCA.⁷⁰

Oscar Pistorius, J Arthur Brown and Shrien Dewani, too, were not presumed to be innocent, as they were all subjected to scathing pre-trial publicity, each being tried in the court of public opinion. Their right to be presumed innocent was denied them by the media and the public at large. Their dignity, privacy and, in some cases, their liberty were affected negatively by such reporting. Oscar Pistorius was released on bail with very stringent conditions, Brown was denied bail and Dewani refused to return to South Africa for fear of facing an unfair trial. Pistorius and Brown were convicted but their convictions and sentences were appealed by the state largely because of vocal public dissatisfaction. Dewani was acquitted but, again, his acquittal was met with hostile media reports which would not accept that he was not guilty.

3.8 Right to a Public Trial

The right to a public trial before an ordinary court is guaranteed by section 35(3)(c) of the Constitution. It is an accepted principle that a public trial is a trial which is open to the public and the media, and on which the media can report. This principle of open justice is based on the constitutional values of openness and transparency, which afford the public and the media a right of access to the workings of the courts. In *South African Broadcasting Corporation Ltd*, the court held that:

The principle of open justice is an incident of the values of openness, accountability and the rule of law, as well as a core part of the notion of a participatory democracy. All these are foundational values entrenched in the Constitution ... In the judicial sphere, notions of openness are even more important. The public is entitled to have access to the courts and to obtain information pertaining to them. There is no gainsaying that the gathering of information pertaining to how courts function is indivisibly linked to representative democracy. Once more, sections 34 and 35(3)(c) of the Constitution require that court proceedings in this country must be “public”.

69 *Media 24 Limited v National Director of Public Prosecutions and Others, In re: S v Van Breda* (5027/2017) (2017) ZAWCHC unreported judgment para 5.

70 *EWN* (24 April 2017).

After all, courts of law exercise public and often coercive power. What they do and do not do is of legitimate public concern.⁷¹

The court in *Mamabolo* articulates this principle as follows:

Judicial proceedings of any significance are conducted in open court, to which everybody has free access. All decisions of judicial bodies are as a matter of course announced in public; and, as a matter of virtually invariable practice, reasons are automatically and publicly given ... This manner of conducting the business of the courts is intended to enhance public confidence ... it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the judiciary by the Constitution.⁷²

It is, therefore, a crucial element of our democracy that the public and the press have free access to courts. According to Milo, Penfold & Stein:

[O]pen justice is a constitutional principle that emerges from the co-incidence of a number of rights and values that are entrenched in the Constitution: the right to freedom of expression, especially the right of the public to receive information and ideas; the rights to a fair criminal trial and public hearing; and the foundational values of accountability, responsiveness and openness.⁷³

The principle of open justice ensures that the exercise of public power by the judiciary is scrutinised by the public and the media, and is reported on by the latter. Thereby judicial officers are held accountable for any abuse of their powers.

That justice not only must be done but also must be seen to be done is implicit in the principle of open justice, fostering public confidence in the criminal process for both offender and victim and thus legitimising the judicial process. As the court in *South African Broadcasting Corporation Ltd* held:

Open court rooms are likely to limit high-handed behaviour by judicial officers and to prevent railroaded justice, to mention two of the risks of secret justice ... Far from being

71 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 560 -561.

72 *S v Mamabolo (E TV and Others Intervening)* 462.

73 Milo, Penfold & Stein (2014: 116).

intrinsically inimical to a fair trial, open justice is an important part of that right and serves as a great bulwark against abuse.⁷⁴

Open courtrooms stimulate judicial excellence, thus rendering courts accountable and legitimate.

The right to a public trial is not absolute and may be limited by section 36 of the Constitution. Further, section 156 of the Criminal Procedure Act provides for circumstances where court proceedings need not be held in an open court. Important for the present discussion is section 153(1) of the Criminal Procedure Act, in terms of which:

[A] criminal court may direct that the public or any class thereof shall not be present at such proceedings or any part thereof if it is in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors.⁷⁵

In international law, the right to a public hearing and exceptions thereto are provided for in several covenants and conventions. Article 14(1) of the ICCPR, Article 6(1) of the ECHR, Article 8(5) of the ACHR and Section A(3)(f),(g) and (h) of the African Principles and Guidelines, read with Article 7(1) of the ACHPR, entitle everyone to a fair and public hearing. In accordance with international law:

The press and the public may be excluded from all or part of a hearing for reasons of public morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.⁷⁶

In terms section 38 of the Siracusa Principles, the media or the public may be excluded from court proceedings or part thereof in circumstances where “the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial”.⁷⁷

As is apparent, both South African law and international law provide for circumstances in which the public and the media may be excluded from a public trial in

74 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 539.

75 See also Du Toit *et al* (2014: 22-30) and Milton, Hoxter & Cowling (2005: C1- 35).

76 Article 14(1) of the ICCPR.

77 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1985.

circumstances where publicity would be prejudicial to the fairness of a trial or the interests of the administration of justice. This exclusion can be determined only by a court in circumstances where it is strictly necessary and in accordance with the law.

Court proceedings tainted by adverse pre-trial publicity during which the accused has been judged and tried in the court of public opinion will encourage a lack of confidence in the judicial process, especially when the judgment of the court does not accord with what was expected by the public. Justice Chauhan says the following in this regard:

Most importantly, the appreciation of the evidence by the public and the judiciary may differ. While the people are convinced of the guilt of the accused, the court, after meticulous examination of the evidence may acquit him. Such differences in perception weaken the faith of the public in the criminal justice system.⁷⁸

The case of Shrien Dewani is an example of adverse pre-trial publicity creating the impression that the accused was guilty of murdering his wife. His eventual acquittal weakened public confidence in the administration of justice and tainted the reputation of the judiciary. Traverso J, standing firm in her judgment, said the following regarding public opinion:

I realise that there is a strong public opinion that the accused should be placed on his defence. I have taken note of that. I have also taken note of the plight of the Hindochas. I have however taken an oath of office to uphold the rule of law and to administer justice without fear, favour or prejudice. That I cannot do if I permit public opinion to influence my application of the law. If any court permitted public opinion, which has no legal basis, to influence their judgments, it will lead to anarchy.⁷⁹

Judge Traverso was accused of gross judicial bias and misconduct in the media, with some detractors calling for her suspension.⁸⁰ In another headline story titled *Justice failed us, says Anni Dewani's family*, the ANC Youth League Provincial Chairperson said:

There was an overriding social interest in the case, particularly given the abuse of women and children in South Africa ... the ruling set a bad precedent in how the justice system dealt with crimes against women and children ... Traverso should have looked at the entire picture instead of "the non-uniformity" in the state witnesses' evidence ... the judgment gave additional credibility to claims that the

78 Chauhan (2011: 38).

79 *S v Dewani* [2015] JOL 32655 (WCC) 83.

80 *The Guardian* (24 January 2015).

South African justice system was compromised and easily manipulated by privileged persons.⁸¹

Other headlines, such as *Judge Traverso wrong to acquit Dewani: Legal expert, Judge Traverso must step down: SOPOC, The Dewani trial is a farce* and *#JusticeForAnni: South Africans criticise court for throwing out murder case* are all examples of adverse pre-trial publicity which convicted Dewani prior to his actual trial and fuelled unfair and unfounded criticisms of Judge Traverso.⁸² The judge explained her decision thoroughly, which ought to have informed the public about the applicable laws and how she reached her conclusions. The media, however, were not interested in this. They needed to sell a story and the best story in this instance was criticism of the presiding judge.

The principle of open justice strengthens public confidence in the workings of the court and enables the public to call to account judicial officers who abuse public power and to debate and comment on the administration of justice. Adverse pre-trial publicity and trial by media, as they did in the cases of both Dewani and Pistorius, weaken public confidence in the courts and the administration of justice. Could it be said that the media reporting in advance of the judicial process in Dewani's case prompted the court to acquit him to retain the integrity of the justice system in South Africa or was the judgment correct? This question is the result of continued irresponsible and prejudicial pre-trial reporting. Should the media in such cases be excluded from a public trial or from reporting on it?

The right to a public trial has been extended to allow the media live coverage of high profile matters. In a landmark decision by the court in *Multichoice*, the media were allowed live coverage of the trial of Pistorius, but in order to balance the right of the media to freedom of expression with the right of Pistorius to a fair trial, the court prescribed the manner of media coverage.⁸³ Mlambo J made it clear that, when faced with balancing two competing constitutional rights:

81 *Mail & Guardian* (9 December 2014).

82 *93.1 FM The Voice of the Cape* (8 December 2014); *93.1 FM The Voice of the Cape* (3 December 2014); *The Stream AllJazeera* (8 December 2014).

83 *Multichoice (Proprietary) Limited v National Prosecuting Authority* 598.

[I]t is not open for me to look at the value of each right and disqualify it in favour of another. My task is to look at each right at stake and permit its enjoyment to achieve the objective for which it is asserted.⁸⁴

Given the adverse pre-trial publicity in the case of Pistorius, it is questionable whether this decision was correct. It allowed the media 24-hour coverage of the trial, which included panel discussions by lawyers, academics and retired judges. These discussions centred ultimately around the possible outcome of the matter. It facilitated trial by media, which the court in *Multichoice* had warned against. The public believed not only that Pistorius was guilty of murder but also that a lengthy prison sentence would be imposed upon conviction. When Pistorius was convicted of culpable homicide and sentenced to a short term of imprisonment only, the public was outraged. Prompted by the public outrage and a vocal media, the state appealed the culpable homicide conviction, which was overturned and Pistorius was convicted of murder. However, the new sentence for the murder conviction attracted further outrage and dissatisfaction, and the state once again appealed, this time against the sentence imposed on Pistorius. The judges may be swayed by media pressure and public opinion, which could lead to a higher sentence for Pistorius.⁸⁵

The right of the media to report on criminal trials and the right of the public to receive such information and participate in the conversation serves the underlying constitutional values of transparency, openness and accountability. Access to courts by the public and the media serves the same values. It is, therefore, of the utmost importance that the reporting of cases, be it before, during or after trial, not infringe upon the fair trial rights of the accused or upon the administration of justice. Adverse media reporting will undermine the entire criminal process, as the court in *Mamabolo* warns:

This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die.⁸⁶

84 *Multichoice (Proprietary) Limited v National Prosecuting Authority* 598.

85 *News 24* (15 September 2016).

86 *S v Mamabolo (E TV and Others Intervening)* 462.

The purpose of the right to a public trial and, consequently, the principle of open justice are frustrated by adverse pre-trial reporting or trial by media. The problem is aggravated by live media recordings of high profile criminal matters which seek not to educate the public but to speculate on the guilt of an accused facing the armoury of the state, public censure and subjection to social stigma and ostracisation from the community. Such manner of reporting will destroy public confidence in the courts, the judiciary and the administration of justice. The right to a fair trial encompasses more than just the rights of an accused; it involves fairness of the entire process. Where adverse pre-trial publicity is prejudicial to the administration of justice the right to a fair trial likewise is infringed.

3.9 Right to a Trial before an Impartial and Independent Court

The independence of the judiciary is a prerequisite for the rule of law and a fundamental guarantee of a fair trial.⁸⁷ Notably, though, the right to be tried by an independent and impartial court is not part of the fair trial rights contained in section 35(3) of the Constitution. This is because the rights in the Bill of Rights are not absolute and may be limited in terms of the limitations clause in section 36, whereas the independence and impartiality of the judiciary never can be limited. This aspect of the right to a fair trial must be read with the provisions of section 165 of the Constitution, which confirm that every accused has a right to a public trial by an ordinary court that is independent and impartial.

Section 165(1) of the Constitution vests judicial authority in the courts. Courts are the fora for pronouncing on a person's guilt or innocence on a criminal charge in a public hearing. Section 165(2) declares courts to be independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice. In the execution of their duties, judicial officers must demonstrate independence in all matters before them. Section 165(3) prohibits any person or organ of state from interfering with the functioning of the court, which includes judicial independence. This

87 Principle 1 of the UN Basic Principles on the Independence of the Judiciary.

principle of judicial independence requires that judicial officers decide matters before them free from inducements or pressures.⁸⁸

The judiciary must display impartiality in all matters before them. The principle of impartiality requires judicial officers not to allow their judgment to be influenced by personal bias or prejudice, not to harbour preconceptions about a particular case before them, and not to act in ways that improperly promote the interests of one of the parties to the detriment of the other.⁸⁹

The right to a trial before an independent and impartial court is entrenched in international law. In terms of Article 10 of the UDHR, Article 14(1) of the ICCPR, Article 6(1) of the ECHR and Article 8(1) of the ACHR, everyone has the right to a fair hearing by a competent, independent and impartial tribunal. Paragraph 19 of General Comment 32 of the ICCPR declares the right to a competent, independent and impartial tribunal an absolute right that is not subject to any exception. The principles of judicial independence and impartiality are entrenched also in African fair trial rights jurisprudence. Section A(4)(f) and Section A(5)(a) of the African Principles and Guidelines, firstly, prohibit any inappropriate or unwarranted interference with the judicial process and, secondly, require that a judicial body base its decision only on objective evidence, arguments and facts presented before it and to decide matters without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

In addition, the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), adopted by the UN in 1985, are intended to establish standards for ethical conduct by judges and to afford the judiciary a framework for regulating its conduct. The requisite of independence of the judiciary is set out in the first of the UN Basic Principles:

A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of

88 Kelly (1996: 2). See also Ul-Haq (2010: 6).

89 Para 21 of General Comment No 32 of the ICCPR (2007).

the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

Independence in this instance speaks to the autonomy of a given judge or tribunal to decide cases by applying the law to the facts. Judges must be free to decide matters before them without interference from other state organs and they cannot be subordinate to the other branches of public power. An independent judiciary not only must be independent of these and other influences, but also must appear to be independent. In terms of the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, every state has a duty to:

Put in place the necessary safeguards so that judges can decide cases in an independent manner. The independence of the judiciary must be upheld by refraining from interfering in its work and by complying with its rulings. The judiciary must be independent as an institution and individual judges must enjoy personal independence within the judiciary and in relation to other institutions.⁹⁰

No person, therefore, may interfere with or influence the outcome of cases before courts. There is an obligation on the state to ensure that the judiciary fulfils its functions free from such interference or inducements.

The impartiality required of the judiciary is set out in the second of the UN Basic Principles:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. This principle requires a judge to perform his or her judicial duties without favour, bias or prejudice.

Impartiality refers to the state of mind of a judge or tribunal towards a case and the parties to it, and requires judges not to harbour preconceptions about the matters brought before them, nor to act in ways that promote the interests of one of the parties.⁹¹ Impartiality is the absence of bias, hostility or sympathy towards either of the parties. Judges are required to decide cases only on the basis of facts and in accordance with the law, without

90 International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioner Guide No 1 (2007: 25).

91 International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Practitioner Guide No.1 (2007:27).

restriction. They cannot hold any preconceived notions or ideas of cases before them and they cannot become partisan to the cause of either of the parties. It is important that the state and all other institutions, private or otherwise, refrain from putting pressure on or inducing judges to rule in a certain way, and judges have a correlative duty not to be influenced in any way by extraneous matters and to maintain their impartiality.

Trial by media usurps the functions of the courts by pronouncing on the guilt of an accused prior to a court of law, in which judicial authority is vested, doing so. Evidence to be used at the trial is published in all tabloids and is discussed widely on all fora. In the Pistorius matter, discussions were held on every trial day and televised worldwide. Where the media publish reports on matters still to be decided by courts, including evidence to be presented and the likely outcome of the cases, they are interfering with the functions of the judiciary. Such discussion and debate do not circumvent judges and may exert pressure on them to decide a matter in a certain way. The task of adjudication is not an easy one and is made all the more difficult by pre-trial publicity. Where pre-trial publicity or trial by media interferes with or disrupts the functions and duties of the judiciary in this manner, section 165 of the Constitution is violated. The view of the court in *Brown* that, due to their training and their office, judges are not influenced by extraneous matters and therefore will decide cases only on the facts before them cannot be supported.⁹²

It is trite that judges must be independent and impartial by virtue of the office that they hold. However, this does not mean that judges are immune to outside influences. According to Ahmad:

Stir caused by media does not leave the judges untouched. Undoubtedly, judges are human beings and the pressure created by the media too influences them.⁹³

Cardozo, in his lecture on the *Nature of the Judicial Process*, refers to the forces which enter into the conclusions of judges and observes that “the great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judges by”.⁹⁴ It is

92 *Brown v National Director of Public Prosecutions* 80.

93 Ahmad F (2009: 58).

94 Cardozo (1921: 168).

incorrect to believe that judges are not influenced by media reports on matters before them. Such influences may not be conscious, as Cardozo explains further:

Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.⁹⁵

According to Cardozo, there is a measure of resistance or refusal to accept that judges, too, are influenced by external forces which manifest in their judgments:

There has been a certain lack of candour in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do.⁹⁶

In concurrence with these views, Justice Frankfurter held in *John D Pennekamp v State of Florida* that:

No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print ... It is a condition of that function – indispensable in a free society – that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence.⁹⁷

Lord Dilhorne, in the matter of *Attorney General v BBC*, had the following to say about the influence of the trial publicity on judges:

It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media and consequently that the need to prevent the

95 Cardozo (1921: 167).

96 Cardozo (1921: 168).

97 *John D Pennekamp v State of Florida* (1946) 328 US 331 at 357.

publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. *This claim to judicial superiority over human frailty is one that I find some difficulty in accepting.* Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of Judicial duties. *Nevertheless, it should, I think, be recognised that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it.*⁹⁸

Similarly, in *Rex v Parke Wills* J held that:

I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him, would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty.⁹⁹

The task of judicial officers is not an easy one. It requires judges to apply their knowledge, experience and expertise to matters before them. This task is made all the more difficult by pre-trial publicity. Cardozo, Frankfurter, Dilhorne and Wills were all respected judges and even they admit that such publicity can influence them in adjudicating matters, albeit subconsciously.

Adverse pre-trial publicity can influence unduly and induce judges to decide cases in a certain way or to be partisan to the cause of a particular party. This kind of influence on presiding officers was evident in the bail hearing of Oscar Pistorius. Traverso J, in her judgment in the *Dewani* case, admits that she took note of the strong public opinion that the accused (Dewani) should be placed on his defence and of the plight of the Hindochas. Why was this necessary if she was going to decide the matter free from such inducements or pressures? The effect of pre-trial publicity on the trial of Dewani is evident from these concessions by the judge. Her alleged hostility towards the prosecutor was reported by the media as another factor leaning towards her being partisan to the cause of the accused. It bears noting here that former Constitutional Court Judge Yacoob, commenting on the

98 *Attorney General v BBC* 1981 AC 303 (HL). Emphasis added.

99 *Rex v Parke* (1903) 2 KB 432.

judgment in the Jacob Zuma rape trial, accepted that judges were human and that their decisions were subjective to some extent.¹⁰⁰

The independence and impartiality of judges are violated by adverse pre-trial publicity or trial by media. Where judges are influenced in this manner and accused persons are convicted despite the existence of reasonable doubt, the right to a fair trial has been infringed. In this way judges succumb to public opinion and their judgments will be aligned to what the public expects and no longer based on the facts before them. Where the state fails to protect the judiciary in the performance of its duties, section 165 of the Constitution is violated.

3.10 Conclusion

The values underlying the right to a fair trial are dignity, liberty and equality. Subjection to public censure and ostracisation from the community count among the indignities suffered by those who are accused of committing crime. These are exacerbated by the media reporting on matters before court and delivering a villain to the community. The right to a fair trial is much more than mere rights afforded an accused person during a criminal trial. It has to protect an accused person from the very inception of the criminal process and the values underlying the right to a fair trial have to be guaranteed those facing criminal prosecution and those who are victims of crime. Any action which infringes the underlying values of the right to fair trial renders a trial unfair.

It may be accepted that trial by media will prejudice the fair trial rights of accused persons and the administration of justice. The question in South African law is whether such publicity will render a criminal trial unfair. Pistorius, Brown and Dewani all were subjected to pre-trial publicity or trial by media. Such media coverage infringes the presumption of innocence, frustrates the right to be tried in open court, and interferes with the independence and the impartiality of presiding officers. It is publicity which is not meant to educate or inform the public on matters before court. Instead, it is publicity motivated by a more sinister design and that is financial and market gain for media houses, irrespective of the way it affects the

100 *The Times Live* (8 August 2014).

dignity and liberty of an individual. The constitutional right to a fair trial, which was denied so many people in the past, ought not to be undermined by media that are intent on publishing stories for entertainment purposes.

The courts in South Africa are reluctant to accept that they are influenced by pre-trial publicity. However, this argument is refuted by experienced members of the judiciary who admit that judges, being human, are influenced by external factors. There is, therefore, a real possibility that an accused may be convicted despite the existence of reasonable doubt. Where this happens the right to a fair trial is violated. It is necessary, therefore, for the state to fulfil its obligation under section 165 of the Constitution to protect the judiciary in the performance of its duties and to prosecute the media who interfere with and unduly influence judges in deciding matters.

CHAPTER FOUR

STAY OF CRIMINAL PROCEEDINGS

4.1 Introduction

Media reporting of a judicial process, or in advance of it, may, in exceptional circumstances, be so irresponsible and prejudicial as to make the unfairness irreparable and the administration of justice impossible. If that were to occur then there is, quite literally, nowhere to go. The court will have no option but to grant a stay of proceedings.¹

This chapter will deal with the stay of criminal proceedings as a possible recourse for those subjected to adverse pre-trial publicity or trial by media.

It is trite that the right to prosecute vests in the state. As a rule, no person can interfere with a decision of the state to institute criminal prosecution. When a court grants a permanent stay of criminal prosecution barring the state from prosecuting an accused, it effectively violates the right of the state to prosecute. This chapter will consider whether adverse pre-trial publicity or trial by media warrants court interference with the decision of the state to prosecute. In so doing, the matters of *Brown* and *Banana* will be analysed critically.

4.2 South African Law

An application for the stay of criminal prosecution is an interlocutory proceeding. Such applications are brought prior to the start of criminal proceedings or during the trial but before its conclusion. However, South African courts are loath to deal with appeals and interlocutory applications before a criminal trial is concluded. In *Broome*, the court held:

As a general rule, criminal trials should be continuous, with no appeals or interlocutory approaches to a court of appeal before conviction. History and experience have taught that in general it is in the interest of justice that an appeal awaits the completion of a case, as the resort to a higher court during proceedings can result in delay, fragmentation of the process, determination of issues based on

1 *Banana v Attorney-General* 1999 (1) BCLR 27 (ZS) 32.

an inadequate record and the expenditure of time and effort on issues which may not have arisen, had the process been left to run its ordinary course.²

The reasoning of the court is based on the fact that it is easier to determine a violation of a right or to correct a wrong decision made during a criminal trial after the trial has been completed than during its course. It is difficult to determine issues that have not arisen yet and any alleged infringement of the right to a fair trial at this juncture would be nothing more than conjecture. However, the court in *Broome* qualified this approach in finding that:

Section 39(2) of the Constitution ... enjoins this court and imposes an obligation to construe that a judicial pronouncement in any criminal proceedings may be subject to an appeal, even before plea, where the interest of justice so requires.³

Thus, an application for the stay of prosecution prior to the commencement of a criminal trial will be considered only if it is in the interests of justice to do so. In *De Vos*, the Constitutional Court held similarly that while it generally is undesirable to decide on constitutional issues before the conclusion of the relevant proceedings in the lower courts, this rule is not inflexible and may be departed from in the interests of justice.⁴ In terms of the decision of *Brown*: "Either party may apply to the court for a stay in the proceedings. This stay in proceedings may be on a temporary or permanent basis."⁵

The stay of criminal proceedings is a drastic remedy which, if granted, could have far-reaching effects. In *Broome*, the court describes aptly the nature of such a remedy:

The relief sought by them is, both philosophically and socio-politically, radical. To bar the prosecution before the trial begins is far-reaching. It indeed prevents the prosecution from presenting society's complaints against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.⁶

The court in *Sanderson* held similarly that the remedies sought in such cases are radical in that they bar the state from prosecuting an alleged offender and seldom will be granted in the

2 *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town, and Others* 2008 (1) SACR 178 (C) 188.

3 *Broome v Director of Public Prosecutions, Western Cape* 188.

4 *De Vos NO v Minister of Justice and Constitutional Development (Cape Mental Health Amicus Curiae)* 2015 JDR 1324 (CC) para 14.

5 *Brown v National Director of Public Prosecutions* 65.

6 *Broome v Director of Public Prosecutions, Western Cape* 190.

absence of significant prejudice to an accused.⁷ Where a court bars the prosecution on an arbitrary basis from instituting criminal proceedings against an alleged perpetrator, it infringes section 179 of the Constitution. Section 179 vests the right to prosecute in the National Prosecuting Authority (NPA). No one may intervene in or interfere with the decision of the NPA to institute a criminal prosecution. An application for the stay of prosecution prior to or during a criminal trial will be considered only where it is in the interests of justice to do so and where the continuation of the trial would lead to substantial irreparable prejudice to an accused person.

As to what would constitute substantial irreparable prejudice, the court in *Brown* held that:

The party applying for the stay in the proceedings will have to prove that the stay in proceeding is the viable option. The appellants or the accused must satisfy the court of the facts upon which they rely for the contention that the right to a fair trial has been infringed. If the prejudice is said to not be trial related then there are other remedies that one could use that would be less radical than the stay in proceedings. The accused ought not to apply for a stay in prosecution on the ground that he or she is likely to be prejudiced by external factors, the party must prove that there is irreparable trial related prejudice and that the extraordinary circumstances will justify such a drastic relief.⁸

The court in *Broome* held also that: “A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial related prejudice.”⁹ The court found further that where the prejudice is non-trial related there are other less drastic remedies available:

These may include a mandamus requiring the prosecution to commence the case, refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused.¹⁰

The court in *Sanderson* held similarly that where the prejudice is not trial related, other relief is possible:

7 *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) 245.

8 *Brown v National Director of Public Prosecutions* 66-67.

9 *Broome v Director of Public Prosecutions* 190.

10 *Broome v Director of Public Prosecutions* 190.

Release from custody is appropriate relief for an awaiting-trial prisoner who has been held too long; a refusal of a postponement is appropriate relief for a person who wishes to bring matters to a head to avoid remaining under a cloud; a stay of prosecution is appropriate relief where there is a trial prejudice.¹¹

The courts are clear, therefore, on the approach to be followed in these matters. Where the prejudice to an accused is non-trial related then a permanent stay of prosecution is not an appropriate remedy. Where the prejudice is trial related, it must result in irreparable prejudice. However, unlike the decisions in *Brown* and *Broome*, the court in *Sanderson* did not rule out the possibility that a stay of criminal prosecution may be granted where the prejudice is non-trial related.¹² This approach is in keeping with the decision in *Zuma*, in which the court found that the right to a fair trial is not limited to the specific rights enumerated under section 35(3) of the Constitution but embraced the concept of substantive fairness which enjoins all courts to conduct criminal trials in accordance with open-ended notions of basic fairness and justice.¹³ The court in *Sanderson* found correctly that the right to a fair trial extends to both trial related and non-trial related prejudice.¹⁴

The non-trial related prejudice that may be suffered by accused persons and the victims of crime can be far reaching. The court in *Phillips* describes the effect of criminal proceedings upon an accused in the following terms:

[D]oubt would have been sown in the eyes of family, friends and colleagues as to the accused's integrity and conduct. In addition to social prejudice, an accused is subject to invasions of liberty that range from incarceration to onerous bail conditions to repeated attendance at remote courts for formal remands.¹⁵

Adverse pre-trial publicity or trial by media exacerbates the grave consequences for those accused of crime. In Chapter Three above a determination was made that adverse pre-trial publicity violates the right of the accused to be presumed innocent. Such media attention perverts the principle of open justice and affects the impartiality and independence of the courts. These constitute trial related prejudice. The consequences suffered by an accused

11 *Sanderson v Attorney-General* 246.

12 *Sanderson v Attorney-General* 246.

13 *S v Zuma* 411.

14 *Sanderson v Attorney-General* 245.

15 *Director of Public Prosecutions v Phillips* 527.

person often violate his rights to dignity, liberty and equality. These are the self-same interests sought to be protected by the right to a fair trial and require the courts to apply the principles enunciated in *Sanderson* in a proper manner. The distinction made between trial related and non-trial related prejudice therefore is unsustainable.

In sum, South African courts will order a stay of prosecution only in circumstances where the trial related or non-trial related prejudice facing the accused is irreparable and there are no less drastic remedies available to forestall such prejudice.

4.3 Foreign Law

The position in England is similar to the position in South African law. Under English law the prosecution decides whether or not to commence criminal proceedings and, if commenced, whether they should continue. English courts will not interfere easily in prosecutorial decisions in this regard. Thus, in *Environment Agency v Stanford*, the court held that:

The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... The question of whether or not to prosecute is for the prosecutor.¹⁶

English courts, by virtue of their inherent jurisdiction to promote justice and to prevent injustice, will grant a stay of criminal prosecution where they are of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.

An abuse of process was defined by the Privy Council in *Hui Chi-Ming v R*, “as something so unfair and wrong about the prosecution that the court should not allow a prosecutor to proceed with the case”.¹⁷ A stay of criminal prosecution will be granted only in exceptional circumstances where there is an abuse of the court process, and in the absence of any less radical remedy. An abuse of process justifying the stay of a prosecution could arise where it would be impossible to give the accused a fair trial or where it would amount to a misuse of process because it offends the court's sense of justice and propriety to be asked to try the

16 *Environment Agency v Stanford* [1998] COD 373.

17 *Hui Chi-Ming v R* 1992 All ER 3 897. See also Seetahal (2014: 16) and Young (2010: 5).

accused in the circumstances.¹⁸ However, courts in England prefer for cases to continue to trial and to consider first remedies other than a stay.

Abuse of process is central to the stay of criminal proceedings in Canadian Law. In the matter of *Scott*, the court held that:

[A]buse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.¹⁹

Abuse of process concerns the conduct of the prosecution and other authorities when instituting criminal proceedings or their conduct during such proceedings. The abuse of process must cause actual prejudice of such a degree that the public's sense of decency and fairness is affected.²⁰ Even where there is an abuse of process as described, Canadian courts will not grant an application for stay of proceedings easily, as it is considered a drastic remedy. Courts will attempt to find less drastic remedies. In *Regan*, the court held that:

[S]tay is reserved for only those cases of abuse where a very high threshold is met: the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the 'clearest of cases'²¹

The court also found further that a stay of criminal proceedings will be appropriate only if two criteria are met:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.²²

To be successful with an application for stay of criminal proceedings under Canadian law, the applicant will have to show an abuse of process which caused actual prejudice and that such prejudice will be aggravated should the trial continue. Once that has been

18 *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, HL.

19 *R v Scott* [1990] 3 SCR 979 1007.

20 *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, 2000 SCC 44 par 133.

21 *R v Regan* 2002 SCC 12 para 53.

22 *R v Regan* para 54.

established, there should be no other remedy available capable of removing that prejudice.

The leading authority under Zimbabwean law is the case of *Banana*. Here the court held that:

[A]n accused person who seeks an order prohibiting his prosecution on the ground that circumstances have occurred which would render it unfair (which include pretrial publicity), must establish on a balance of probability that there is a real or substantial risk that by reason of such circumstances he could not obtain a fair trial.²³

In terms of the judgment, a real or substantial risk is not based entirely on the ability of assessors or judges to accomplish their task but on the availability of inbuilt mechanisms in the criminal justice system to protect the fairness of the trial. According to the court:

Only when such measures are inadequate to guarantee impartiality and to rid the influence of prejudice, will section 18(2) of the Constitution have been breached and the benefit of the fair trial process lost to the accused.²⁴

It may be concluded that a stay of criminal proceedings will be granted only as a last resort, when all measures put in place to protect the fairness of a trial fail. The case of *Banana* is considered in more detail below.

In sum, adverse pre-trial publicity is a ground upon which an order for a stay of criminal prosecution may be sought. The court will have to be satisfied that it will be in the interests of justice to hear such an application and that the accused will suffer substantial prejudice, whether trial related or non-trial related, should the matter proceed to trial. The prejudice suffered as a result of such publicity must be irreparable and not capable of being remedied by a less drastic recourse.

4.4 The Cases of *Brown* and *Banana*

The courts in *Brown* and *Banana* had an opportunity to consider whether adverse trial publicity was a basis upon which an order for the stay of criminal prosecution could succeed.

23 *Banana v Attorney General* 35.

24 *Banana v Attorney General* 39.

It is common cause that Brown was subject to scathing pre-trial reporting. As noted in §1.1 above, he was labelled a thief who stole billions from widows and orphans. The media went so far as to suggest that there was already a verdict against him. Brown argued that his right to be presumed innocent and his right to a public hearing before an independent and impartial court were violated and that there was no remedy short of a stay available to him.

In deciding the matter, the court had to consider the nature of the crime and the nature of the alleged prejudice. The court acknowledged the pre-trial publicity of which Brown complained, and made a determination that it amounted to adverse pre-trial publicity which was prejudicial to him. However, the court found the prejudice suffered by Brown was not trial related. In dealing with the Brown's argument that any appointed judicial officer would be biased against him as a result of the detailed media reports on the matter, the court expounded upon the infallibility of judges and found that they were unlikely to be influenced by extraneous matters and would make a finding only on the facts before them.²⁵

It is submitted that the court in *Brown* erred in several respects. Firstly, the court made it clear that:

The accused ought not to apply for a stay in prosecution on the ground that he or she is likely to be prejudiced by external factors.²⁶

The court found, in essence, that trial by media or adverse pre-trial publicity is not a ground upon which a stay of prosecution may be sought. In so doing, it confined the right to a fair trial to the procedural aspects of section 35(3) of the Constitution. Secondly, it did not extend the right to a fair trial to non-trial related prejudice, as per the decision in *Sanderson*. Finally, when the court found that the applicant did not show actual trial related prejudice caused by the adverse pre-trial publicity, it did not suggest a remedy less drastic than a stay. The result was that the applicant was left without a remedy.

In *Banana*, the court similarly found that the pre-trial reporting was prejudicial to the accused. The court then had to decide whether the accused had established, on a balance of

25 *Brown v National Director of Public Prosecutions* 79-82.

26 *Brown v National Director of Public Prosecutions* 66-67.

probability, that there was a real or substantial risk that he would not obtain a fair trial.²⁷ The court made the following concession regarding the effect of pre-trial publicity on judges:

I am inclined to think it a fallacy to assume that trial judges cannot be affected by persistent outside information of a prejudicial nature. Judges are mortals with human frailties.²⁸

However, the court found that the determination of the existence of a real and substantial risk of partiality is negated by the availability of mechanisms in the criminal justice system designed to protect the fairness of the trial.²⁹ It is clear that the judge in *Banana* relied upon these inbuilt mechanisms of the criminal justice system to ensure the fairness of the trial rather than on his role as judicial officer. In the absence of such mechanisms or where they are inadequate, the independence and impartiality of judicial officers cannot save the trial and a stay of proceedings ought to be granted.

In both judgments, the courts' refusing a stay of criminal proceedings was based on the rationale that judges have dealt successfully with such matters in the past (*Brown*), and if it is accepted that there is a real or substantial risk of judges being influenced by extraneous concerns, it would be impossible to find impartial judges to hear high profile cases (*Banana*). These are untenable reasons. The failure of the state to protect judges in the performance of their duties and to ensure that they are free from outside interference and inducements constitute *lacunae* in the legal system. The media should be held accountable for their actions, but it appears that neither the courts nor the state is willing to do so, and would rather protect freedom of expression than safeguard the integrity, independence and impartiality of the judiciary.

The courts in *Brown* and *Banana* placed too much weight and reliance on the position of judges. It is implicit in their position that judges should be independent, impartial, competent and diligent, have integrity and treat all people equally who appear before them.³⁰ However, to

27 *Banana v Attorney General* 35.

28 *Banana v Attorney General* 37.

29 *Banana v Attorney General* 39.

30 The Bangalore Principles of Judicial Conduct 2002.

imagine that they will not be influenced by what they read and hear about those appearing before them is a fallacy.

The matter of *Shaik* should nullify the misconception that judges are not influenced by what they read and hear in the media. The *Mail & Guardian*, in reporting on the judgment in *Shaik*, published an article quoting Judge Hilary Squires as saying that there was a generally corrupt relationship between Deputy President Jacob Zuma (as he then was) and Durban businessman, Schabir Shaik.³¹ The SCA in *Shaik* found, astonishingly, that:

Between 1996 and 2002 Shaik and Mr Jacob Zuma engaged in what *the trial court appropriately called "a generally corrupt relationship"* which involved frequent payments by Shaik to or on behalf of Zuma.³²

Judge Squires never made this remark in his judgment and in a letter to the *Business Day* he complained about the persistent misattribution by the media of that phrase to him. In a newspaper article titled *Zuma, the SCA and the "generally corrupt relationship" Phrase*, it was reported that the Registrar of the SCA had issued a statement to the media saying that "that the SCA erred in ascribing the words 'a generally corrupt relationship' to the trial court". The statement acknowledged that the quoted words had been ascribed "incorrectly and regrettably" to the trial judge.³³

The media had misquoted Judge Squires and the SCA attributed the same incorrect quote to the trial judge! It no longer can be accepted, therefore, that judicial officers are free from external influences and inducements despite all the qualities of a judicial officer as set out in *Brown* and *Banana*. The decisions of the courts in *Brown* and *Banana* fall short of the principles governing applications for stay of criminal proceedings as expounded in *Broome* and *Sanderson* in that neither judgment considers any remedies short of a stay of criminal proceedings.

31 *Mail & Guardian* (1 June 2005).

32 *Shaik and others v S* (2007) 2 All SA 150 (SCA) 154.

33 *Politicsweb* (15 November 2006).

4.5 Conclusion

The right to prosecute vests in the state and the courts are unlikely to interfere with its discretion to institute criminal proceedings unless the continuation of such prosecution would lead to substantial irreparable prejudice to an accused person, whether such prejudice is trial related or non-trial related.

Adverse pre-trial publicity and trial by media are grounds upon which an application for a stay of criminal prosecution may be brought. Such media coverage interferes with the functioning of the court, exerting pressure on it to decide a matter in a certain way. The reliance placed solely on judges to ensure the fairness of criminal trials in South Africa should be revisited. There is sufficient authority for the opinion that judges are not immune to outside influences or pressures. It is trite that no person may interfere with or manipulate the outcome of cases before courts, whether directly or indirectly. There is an obligation on the state to ensure that the judiciary fulfils its functions free from such interference or manipulation. Where the state fails to provide the mechanisms necessary to ensure the fairness of a trial, an application for the stay of criminal prosecution is the only remedy.

The approach of the Canadian courts is to be preferred in these cases. The court in *Regan* found that:

The stay of criminal proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.³⁴

Trial by media continues unabatedly in South Africa. Both the state and the courts are unwilling to limit the right of the media to freedom of expression and rely instead on the supposed infallibility of judges to ensure the fairness of trials. Where it is impossible to give an accused a fair trial because “it would offend a court’s sense of justice and decency” to try the accused in the circumstances of a particular case, an application for a stay of prosecution should be granted.³⁵ This will force the state to enact additional mechanisms to ensure the fair trial rights of accused persons, thereby preventing future contraventions by the media. In this way the

34 *R v Regan* 328.

35 *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42, HL.

independence of the judiciary, the principle of open justice and the fair trial rights of accused will be protected satisfactorily.

CHAPTER FIVE

PRIOR RESTRAINT AND THE *SUB JUDICE* RULE

5.1 Introduction

The classical principle of liberty holds that the law is justified in interfering with conduct when that conduct threatens the liberty of other persons ... No right or liberty can be absolute, howsoever important it may be. Law simply regulates the lives of people to ensure a society where a person can enjoy his freedoms without undue interference.¹

This chapter will deal with prior restraint or “gag” orders and the *sub judice* rule as measures to safeguard the administration of justice in pending court proceedings. When commenting and reporting on pending court proceedings, the media should do so responsibly without creating any risk or prejudice to the accused or to the administration of justice. The court in *Moafrika Newspaper* correctly held that while the importance of the media reporting on pending court proceedings cannot be minimised, it does not mean that the media “can be allowed to trample other people's rights and interests”.²

Prior restraint orders will allow courts to ban the publication of adverse pre-trial information before it is released or discussed in the public domain; and the *sub judice* rule provides for criminal prosecution of the media in cases where pre-trial information is already in the public domain and such information is found to prejudice or interfere with the administration of justice in pending court proceedings. While these types of orders could be effective measures against adverse pre-trial publicity or trial by media, there is no denying that they amount to censorship which, by its nature, is an extreme intrusion upon free speech. The approach of the SCA in *Midi Television*³ will be analysed critically in this regard and will be

1 Ahmad (2009: 50).

2 *Moafrika Newspaper re: rule nisi (R v Mokhantso and Others)* 2003 (5) BCLR 534 (LesH).

3 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* (2007) 3 All SA 318 (SCA).

contrasted with the decision of the court *a quo* in *Midi Television* and with those of the SCA and the CC in the matter of *SABC v NDDP*.⁴

Adverse pre-trial publicity or trial by media, as discussed in Chapter Two above, is speech that does not warrant constitutional protection. It violates the right to a fair trial, the independence and impartiality of the judiciary and the administration of justice, as determined in Chapter Three above. The media must be called to account in these cases and prior restraint orders and the *sub judice* rule constitute effective responses to their conduct.

5.2 Prior Restraint

A prior restraint is an order which seeks to prohibit speech in advance of publication. For the present discussion it may be defined as an interdict to prohibit the media from publishing information which will prejudice and interfere with pending court proceedings and the fair trial rights of an accused. These interdicts are obtained before the information is in the public domain and could be effective measures to protect the judicial process and, consequently, the right to a fair trial, as they will prevent prejudice at its inception.⁵ Prior restraint amounts to censorship as courts have to determine whether or not a publication should be released and whether it amounts to a violation of the dignity, privacy or fair trial rights of a person. These types of orders effectively “gag” the media and are an extreme limitation upon free speech.

The general rule is that prior restraints are presumed to be unconstitutional and will be granted only in exceptional circumstances where the publication is not “pre-eminently of public concern and interest and of which the public is [not] entitled to be fully informed” and, in addition, will cause substantial harm to the dignity or privacy of an individual.⁶ The person seeking a prior restraint must show also that there are no alternative measures which could mitigate the effect of the publicity. Milo, Penfold & Stein explain the basic point of departure in matters where a prior restraint is sought:

4 *South African Broadcasting Corporation Ltd v Downer SC NO and others* (2007) 1 All SA 384 (SCA) and *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC).

5 Bernabe-Riefkohl (1995-1996: 279).

6 Milo, Penfold & Stein (2014: 186). See also *Director of Public Prosecutions (WC) v Midi Television (Pty) Ltd t/a e-tv* (2006) 2 All SA 286 (C) 294.

[A] commitment to freedom of expression requires that courts view prior restraints as unconstitutional unless exceptional factors are present. Historically, freedom of expression and especially the right to a free press have been regarded as encompassing, at their very basic level, the freedom to publish first and suffer the consequences, if any, thereafter.⁷

Media coverage of pending criminal proceedings is in the public interest. The judiciary exercises public power and media coverage of criminal trials keeps a check on the judiciary in this regard. The media also inform the public of court proceedings and foster understanding and constructive discussions of matters before courts. Bernabe-Riefkohl opines that media access to criminal trials helps to protect an accused's right to a fair trial.⁸ In so doing, the principle of open justice is bolstered by a media acting responsibly and in the public interest.

Adverse pre-trial publicity or trial by media is not expression which is in the public interest and serves only the financial interests of media houses. Public interest is not defined merely by what is interesting to the public. What is of greater public interest is an independent and impartial judiciary which decides cases only on the evidence presented in court. Trial by media is expression that interferes with the independence and impartiality of presiding officers, influencing or potentially influencing them to decide matters according to public demand and not on the evidence before them. Trial by media speaks to the guilt of an accused and discusses evidence to be used at trial in the public domain, encouraging speculation on the guilt or innocence of the accused. Therefore, it "undermines the fundamental principle of common law that every man is presumed to be innocent till proved guilty".⁹ This is not sufficient, however, to jettison a publication before it reaches the target audience under current South African law. The SCA in *Midi Television* held thus:

A publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is

7 Milo, Penfold & Stein (2014: 183).

8 Bernabe-Riefkohl (1995-1996: 264).

9 Chauhan (2011: 38).

satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.¹⁰

This test laid down in *Midi Television* is to be applied:

[W]henever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise [and], with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.¹¹

In this matter the DPP of the Western Cape applied for a prior restraint preventing Midi Television (e-TV) from broadcasting a documentary dealing with the murder of a six-month old baby before the trial had commenced. The Baby Norton Murder Trial, as it was known, attracted enormous media attention and caused widespread public outcry. The television programme included interviews with persons who were likely to be state witnesses. The DPP sought an interdict to prohibit e-TV from broadcasting the documentary until his office had an opportunity to view the content and satisfied itself that the programme would not prejudice the forthcoming criminal trial. The DPP argued that:

A broadcast involving the identification of the accused or an indication of the ability to identify the accused could materially prejudice its case ... that the police have already obtained statements from the witnesses interviewed by the respondent ... that possible discrepancies between statements made to the police and statements made during the interview may be held against the witnesses and may thus prejudice their evidence and the State's case.¹²

Midi Television argued that the request by the DPP amounted to censorship and consequently violated its right to free speech. It also argued that there was no law which required it to grant access to its material to the DPP before broadcast. In setting out the rights of the state to prosecute crime, the Western Cape High Court found that the state has a constitutional obligation to prosecute offenders in order to protect the rights of citizens and that it has a right to a fair trial. The question was whether the broadcast of the programme would prevent the state from complying with its constitutional obligations, thereby violating its right to a fair trial.¹³ The court found in favour of the DPP and granted the restraint. It held that there was

10 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* 325.

11 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* 325.

12 *Director of Public Prosecutions (WC) v Midi Television* 296.

13 *Director of Public Prosecutions (WC) v Midi Television* 295.

substantial public interest in the murder of the Norton baby and the subsequent arrests relating thereto, which was of public concern and in the public domain. However, the events surrounding the murder were not in the public domain and not of public concern. Thus, media reports detailing events surrounding the offence, including witness statements, should not be allowed in the public domain while the matter was being investigated. This, the court held, could endanger the lives of state witnesses and hence compromise the state's right to a fair trial, which was not in the interests of the administration of justice.¹⁴

Before turning to the reasoning of the SCA in *Midi Television*, the judgments of the SCA and the CC in *SABC v NDPP* will be considered to illustrate the different approach adopted by the courts in that case. Although *SABC v NDPP* dealt with the principle of open justice and the live broadcast of judicial proceedings, it finds application in the present discussion insofar as it relates to the right to a fair trial. In this matter the SABC brought an application to broadcast live the appeal hearing of Schabir Shaik. The National Director of Public Prosecutions (NDPP) opposed the application, submitting that:

Two of the charges are the subject of a pending prosecution of Zuma. Many of the witnesses who testified in the criminal trial in the present case will be liable to be called to testify in the pending matter... the exposure which the applicant proposes, or its aftereffects, may inhibit them from testifying, or while testifying, in the Zuma trial.¹⁵

The NDPP argued that live coverage of the appeal of Shaik would prejudice the eventual criminal prosecution of Zuma in that witnesses may not want to testify or their testimony might differ from what was said during the appeal. This would lead to adverse credibility findings which could prejudice the case against Zuma.

The second argument raised by the NDPP was that Zuma's right to a fair trial may be violated in that the appeal of Shaik invariably would involve discussion of Zuma, which may lead to the public pronouncing on the guilt of Zuma. The SCA agreed with the arguments by the NDPP. It found that:

14 *Director of Public Prosecutions (WC) v Midi Television* 298.

15 *South African Broadcasting Corporation Ltd v Downer SC NO and others* (2007) 1 All SA 384 (SCA) 386.

Two of the three charges preferred against the second respondent will also be preferred against Zuma. The evidence of those witnesses whose testimony is in dispute in the pending criminal appeal will be subject to searching examination and very likely trenchant criticism ... The appellate court's findings on credibility could of course be adverse to such witnesses and reported in the press ... What must be minimised as far as possible, in the interests of justice, is exposure of such witnesses that might cause them to refuse to testify in the Zuma trial. And the risk of that happening would not necessarily be undone even if the appellate court's credibility findings were favourable to them. Similar considerations correspondingly apply in respect of witnesses called in the second respondent's defence.¹⁶

With regard to prejudice to Zuma in any prospective prosecution against him, the SCA held that:

Although Zuma's alleged guilt is not in issue in the pending criminal appeal, discussion and consideration of the case [of Shaik] will necessarily involve exhaustive reference to Zuma and may even appear to the outside observer or listener to portray him as a co-accused and even as criminally liable. Obviously it will not be anyone's intention in the pending criminal appeal to consider or pronounce upon Zuma's alleged guilt but again it is in the interests of justice pertinent to the pending trial to minimise, if not eradicate, the risk that popular perception will regard the crucial question in the Zuma case as having already been made.¹⁷

The SCA found that live coverage of the appeal hearing of Schabir Shaik would prejudice the administration of justice and the fair trial rights of Zuma. This finding was based on the effect such proceedings, if broadcast live, would have on witnesses.

The CC did not differ from SCA and found that "the possible impact on witnesses remains a sufficient justification for the Supreme Court of Appeal decision to prohibit live broadcasting in this case".¹⁸ In reaching its conclusion, the CC made the following remark concerning the conclusions reached by the SCA:

It is moreover important to bear in mind that, in arriving at their conclusion, the Supreme Court of Appeal had the benefit of having before it the entire record of the trial proceedings containing, in the words of the Supreme Court of Appeal, "a mass of facts and a myriad of factual issues laced with a variety of legal points".¹⁹

16 *South African Broadcasting Corporation Ltd v Downer* 391.

17 *South African Broadcasting Corporation Ltd v Downer* 391.

18 *South African Broadcasting Corp Ltd V National Director of Public Prosecutions* 550.

19 *South African Broadcasting Corp Ltd V National Director of Public Prosecutions* 548-549.

By contrast, the SCA in *Midi Television* did not have the benefit of a myriad of facts and an entire record of trial proceedings before it. The court had no insight into the contents of the programme which e-TV intended to broadcast. The DPP did not place sufficient and cogent evidence before the SCA to substantiate its case for a prior restraint, as is evident from the following passage:

The DPP did not ask for an outright ban on publication and the reason for that is obvious: he did not know what the documentary contained and so he could not say that the administration of justice would be prejudiced if it was broadcast. All he could say was that the documentary might possibly have that effect, depending upon its contents, and he pointed to how that might occur.²⁰

The DPP was left to speculate on the contents of the documentary, as appears from the argument below:

In their interviews the witnesses might have given accounts that differed from what they told the police, with the result that the discrepancies might be used to discredit their evidence ... the safety of witnesses might be at risk if their identities were revealed to the public.²¹

The DPP could not show that the conduct of the trial would be compromised by the broadcast of the documentary. The court held that if the documentary were broadcast and it was found to be unlawful, e-TV would be liable to prosecution, but the broadcaster could not be prohibited from broadcasting without grounds for apprehending that it would be unlawful. The DPP could not show such grounds. Hence, the relief sought had no basis in law, as the court correctly held:

But there is no general principle of our law, whether in the common law, or in a statute, or to be extracted from the Constitution, that obliged e-tv to furnish its material to the DPP before it was broadcast, and least of all a law that prohibited it from broadcasting the material unless it could first demonstrate that the publication would not be unlawful. The law generally allows freedom to publish and freedom is not subject to permission. In the absence of a valid law that restricts that freedom a court is not entitled to impose a restriction of its own.²²

A publication which is not yet in the public domain will be unlawful only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. This requires courts to

20 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 326.*

21 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 326.*

22 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 328.*

have insight into the contents of such publication to determine whether it may be released. The court in *Midi Television* clearly did not have any insight into the contents of the documentary and therefore was in no position to make a ruling. The decision in *Midi Television* was therefore no more a victory for press freedom than it was a case of the DPP having no arguments to substantiate its application for a prior restraint.

A prior restraint likely will not be appropriate relief to an accused subjected to adverse pre-trial publicity or trial by media for two reasons. Firstly, adverse pre-trial publicity or trial by media constitutes information already published and therefore prior restraint will serve no purpose. Secondly, the accused will require access to all the information contained in a publication prior to its release, which is an intrusion on free speech that cannot be justified.

5.3 The *Sub Judice* Rule

The law prohibits publication of material concerning a pending case which will cause demonstrable and a real risk of prejudice to the administration of justice. This is known as the *sub judice* rule. Essentially, it is a rule which prevents the prejudicing of pending proceedings. Unlike prior restraint, the *sub judice* rule concerns publications and comments already in the public domain. Any comment or publication by the media which causes a demonstrable and real risk to the administration of justice in a pending case constitutes the offence of contempt of court *ex facie curiae*. In *Midi Television* the SCA held that:

It is an established rule of the common law that the proper administration of justice may not be prejudiced or interfered with and that to do so constitutes the offence of contempt of court.²³

According to Snyman, contempt of court *ex facie curiae* consists in unlawfully and intentionally:

(P)ublishing information or comment concerning a pending judicial proceeding which constitutes a real risk of improperly influencing the outcome of the proceeding or to prejudice the administration of justice in that proceeding.²⁴

The *sub judice* rule and the concomitant crime of contempt of court constitute a limitation on the right to freedom of expression. It amounts to censorship as the press must report on

23 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* 322.

24 Snyman (2014: 316).

pending court proceedings in such a manner as not to prejudice the administration of justice. The *sub judice* rule is, however, an accepted limitation on the right to freedom of expression, according to the SCA in *Midi Television*.²⁵ The court held that the common law rule against prejudicing and interfering with the proper administration of justice:

is now reinforced by the constitutional right of every person to have disputes resolved by a court in a fair hearing and by the constitutional protection that is afforded to a fair criminal trial. It is not contentious in all open and democratic societies and it was not contentious before us that the purpose that is served by those principles of law provides a proper basis for limiting the protection of press freedom.²⁶

The purpose of this rule, which is strengthened by the constitutional right to a fair trial and the right to a fair public hearing, is to protect the integrity of the judicial process. The SCA held thus:

The integrity of the judicial process is an essential component of the rule of law. If the rule of law is itself eroded through compromising the integrity of the judicial process then all constitutional rights and freedoms including the freedom of the press are also compromised.²⁷

The continued existence of this rule in South African law is justified and is strengthened further by section 165(3), as read with section 165(4), of the Constitution which provides that no person or organ of state may interfere with the functioning of the courts and obligates the state to protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. Maré argues that if the administration of justice is not protected from improper interference, it will be impossible for a person to exercise the right to a fair trial and the right to a fair public hearing by a court.²⁸

A publication and comment on pending proceedings can prejudice the administration of justice by compromising the integrity of the judicial process. It is submitted that where the court refers to the “integrity of the judicial system” it means much more than a mere conclusion that presiding officers will not be influenced by what they read and hear in the

25 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 322-323.*

26 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 323.*

27 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 322.*

28 Maré (1996: 2A7).

news. What is at stake in these cases, according to Jordaan, is the public interest.²⁹ He argues that “the doctrine of contempt exists for the public good (ie to protect the public interest in the due administration of Justice)”.³⁰ Therefore, the question to be considered is whether the “greater public interest” justifies the publication or comment irrespective of any prejudice that may result. Jordaan argues for “there to be no contempt in such circumstances [since], far from interfering with the course of justice, such a publication in fact furthers it”.³¹ This position is confirmed in *Midi Television*, where the SCA held that even where prejudice results due to comment or publication concerning a pending case, “the publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage”.³² The advantage in this case is the greater public interest in the due administration of justice.

The question to be considered, therefore, is whether adverse pre-trial publicity or trial by media amounts to a publication or comment on a pending matter which causes demonstrable and substantial prejudice to the administration of justice. Where prejudice results, a determination will be made as to whether the “greater public interest” justifies the publication or comment irrespective of the prejudice.

It is trite that the media are free to report on pending court proceedings. The obligation of the media is to foster better understanding of the justice system, to reinforce confidence in the criminal process for both offender and victim and, thus, to legitimise the judicial process. Trial by media has the opposite effect. As shown in the previous chapters, it creates a lack of trust in the process and the integrity of the system is called into question. The media in these cases pronounce on the guilt of an accused prior to the actual case being tried in a court of law. Inflammatory details that would be inadmissible as evidence in court become public knowledge before the trial has begun and the media are willing to pay witnesses to tell their stories before they have testified, as happened in *Midi Television*. In such cases, the media, as the primary

29 Jordaan (1990: 222).

30 Jordaan (1990: 222).

31 Jordaan (1990: 222).

32 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 325.*

source of information, dictate and influence public perception and the accused is tried in the court of public opinion.

Such manner of reporting is certainly interesting to the public but serves an entertainment purpose only and, therefore, the prejudice caused outweighs its advantage. In *Multichoice*, the court held that trial by media cannot be in the interests of justice and potentially could undermine court proceedings and the administration of justice.³³ In *Talk Radio 702*, the court held that the prejudging of pending cases was unfair to the accused who is entitled to a verdict by a court and not the media. It was unfair also to witnesses and to judicial officers.³⁴ The SCA in *Midi Television* held similarly that:

It is prejudicial to prejudge issues that are under judicial consideration, it is prejudicial if trials are conducted through the media, it is prejudicial to bring improper pressure to bear on witnesses or judicial officers.³⁵

The court in *Harber* best describes the dangers of trial by media:

Trial by newspaper is intrinsically objectionable as it would lead to disrespect for the law ... If the mass media are allowed to usurp the function of the courts and judge the issues which are to be tried, not only will unpopular causes not get a fair trial, but the public will be led to believe that it is easy to find the truth, viz in the popular press, and disrespect for the process of the law could follow.³⁶

Snyman warns also that: "Trial by newspaper is and remains a real danger to a fair and impartial disposal of an issue in the judicial process."³⁷ The key question is when the risk of prejudice will be sufficient to constitute the kind of interference with the administration of justice that justifies a charge of contempt of court *ex facie curiae*?

Where the media publish information and comment on pending cases, including evidence to be presented and the likely outcome of the cases, they interfere *prima facie* with the functions of the court. The function of adjudication vests only in the judiciary. Trial by media usurps this function by pronouncing on the guilt or innocence of an accused prior to a court of law doing so. The next consideration is whether such interference constitutes a real

33 *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority* 28.

34 *Talk Radio 702 v Gericke* (2013) JOL 30239 (BCCSA) 10.

35 *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* 323.

36 *S v Harber* 221.

37 Snyman (2014: 321).

risk of prejudice. Popular opinion suggests that judges are not influenced by extraneous factors but the enquiry does not end there. As noted earlier, there is sufficient authority to suggest that judges are not immune to what they see and read in the news. The right to a fair trial vests in the accused and in the state representing the people. According to Snyman:

Parties to a case, and even outsiders, must be satisfied that the court's conclusion is based upon information laid before the court in an admissible way only, and not upon information or comment concerning the merits of the issue published in the media. Once the media is allowed to publish information and comment on a pending case, there will always remain at least a suspicion in the mind of the public and of a party to the case that the court, in coming to its conclusion, was influenced by outside factors.³⁸

There should exist no doubt in the mind of the accused or of the public that the court reached its decision on the facts placed and argued before it. Where the media create such doubt, the legitimacy of our courts and our constitutional order is at risk because the credibility of the judiciary and the administration of justice will be questioned. Trial by media or adverse pre-trial publicity constitutes interference with the function of the courts and results in a real risk of prejudice to the fair trial rights of an accused and to the administration of justice. In such cases, prosecution of the media for contempt of court *ex facie curiae* is justified.

5.4 Conclusion

Prior restraint orders and the *sub judice* rule are effective remedies against recalcitrant media houses bent on distributing news and information which prejudice the administration of justice and the fair trial rights of accused persons. The test expounded by the SCA in *Midi Television* made it more difficult but not impossible for an accused or the state to obtain prior restraint orders or pursue criminal charges against the media for breaching the *sub judice* rule. The issue to be considered is simply whether the greater public interest justifies the publication or comment, despite the corresponding prejudice. That enquiry is preceded by the determination of whether or not the publication or comment results in demonstrable and substantial prejudice to the administration of justice or creates a real risk that the comment or publication will influence improperly the outcome of pending court proceedings.

38 Snyman (2014:320-321).

Adverse trial publicity or trial by media is prejudicial to the administration of justice and to the fair trial rights of accused persons.³⁹ Any publication or comment which undermines the legitimacy of the courts and threatens the constitutional order cannot be in the public interest. Prior restraint orders can stop such prejudice at its inception and *the sub judice* rule will allow for criminal prosecution where prejudice is caused by publications or comments already in the public domain. These remedies are accepted limitations upon free speech and operate to maintain the rule of law.

39 See Chapters Two and Three and further discussions in Chapter Four.

CHAPTER SIX

CONCLUSION

6.1 Closing Remarks

Interest in crime news is usually high and attracts public interest, especially if it concerns famous persons or the crime is of a particularly gruesome nature.¹At the heart of freedom of expression lies the right of every citizen to receive and impart information and to debate openly and frankly matters which are of public concern, including matters before the courts. The legitimacy of the courts is dependent on media reportage and public scrutiny of judicial matters which such reportage stimulates. However, a criminal trial, according to Resta, turns easily into a show with strong entertainment value, giving newspapers and broadcasters strong commercial incentives to cover it.² In their pursuit of profit and in seeking to satisfy the curiosity of their readers, listeners or viewers, the media regularly resort to trial by media or adverse pre-trial publicity, described by Resta as “a playground of a commercially motivated media industry that capitalise on the public’s apparently insatiable appetite for all things sensational”.³

There is a fine line between that which is of public interest and that which is interesting to the public. According to Resta, the law should “prevent socially valuable activity—such as informing the public about the workings of the justice process—from being transformed by market pressures into a power without responsibility”.⁴ At the receiving end of such coverage is the accused and, in many cases, the victims of crime as represented by the state. Public censure of crime and of accused persons which follows trial by media should not be imposed on the innocent. The right to a fair trial requires an accused to be treated fairly from the inception of the criminal process, from which point the person suspected of committing the crime in question is considered innocent. Any pre-trial process which implies that the accused is guilty, including any such process influenced by media reports surrounding criminal

1 Resta (2008: 33).

2 Resta (2008: 33).

3 Resta (2008: 64).

4 Resta (2008: 64).

offences, violates the presumption of innocence. Trial by media or adverse pre-trial publicity challenges not only the right of an accused to a fair trial but also the integrity of the judicial process.

Despite the availability of remedies, the media in South Africa usually are not held to account for their actions and persist with adverse, biased and irresponsible pre-trial reporting. Trial by media is nothing more than commercially motivated expression which does not warrant constitutional protection. However, the courts have shown a tendency to protect the media in these cases, despite the effect of such reporting on the judicial process, the administration of justice and the fair trial rights of accused persons. The reason for this is the hesitation on the part of judges to recognise their susceptibility to extraneous influences. It is not submitted that judges are influenced by what they see and read in the news, but rather that they should not be placed in a position where their independence and impartiality are questioned as a result of media sensationalism. The media, therefore, should heed the warning of Frankfurter J that the “delicate task of administering justice ought not to be made unduly difficult by irresponsible print”.⁵ There should exist no doubt in the mind of the accused or the public that the court reached its decision on the facts placed and argued before it. Where the media create such doubt, the legitimacy of the courts and our constitutional order is at risk because the credibility of the judiciary and the administration of justice are called into question.

6.2 Recommendations

Under current South African law there are recourses available to individuals, as well as to the state, for harm caused by trial by media or adverse pre-trial publicity. Section 165(3) of the Constitution holds that no person or organ of state may interfere with the functioning of the courts. To this end, section 165(4) obligates the state to protect the courts to ensure their independence and impartiality. Contrary to the views expressed by De Vos and Stevenson, *Midi Television* did not abolish the *sub judice* rule. In fact, the court reaffirmed its existence to

5 *John D Pennekamp v State of Florida* (1946) 328 US 357.

protect the right to a fair trial and, in so doing, preserve the integrity of the judicial process.

In *Moafrika*, the Lesotho High Court also made it clear that:

The *sub judice* rule is an important and useful process whereby the proper administration of justice is protected against extrajudicial statements which have a substantial risk of prejudicing or interfering with pending court proceedings.⁶

The media ought to appreciate that there are boundaries when reporting on pending criminal matters. This was confirmed by the court in *Moafrika*:

When publishing critical comments over pending proceedings the media should do so advisedly and with a full sense of responsibility without creating any risk or prejudice to those pending court proceedings.⁷

Thus, the *sub judice* rule is available to the state to hold the media accountable for publishing information or commentary on pending court proceedings which causes a real and substantial risk of prejudice to the administration of justice and the fair trial rights of the accused. The consistent application of this rule will ensure that the provisions of sections 165(3) and 165(4) of the Constitution are adhered to and will act as deterrents for future transgressions by the media.

Where the state fails to charge the media with contempt of court for breaching the *sub judice* rule, a stay of criminal prosecution is an effective and prospective remedy available to an accused person. If the accused satisfies the court that, as a result of adverse pre-trial publicity, trial related or non-trial related prejudice exists which will cause substantial irreparable prejudice to his trial, the court should grant the stay of prosecution. The interest sought to be protected in such cases is the general public interest in the due administration of justice. The matter of whether judges are immune to external issues is not in question, but rather whether the public is confident that a judgment will be reached only on the facts before the court. Where doubt exists, it is submitted that the question to be asked is whether it will be possible to give an accused a fair trial in such circumstances, that is, whether the trial process will remove the risk of prejudice. Adverse pre-trial publicity or trial by media always will raise doubt in the minds of the accused and of the public as to

6 *Moafrika Newspaper* 543.

7 *Moafrika Newspaper* 543.

whether a decision was arrived at only on the facts of the matter. Whatever the decision of the court, it will be questioned by the public, thereby eroding the integrity of the judicial process and, consequently, the rule of law.

The stay of criminal prosecution is a drastic remedy but, if granted consistently, will exert pressure on the state to ensure that the media are prosecuted for publishing adverse pre-trial information or conducting a trial by media.

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