

ISSUES IN LAW, RACE AND GENDER

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**Unrepresented accused  
and the language of the  
Magistrates' Court**

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"Excuse me your Worship, do I also get a chance to tell my story?"  
– *Unrepresented accused*

## Introduction

The main focus of this research is on the way in which unrepresented accused persons in the lower courts are guided by magistrates in conducting their defence. Specifically, the research is concerned with the way in which the legal and procedural requirements of cross-examination and evidence-in-chief are explained to the accused by the presiding magistrate, the extent of the accused's understanding of these requirements, and the subsequent role of the magistrate in facilitating the accused's comprehension of his rights and duties.

### 1.1 Method of selecting material

We found the most accessible and accurate data source on cases in magistrates' courts to be the typed verbatim transcripts of trials. However, although all court cases are taped, not all are transcribed.<sup>1</sup> The sample of cases used in the research study was drawn from those for which a typed transcript already existed, hence the cases were, to some degree, pre-selected. A total of 96 cases were identified for four district courts for the year 1994 at the Wynberg Magistrates' Court.<sup>2</sup>

Brief details concerning the particulars of the accused, the charge, explanation from the magistrate regarding cross-examination and evidence-in-chief and the accused's response to these in each case were recorded on a computer database.<sup>3</sup> Those parts of trial proceedings during which the unrepresented accused was afforded an opportunity to cross-examine or give evidence-in-chief were then examined more closely.

- 1 The reasons for a case being transcribed vary – this is usually done for one of the following reasons: the case is to be reviewed by the Supreme Court; the case is being taken on appeal; there is a likelihood of the case being transferred to the regional court; or a magistrate or attorney has specifically requested that a transcription be made.
- 2 We note that while this method of sampling was convenient, there is no way of ascertaining whether the trends that were observed are typical also in the majority of cases that were not transcribed.
- 3 In only 8 cases in our study did the accused person or persons have legal representation. Altogether there were 14 different magistrates presiding over the 96 trials in the sample.

A preliminary examination of magistrates' explanations to unrepresented accused in the sample indicated that magistrates consistently issued instructions which were adequate in terms of what was required by law.<sup>4</sup> It was nonetheless apparent that unrepresented accused appeared to have difficulty in understanding what was required of them. Subsequent investigation revealed a degree of variation both in the way in which magistrates instruct accused persons, and also in the extent to which magistrates are prepared to intervene if the defence case is inadequately presented. To investigate these differences and their consequences more fully, a sub-sample of cases was selected from the initial sample of 96.<sup>5</sup>

## 1.2 The undefended accused in South Africa

### 1.2.1 Background

The South African law of criminal procedure is of an accusatorial and adversarial nature. Ideally, this requires two equal parties to state their respective positions to a judge, or magistrate, who is required to be impartial throughout and then deliver a judgement based on the merits of the case. The accused is presumed innocent until proven guilty and the onus of proof lies with the prosecution.

The system is intended to ensure that each side is accorded a participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments. Due process under the system thus requires that persons to be affected by a decision should have some formally guaranteed opportunity to influence that decision.... It is expected that all persons, motivated by enlightened self-interest, would participate vigorously in the dispute resolution and that as a result of the accused and prosecution strongly promoting and protecting their own interests, a just decision will eventually emerge.<sup>6</sup>

4 This is in contrast to a 1986 study of black unrepresented accused in some of the lower courts in Kwazulu-Natal in which it was found that magistrates' explanations to accused were frequently inadequate and often non-existent. For example, the study found that in only 24 per cent of cases (in the sample examined) in which the state offered evidence, was the right to cross-examination explained at all. (SE Van Der Merwe and JJ Buchner 'Aspects relating to the unrepresented black accused in the application of procedural law in some lower courts in Natal and Kwazulu' (1988) 10 *University of Zululand Institution for Public Service and Vocational Training* 14).

5 Appendix A describes the method of analysis used in this investigation in greater detail.

6 NC Steytler *The Undefended Accused on Trial* (1988) Cape Town: Juta and Co 6. ;

In 1988 it was estimated that about 80 per cent of all accused passing through South African criminal courts were unrepresented.<sup>7</sup> Although the situation may have improved, accused persons with little or no legal knowledge defending themselves remain a common sight in our lower courts.

An 'enlightened self-interest' (as expressed in the quotation above) is of little practical use when an unrepresented accused person is confronted by the unfamiliar conventions of courtroom protocol and it is incumbent on the magistrate in such a case to explain what rights and obligations there are at each stage of the trial. These include

the right to legal representation; the right to remain silent after pleading not guilty; the right to cross-examine State witnesses; the right to present his defence and the ways in which this can be done; the existence of presumptions; the right to participate in the mitigation process and the right to participate in the automatic review proceedings.<sup>8</sup>

Most unrepresented accused are unaware of some or all of these rights before they are explained by the magistrate. The law contains numerous requirements concerning the adequate explanation of these rights to unrepresented accused at various stages of the trial. In the next part of the paper we examine those rights which relate to cross-examination and evidence-in-chief.

### 1.2.2 Cross-examination and the undefended accused

Cross-examination represents an invaluable opportunity which, if exploited to its fullest extent, can result in the discrediting of a dishonest witness by a skilled questioner. However, a typical cross-examination conducted by an unrepresented accused person appears to bear only a passing resemblance to the confrontation between a lawyer skilled in the art and a witness. In the case of an unrepresented accused, the cross-examiner seldom has any advantage over the witness, no pre-conceived strategy to challenge her testimony and, more often than not, has no idea what he is meant to do or prove during the examination. To an unrepresented accused with little or no previous exposure to

7 Sleytler vii. The most recent figures for the Wynberg Magistrates' Court (for the period 1 July 1995 - 30 June 1996) are as follows: total number of criminal cases disposed of (where evidence was led or where the accused was questioned in terms of section 112(1)(b) of the Criminal Procedure Act No 51 of 1977) was 5922, while the total number of accused persons involved equalled 6666. Of these only 2104 were represented (1972 by attorneys and 132 by advocates), (statistics provided by the Chief Magistrate for the Wynberg Magistrates' Court).

8 Steytler 222.

what is prescribed by the law of evidence, the cross-examination process can be a harrowing ordeal. Judge Didcott captures some of the terrors of cross-examination for the unrepresented accused when he writes that

More familiar still is the kind of performance one tends to get from laymen. Few have the wit to appreciate every point they should challenge or make, and to sort the wheat from the chaff in this respect. Few have the memories to store every detail of the evidence they hear, and not many more the literacy to note such as the trial progresses, or the means of doing so when it comes to that.... And scarcely any know how to set about the task when the moment arrives. So many records one sees on appeal and review show a layman doing his best, only to find himself pulled up time and again for assertions instead of questions, or for questions that are muddled and irrelevant, repetitive or argumentative, until eventually he tires of the effort.<sup>9</sup>

Supreme Court judgements have generally been sympathetic to unrepresented accused and the range of problems they frequently face during cross-examination. Decisions have held that –

- a) a failure to cross-examine should not be held against an accused;<sup>10</sup>
- b) the court should assist illiterate accused persons in putting their questions;<sup>11</sup> and
- c) when an accused's plea alerts a magistrate to the fact that the accused disagrees with certain statements made by a State witness, the magistrate should actively assist the accused without compromising her own impartiality by putting relevant and pertinent questions to the witness in the interests of a free and fair trial.<sup>12</sup>

Numerous convictions have been set aside on appeal because of irregularities that occurred during the cross-examination process.<sup>13</sup> A recent ruling has emphasized that a failure to explain the right to cross-examine to an undefended accused is tantamount to a failure to allow him to cross-examine and constitutes an irregularity.<sup>14</sup>

9 *S v Mngomezulu* 1983 (1) SA 1152 (N) at 1153 C-E.

10 *Mngomezulu* 1154 A-B.

11 *S v Sebanta* 1983 (1) SA 809 (O) and *S v Govazela* 1987 (4) SA 297 (O).

12 *S v Khambule* 1991 (2) SACR 277 (W) and *S v Maseko* 1993 (2) SACR 579 (A).

13 For some recent examples of convictions being overturned because the accused's right to cross-examination was not adequately explained see P Swaneepoel 'Strafprosesreg' (1994) 35 *Codicillus* 91.

14 *S v Modiba* 1991 (2) SACR 286 (T) per Goldstein J; see also *S v Khambule* 1991 (2) SACR 277 (W).

When the magistrate explains the requirements of cross-examination to an undefended accused, the following components are essential in terms of the law:

- 1) An explanation of the need for the defence to cross-examine, i.e. why it is important that the accused cross-examines at all.
- 2) An explanation that, if a witness has made damaging allegations, this is the appropriate stage of the trial for these to be challenged.
- 3) An explanation that the accused must refer to omissions (if they exist) in the testimony of the witness and make them known so that a balanced version of events is presented to the court.
- 4) An indication of how accused are expected to go about the actual process of cross-examination.

Equally important, although not specified in the law, is in the way in which these instructions are presented by the magistrate to an undefended accused. For example, extracts 1 and 2 are explanations of cross-examination by two different magistrates from our sample, which each contain the same basic points. Yet, the tone of each explanation is quite different.<sup>15</sup>

#### Extract 1

Ja-meneer u het nou gehoor wat die meneer vir die Hof sê, u het die *reg* om hom vrae te vra as u nie saamstem met sy getuienis nie of as hy leuens vertel of goed uitlaat volgens u, dan *moet u nou* vir hom vrae vra dat die Hof *kan* hoor wat is u kant van die saak. As u nie vrae vra nie *kan* die Hof sy getuienis aanvaar en u moet u kant van die saak ook vir die persoon stel dat die Hof *kan* hoor wat sy kommentaar daarop is. Verstaan u dit?<sup>16</sup>

15 Note: About 90 per cent of all the trials in the sample were conducted primarily or entirely in Afrikaans. The accused was usually asked to indicate at the outset which language he or she preferred. Witnesses were allowed to testify in their chosen language, even if proceedings were conducted in another language, if they could be understood by the accused. Interpreters were provided in only a handful of cases.

16 *S v Mayekiso*, Wynberg Magistrates' Court, criminal case number 3/1232/94. Authors' translation: 'Well sir you have now heard what the gentleman says to the Court, you have the *right* to ask questions if you do not agree with his testimony or if he told lies or left anything out according to you, then you *must* ask him questions *now* so that the Court *can* hear what your version of events is. If you do not ask questions the Court *can* accept his testimony and you *must* also put your side of the case to this person so that the Court *can* hear what his response to it is. Do you understand this?' (Authors' emphasis)

This explanation conveys to the accused that he has certain obligations, i.e. that he must ask questions and that he must put his version to the witness. The fact that he has a right to cross-examine, 'reg', is stressed from the outset, and the use of the word 'moet' in the rest of the explanation suggests that cross-examination is obligatory rather than simply a right. Cross examination is presented as being a duty or a requirement, 'dan moet u nou vir hom vrae vra' and 'u moet u kant van die saak ook vir die persoon stel'. Where the discretionary 'kan' is used in the explanation, it is in association with the magistrate, who refers to herself as 'die Hof', to emphasize that the only real options are those exercised by the court, 'dat die Hof kan hoor wat is u kant van die saak... dat die Hof kan hoor wat sy kommentaar daarop is'. Thus, based on an analysis of the modals chosen by the magistrate in this explanation, it is the accused who has a duty, and the court that has options. Compare the tone of the above extract to that of the extract below:

#### Extract 2

U het nou die geleentheid om vrae te stel aan die getuie, meneer. As daar enigets is in sy getuienis wat u nie mee saamstem nie het u die geleentheid om dit te betwis – met ander woorde u kan hom kruisverhoor. U sal op 'n latere stadium na die staat gesluit het die geleentheid kry om u saak te stel en ook te getuig onder eed. Verstaan u dit?<sup>17</sup>

The tone of the explanation in the second extract conveys rather less obligatoriness and urgency than the first. The magistrate uses the word 'geleentheid' – opportunity – right at the beginning of the explanation and then repeats it – 'die geleentheid om vrae te stel', 'die geleentheid om dit te betwis' and 'die geleentheid kry om u saak te stel'. This last use of 'geleentheid' is re-inforced by the use of 'sal' earlier in the sentence. The repetition of 'geleentheid' underscores the fact that cross-examination is optional. This is further emphasised by the word 'kan' – 'u kan hom kruisverhoor'. The use of 'geleentheid' and 'kan' in extract 2 contrasts strongly with the use of 'reg' and 'moet' in extract 1.

Although extract 2 more accurately conveys to the accused that the cross-examination of the State witness is not mandatory, extract 1 communicates

more effectively the importance of participating in the process. In an explanation, magistrates need to attempt to balance presenting the exercise of the accused's rights as an option, while communicating how important it is that these rights be exercised. Just how difficult it is to strike such a balance can be seen in the examples above.

#### 1.2.3 Evidence-in-chief and the undefended accused

At the conclusion of the State's case, the unrepresented accused has an opportunity to present evidence in support of his own defence. There are important decisions he will need to make at this point in the proceedings, and what he does, or does not do, can have a direct bearing on the eventual outcome of the trial. The accused may remain silent, or he may address the court and give his own version of the events leading to the charge against him. The magistrate is required to explain both these options and what consequences a choice of one or the other would entail. If an accused remains silent, the magistrate will have only the testimony of the State witness/es to consider, and there is usually a strong likelihood of conviction. If the accused does elect to testify under oath, then he will be subject to cross-examination by the prosecutor.

Steytler outlines the potential problems confronting an unrepresented accused when invited to present his evidence-in-chief:

The undefended accused, perhaps uneducated and/or inarticulate, confronted by the unfamiliar and formal atmosphere of the court, may find it difficult to relate his version of the event in a coherent and logical manner. He may not confine himself to the incident in question, but may include antecedent events which appear to the court to be irrelevant. The court is obliged, however, to allow the accused his day in court and give him the necessary leeway to tell his story in his own way.<sup>18</sup>

The magistrate must explain fully to an accused person what range of options is available to him, and should further advise him of a course of action, given the circumstances of that particular case.<sup>19</sup> The law pertaining to evidence-in-chief holds that the following rules are essential, and must be explained by the magistrate when the accused is unrepresented:<sup>20</sup>

17 *S v Doolings*, Wynberg Magistrates' Court, criminal case number 3/957/94.

Authors' translation: 'You now have the opportunity to put questions to the witness, sir. If there is anything in his testimony with which you do not agree then you have the opportunity to dispute it – in other words you can cross-examine him. At a later stage when the State has closed its case you will have the opportunity to put your case and also testify under oath. Do you understand this?' (Authors' emphasis)

18 Steytler 169.

19 This responsibility may not be delegated to anyone else, for example, the court interpreter. See *S v Mahaoa* 1991 (1) SACR 261 (T); see also generally *S v Hlongwane* 1992 (2) SACR 484 (N) 487-488A.

20 *Criminal Procedure Act No 51 of 1977* s 151; see also E Du Toit et al *Commentary on the Criminal Procedure Act* (1987) Cape Town: Juta and Co s 151.

1. After the State has closed its case, the accused must be informed that he may close his case immediately or otherwise may elect to testify and/or call witnesses. The magistrate should give the accused some indication of whether or not he could be convicted on the evidence which has been led by the State.
2. The accused must be informed that it his right to remain silent, and that he is under no obligation whatever to testify.
3. If the accused has given his version of events at an earlier stage of proceedings, he must be warned that this is not admissible as evidence until he has repeated his account under oath. Any assertions an accused may have made at an earlier stage of the trial can be disregarded if he fails to repeat them under oath.<sup>21</sup>
4. The accused should be warned that if he chooses to testify he could be subject to cross-examination by the prosecutor.
5. The accused must be informed fully of his rights regarding the calling of witnesses on his behalf.<sup>22</sup> He should also be told that such witnesses may appear only after he has testified himself, or if he has declined to testify himself.
6. The accused should be informed of any presumptions which may exist.<sup>23</sup> If presumptions do exist, he should be advised of how they may be rebutted.

A thorough explanation by a magistrate, then, needs not only to detail the rights of an accused, but also the limitations that are placed on such rights by the rules pertaining to evidence.

21 If this is not adequately explained to the accused there exists the very real danger that he will decline to testify, believing that he has sufficiently outlined the reasons for his defence during the earlier proceedings.

22 There is much legal discussion on the importance of this particular right and what happens when it is restricted. For example, if the accused is held in custody this would limit his access to potential witnesses. Accused persons are also often not informed that witnesses can be compelled to appear.

23 A presumption is anything which can be taken for granted as implying complicity or guilt in an offence, unless the assumption (or 'presumption') is specifically refuted. The type of presumptions that apply differ from offence to offence and would usually be outlined in the relevant legislation. For example, one of the presumptions which relate to the possession of drugs is that anyone found with more than 115 grams of dagga would be presumed to be a dealer. The onus would then be on the accused to refute this presumption. See section 21 of the *Drugs and Drug Trafficking Act No 140 of 1992*.

Below we consider two extracts in which the right to present evidence-in-chief is explained to the accused. The respective magistrates both set out the requirements of legislation and common law adequately in terms of the law, yet the two explanations are couched rather differently.

### Extract 3

Die aanklaer het nou sy saak gesluit. U kry die geleentheid om u saak voor die Hof te lê. Op hierdie stadium van die verrigtinge kan u stilbly as u wil of u kan u weergawe – u verduideliking – vir die Hof kom gee. As u u weergawe of verduideliking vir die Hof wil kom gee sal u getuiebank toe moet kom – u sal die eed moet neem en die Staatsaanklaer sal vir u vrae kan vra. U kan op hierdie stadium van die verrigtinge stilbly as u wil maar as u wil stilbly dan het die Hof niks van u kant af nie. Wat u gesê het toe u gepleit het – die vrae wat u gevra het en die stellings wat u gemaak het aan die getuies – dit is nie getuienis in u guns nie. Die Hof kan dit nie in aanmerking neem tensy u dit onder eed herhaal. Verstaan u dit?<sup>24</sup>

In this extract, the magistrate explains the basic choice which the accused needs to make. Thereafter she elaborates on the various consequences of making one or other of these choices. She uses words like 'as' (if), 'of' (or), 'maar' (but) and 'tensy' (unless) to introduce each of the consequences. Choice, 'As u u weergawe of verduideliking vir die Hof wil kom gee' (if you want to give your version or explanation to the court) is inextricably linked with consequence, 'sal u getuiebank toe moet kom' (then you will have to come to the witness box). Here the use of 'moet' emphasizes the obligation the accused is under once a choice has been made. Further obligations are added, 'u sal die eed moet neem en die Staatsaanklaer sal vir u vrae kan vra' (you will then have to take the oath and the prosecutor can then ask you questions). Then follows an explanation of the other choice 'U kan op hierdie stadium van die verrigtinge stilbly as u wil' (you can keep quiet at this stage of the

24 S v Dollie, Wynberg Magistrates' Court, criminal case number 3/853/94.

Authors' translation: 'The prosecutor has now closed his case. You get the opportunity to put your case before the Court. At this stage of proceedings you can keep quiet if you want to or you can give your version - your explanation - to the Court. If you want to give your version or explanation to the Court then you will have to come to the witness box - you will then have to then take the oath and the prosecutor can then ask you questions. You can keep quiet at this stage of proceedings if you want but if you do keep quiet then the Court will have nothing from your side. What you said when you pleaded - the questions that you asked and the statements that you made to the witnesses - that is not testimony in your favour. The Court can not take it into consideration unless you repeat it under oath. Do you understand this?' (Authors' emphasis)

proceedings if you want to) coupled with its own consequences, these in the form of an extended warning, 'maar as u wil stilbly dan het die Hof niks van u kant af nie. Wat u gesê het toe u geploit het – die vrac wat u gevra het en die stellings wat u gemaak het aan die getuies – dit is nie getuienis in u guns nie' (But if you keep quiet then the court will have nothing from your side. What you said when you pleaded – the questions that you asked and the statements that you made – to the witnesses – that is not testimony in your favour). The serious consequences of an inappropriate choice are again emphasized in closing, 'Die Hof kan dit nie in aanmerking neem tensy u dit onder eed herhaal' (The court cannot take it into consideration unless you repeat it under oath). Here the word 'tensy' (unless) carries a sense of threat, and underscores the importance for the accused of testifying under oath. The first part of the explanation, thus, provides a choice, then outlines the obligations associated with testifying under oath and these are emphasized by 'moet'. The rest of the explanation is then devoted to discouraging the accused from choosing the alternative, staying silent. Compare this to the explanation, by a different magistrate, below:

#### Extract 4

Nou het u die geleentheid om u weergawe voor die Hof te plaas. Dit beteken u kan vir die Hof u weergawe vertel oor wat gebeur het die betrokke dag. Nou u kan dit net doen te getuig soos wat die Staatsgetuies gedoen het. Met ander woorde u word ingesweer en vertel dan vir die Hof onder eed volgens u wat gebeur het. Nou as u dit doen, as u getuig, sal die aanklaer weer vir u ondervra. U het die reg om stil te bly as u nie wil getuig nie, maar die Hof moet dan net onder u aandag bring dat die Hof u dan heel moontlik sal skuldig bevind op die getuienis van die drie Staatsgetuies. Die Hof kan ook 'n nadelige afleiding maak as u verkies om stil te bly, met ander woorde die Hof kan dink dat u bang is om te getuig en ondervra te word deur die Staatsaanklaer.<sup>25</sup>

In the course of this explanation the same choice is presented to the accused – to testify under oath or to remain silent. However, the benefits of testifying are emphasized far more than in the first explanation. The magistrate immediately explains what the opportunity to testify means 'Dit beteken u kan vir die Hof u weergawe vertel oor wat gebeur het die betrokke dag' (This means that you can give the court your version of what happened that particular day) and the process is compared to what the State witnesses did earlier, emphasizing to the accused that it is his opportunity, his chance, 'Nou u kan dit net doen te getuig soos wat die Staatsgetuies gedoen het' (Now you can only do this by testifying like the State witnesses did). Only after explaining to the accused the benefits of giving his testimony does the magistrate explain what the legal implications of the process are. The magistrate then reminds the accused that giving testimony is an option. If it is one he chooses there is a potentially threatening element, 'Nou as u dit doen, as u getuig, sal die aanklaer weer vir u ondervra' (Now, if you do this, if you testify, the prosecutor will again ask you questions). The last part of this explanation, as with the preceding one, however, is devoted to warning the accused of the risks of not testifying. The overall tone of the warning is, by contrast with that of extract 3, much kinder, and contains more clarification of what is required from the accused. Where a warning is necessary, the language is simple and unambiguous, 'Die Hof kan ook 'n nadelige afleiding maak as u verkies om stil te bly, met ander woorde die Hof kan dink dat u bang is om te getuig en ondervra te word deur die Staatsaanklaer' (The court can also draw an adverse inference if you choose to remain silent, in other words the court can think that you are scared to testify and be examined by the prosecutor). The fact that the magistrate talks of 'u weergawe' (your version) is a clear and overt acknowledgement by the court that there are different versions of the events that can be brought before the court, and that each must be given a fair opportunity to be presented.

Both explanations contain essential details of the choice accused persons have to make when deciding whether to testify or not. There is, however, a significant difference in the manner in which this choice is presented to them. While the illocutionary force which both speech acts convey is a warning, the first explanation is couched as a threat, while the second is more like a friendly word of caution.<sup>26</sup> In extract 3 words like 'as' (if), 'maar' (but) and 'tensy' (unless) emphasize that there will be consequences while the use of

26 See Appendix B for a more thorough discussion of Speech Act Theory. The term 'speech act' refers to the communicative force of a particular utterance in its context of use.

25 *S v Fayo and another*, Wynberg Magistrates' Court, criminal case number 5/1114/94. Authors' translation: 'Now you have the opportunity to present your version to the Court. This means you can give the Court your version of what happened that particular day. Now you can only do this by testifying like the State witnesses did. In other words you are sworn in and then tell the Court under oath what happened according to you. Now, if you do this, if you testify, the prosecutor will again ask you questions. You have the right to remain silent if you do not want to testify, but the Court must then bring it to your attention that the Court can quite possibly find you guilty on the testimony of the three State witnesses. The Court can also draw an adverse inference if you choose to remain silent, in other words the Court can think that you are scared to testify and be examined by the prosecutor.' (Authors' emphasis.)

'moet' (must / have to) underscores the sense of obligation. The magistrate in extract 4 employs a different approach to encourage the accused's participation. She does this by presenting the accused's testimony as an opportunity ('geleentheid') while coupling the other option, remaining silent, with negative associations, 'nadelig' (unfavourable) and 'skuldig bevind' (be found guilty) leaving the accused under no illusions as to the importance of his testimony to his own defence. While both explanations are adequate in law, the tone of each is quite different and the messages they send are not equivalent.

We have seen that magistrates' explanations to undefended accused may contain the same or similar essential elements yet differ in tone and force, and hence, in the message conveyed. This difference is influenced, at least in part, by the attitude and manner of the respective magistrates towards the accused. In the next part of the paper, we examine more closely the notion of magisterial discretion and how it pertains to undefended accused persons.

#### 1.2.4 Magisterial discretion and the undefended accused

Recent judgments have emphasized that, when an accused is unrepresented, the magistrate should, as far as possible, assist that person, whether it be during a cross-examination or in the presentation of evidence-in-chief.<sup>27</sup> This is especially important where the accused is illiterate and uneducated. Magistrates have a responsibility to ensure that courtroom protocol is adhered to and that the requirements of legislation met, yet are expected, in addition, to be able to empathize with the difficulties experienced by those appearing before them.

Common law does not prescribe, beyond general guidelines, the extent of assistance a magistrate is expected to provide to an undefended accused who is experiencing difficulty comprehending the requirements of courtroom procedure. Instead, magistrates are required to use their discretion, based on the evidence presented to them. On the notion of magisterial discretion, Steytler comments that:

Even where the pursuit of the principles of a fair trial is made obligatory, the full realization of those principles in practice will to a large extent remain dependent on the proper exercise of the court's discretion. The discretionary component in the administration of justice allows numer-

27 See, for example, *S v Sebanta* 1983 (1) SA 809 (O), *S v Govazela* 1987 (4) SA 297 (O) and *S v Zulu* 1990 (1) SA 655 (T).

ous factors to be influential, irrespective of whether they are relevant or acceptable.<sup>28</sup>

So, the law does make provision for the intervention by a magistrate on behalf of an unrepresented accused who is unable to exercise, for whatever reasons, his rights and duties in the course of proceedings. Steytler expands on the role of the magistrate as follows:

[T]he judicial officer listens to the evidence and arguments presented by the parties, and makes decisions when called upon to do so. He does, however, have a subsidiary duty to control the admission of evidence and the conduct of parties. He may put questions to witnesses in order to clarify aspects of evidence and may even call witnesses *mero motu*. In the main, though, the judicial officer bases his decisions on the evidence produced by the parties.<sup>29</sup>

However, he goes on to emphasize that 'the court is not required to participate actively in the process since the adversary system is predicated on the assumption that each party to the dispute will protect its own interests.'<sup>30</sup> It is the responsibility of the magistrate to judge when a party is not able to 'protect its own interests'. While common law provides the criteria by which this may be measured it is the responsibility of the magistrate to decide the extent of participation that is necessary to ensure a fair trial.

28 Steytler 230.

29 Steytler 5.

30 Steytler 6.

## THE UNDEFENDED ACCUSED AND THE LANGUAGE OF THE COURTROOM

In this part of the paper we examine more closely the roles which the respective participants in the courtroom are expected to play. We show how certain aspects of the behaviour expected of an accused are made apparent. For example, courtroom language contains verbal cues which require that the accused submit to the magistrate and acknowledge her authority throughout the trial. The prescribed evidentiary laws as set out by the rules governing admissibility and relevance further define an accused's subject position. However, there are other rules which are equally important, such as those governing the requisite discourse type which are seldom made explicit.

### 2.1 Subject position

In *Language and Power*, Norman Fairclough explores everyday examples of social interaction and focuses on the connections between language, power and ideology.<sup>31</sup> He contends that various discourse types exist in certain social settings which place participants in different 'subject positions'. Fairclough argues that

occupying a subject position is essentially a matter of doing (or not doing) certain things, in line with the discursial rights and obligations... what each is allowed and required to say, and not allowed or required to say, within that particular discourse type.<sup>32</sup>

His notion of subject position is useful in analysing the hierarchical structure in the courtroom, and the different subject positions that are constructed for each participant in a trial.

The setting up of subject positions for the various players in the trial process is facilitated by the use of language and conventions which define the

31 N Fairclough *Language and Power* (1989) London: Longman. In this book Fairclough exposes and examines what he calls the 'common-sense assumptions' in general language use which perpetuate social inequality.

32 Fairclough 38.

roles which the participants are expected to play.<sup>33</sup> They are expected to express themselves within the confines of the subject positions that have been constructed for them. These confines need not be an impediment to an effective functioning in such a capacity, provided the limits of the subject position are made clear to the subject. Fairclough writes that 'being constrained is a precondition for being enabled'. He argues that:

Social subjects are constrained to operate within the subject positions set up in discourse types... and are in that sense passive; but it is only in through being so constrained that they are made able to act as social agents... [who] are active and creative.<sup>34</sup>

Different constraints exist for different subjects. In the context of the courtroom, for example, the magistrate, prosecutor and undefended accused occupy distinct subject positions, each of which allows for some forms of expression, while constraining others. Unlike the accused, however, the officers of the court are familiar with the constraints that define their subject positions. This ensures that they are able to fulfil the requirements of their respective roles. Some of the expectations of an accused's subject position are made known in the course of explanations and instructions from the magistrate. Others, however, are not. The enablement to which Fairclough refers can take place only if the subject is fully appraised of the constraints and the possibilities of his subject position. In the next part of the paper, we look at which expectations are made obvious to unrepresented accused, and which are not.

#### 2.1.1 Explicit assumptions in the courtroom

The set-up and operation of the trial process is designed to accentuate the legitimacy of the proceedings and to make clear, among other things, the authority of the magistrate. A closer examination of typical courtroom language reveals that this is made explicit by cues in the discourse which are conspicuous throughout. Extract 5, which is taken from a magistrate's explanation of his cross-examination rights to an undefended accused, is an example of how the discourse makes explicit the dynamics of power and control to the respective participants in the courtroom:

33 Fairclough 38.

34 Fairclough 39.

## Extract 5

*Magistrate:* U het nou die reg om hierdie getuie te kruisverhoor. Dit beteken u kan vir hom vrae vra en met hom stry.

*Accused:* Ja u Edele, dankie.

*Magistrate:* Die is belangrik – laat die Hof eers klaar verduidelik. Dit is belangrik dat u met hom stry oor alles wat hy gesê het waarmee u nie saamstem nie want as u dit nie doen nie, gaan die Hof kan aanvaar sy getuienis is waar.

*Accused:* Ja Edele.

*Magistrate:* En die Hof kan aanvaar dat u saamstem met hom oor die dele waaroor u nie gestry het nie. U kan vir hom ook uitvra oor iets waaroor hy nie getuig het nie, as dit relevant is tot hierdie saak. Nou u moet ook u verweer aan hom stel met ander woorde u moet vir hom sê wat volgens u gebeur het sodat die Hof sy antwoord kan hoor. U kan maar voortgaan.<sup>35</sup>

This is as much an outline of the relative positions of power which the participants occupy as it is an explanation of rights. The magistrate explicitly refers to herself as 'die Hof', as a personification of the court's authority.<sup>36</sup> Much of what the magistrate says in the rest of the explanation establishes and confirms that she is in control over the courtroom. She will decide what is relevant<sup>37</sup> 'as dit relevant is', what is important, 'Die is belangrik.... Dit is belan-

35 *S v Willeby*, Wynberg Magistrates' Court, criminal case number 4/454/94.

Authors' translation: *Magistrate:* You now have the right to cross-examine this witness. That means you can ask him questions and argue with him.

*Accused:* Yes your Worship thank you.

*Magistrate:* This is important – first let the Court finish explaining. It is important that you argue with him about everything he said, with which you do not agree, because if you do not do so, the Court can accept his testimony as the truth.

*Accused:* Yes your Worship.

*Magistrate:* And the Court can assume that you agree with him over those parts you did not dispute. You can also ask him about something not related to his testimony, if it is relevant to this case. You must now also put your version to him, in other words you must tell him what happened according to you, so that the Court can hear his response. You may proceed.

36 In P Carlen *Magistrates' Justice* (1976) London: Martin Robinson, Carlen discusses a similar tendency amongst English magistrates who 'argue that their own authority is invested in the place rather than in their trans-situational statuses as magistrates' 31.

37 The ground rule is that evidence must be relevant to be admissible. Section 210 of the *Criminal Procedure Act No 51 of 1977* provides that evidence which is not relevant or which is of no significant importance and which does not prove or rebut any point or fact in dispute, is not admissible. The magistrate will judge from the facts of a case what is relevant and therefore admissible.

grik' and she makes it clear that it is up to her to accept as accurate anything that is not disputed in the testimony of the State witness, 'die Hof kan aanvaar' (the Court can accept). The use of the optional 'kan' underscores that she has discretion in deciding what is credible. When the accused speaks prematurely, he is told to wait, 'laat die Hof eers klaar verduidelik' until she has finished. Only then may he continue with her permission, 'U kan maar voortgaan'. She makes it clear that while the primary exchanges may be between accused and witness during cross-examination, it is the Court (in her person) that will rule on what is admissible and what is not.<sup>38</sup>

Magisterial discretion is provided for by the evidentiary rules governing relevance and admissibility. It is, in part, these rules which set up the respective positions of power for accused and magistrate. The magistrate also emphasizes that while the primary exchanges will be between accused and witness, she will be assessing what is said, 'u moet vir hom sê wat volgens u gebeur het sodat die Hof sy antwoord kan hoor'. The accused's contribution to the above exchange is in accord with the subject position that has been constructed for him. He plays a passive and submissive role and shows deference to the magistrate. He refers to the judicial officer in respectful terms, and uses honorifics when addressing her, 'u Edele' and 'u Edelagbare' (your Worship). These form an important part of the accused's acceptance of at least one aspect of his constructed subject position, i.e. the acknowledgement of magisterial authority in the courtroom.

The authority of a magistrate is constantly acknowledged in the court, even when she herself does not participate directly in proceedings. Extract 6 is taken from the same case and is an excerpt from the accused's cross-examination of the witness:

## Extract 6

*Accused:* Edelagbare die man. So sê jy ek het oor die pad gekom. Nou ek het buite gestaan met my sakkie in my hand en my neus en my mond wat bloei. Sê jy nou my toe – toe wat ek dan gemaak met daardie goed wat ek in my hand gehad het?

38 'Evidence is admissible if the court may take it into account to determine whether the facts in dispute have been proved or not.... Evidence cannot be more or less admissible, but can be more or less important, depending on the circumstances. Our law with regard to admissibility of evidence is flexible in its nature, which means that there are many exclusionary rules which limit the evidence which the court may consider' in: The Association of Law Societies of the Republic of South Africa 'Practical Legal Training: Criminal Court Practice' (1994) Handbook 115. For more discussion on the relevance and admissibility of evidence see also LH Hoffman and DT Zeffert *The South African Law of Evidence* (1988) Johannesburg: Butterworth Publishers 21-27.

*Witness:* Jou ma-hulle en jou dingies, jy kan cen van hulle gegee het, ek weet nie wat jy daarmee gemaak het nie.

*Accused:* En my neus en my mond, het ek net so met daardie bloed ....

*Witness:* (interrupts) Ek het alreeds aan *die Hof* daardie antwoord gesê, sy mond het gebloei *my Edele* en sy neus *my Edele*.

*Accused:* En met daardie 'moment' toe het ek wat hy nou vir jou steek en toe hardloop ek om vir jou te gooi, sê jy nou so?

*Witness:* *U Edele* soos ek sê *my Edele* daardie pad is nie baie breed nie *my Edele* en dit was op die sypaadjie gewees wat ek en sy broertjie gestry het *my Edele*.<sup>39</sup>

The language used in the exchange shows an explicit and ongoing acceptance of the relative positions of power by the participants in the courtroom. When in dialogue with each other both the accused and the witness, at times, slip into the use of informal expressions in a dialect which they share; 'ma-hulle', 'dingies', (describing a group of onlookers including the accused's mother and an unknown relative or friend), 'moment' (literally that moment – describing what he did at that time) and 'broertjie' (younger brother – the 'tjie' being indicative of the relatively young age of the brother). Each also uses terms which he knows the other is likely to be familiar with, as they are both from the same neighbourhood (Steenberg). This use of the same dialect puts them on an equal footing with each other, at least in this respect, in the courtroom. They both show, however, an ongoing awareness that it is the magistrate who decides what is worth listening to, what is relevant and what the relative importance of the different accounts is. It is also clear that they adapt to her dialect and defer to a notion that it is superior to their own. This dialect-shifting seems to be at least one of the implicit requirements of courtroom discourse. Although the exchange is between accused and witness both are

39 *5 v Lombaard and another*, Wynberg Magistrates' Court, criminal case number 3/172/94. Authors' translation; *Accused:* *Your Worship* this man. So you say I came across the road. Now, I stood outside with my bag in my hand and with my nose and mouth bleeding. So you tell me now what did I do with those things that I had in my hand?  
*Witness:* Your mother and them and your whatever, you could have given it to one of them, I don't know what you did with it.  
*Accused:* And my nose and my mouth, did I just go with that blood....  
*Witness:* (interrupts) I have already told the *Court* the answer to that, his mouth was bleeding, *your Worship*, and his nose, *your Worship*.  
*Accused:* And at that moment when he stabbed you I ran across to throw (the brick at) you, is that what you are saying now?  
*Witness:* *Your Worship*, as I say, *your Worship*, that road is not very wide, *your Worship*, and it was on the pavement that me and his brother were arguing, *your Worship*.

aware that the magistrate is the person each needs to convince. Their dialogue appears, in places, to be little more than a contest to win her approval. The accused prefaces his statement to the witness with 'Edelagbare die man' (Your Worship this man) presumably to indicate to her his exasperation with what the witness has testified. When the witness responds, 'Ek het alreeds aan die Hof daardie antwoord gesê, sy mond het gebloei my Edele en sy neus my Edele' (I have already told the Court the answer to that, his mouth was bleeding your Worship and his nose your Worship) he is dismissive of the accused and instead directs his answer to the magistrate. When the accused and witness speak to the magistrate they switch, not only to her dialect (inasmuch as they have mastery of it), but also to a formal speech style, interspersed with deferential honorifics. They revert to their own dialect and a more casual style when engaging with each other in dialogue.

Thus far we have considered some of the court's expectations of accused persons which are made explicit either by the rules of the discourse type, for example, the authority of the magistrate over proceedings in courtrooms, or by the law, for example, those regulations concerning admissibility and relevance of evidence which magistrates are required to explain to accused persons. There are, however, rules in operation in the courtroom of which the accused is seldom aware.

### 2.1.2 Implicit assumptions in the courtroom

Magistrates and lawyers alike appear to share implicit assumptions which influence and inform legal reasoning. This collective mindset is moulded in part by legal schooling, and in part by the repetition of courtroom practice. Scheppele writes of a 'we-they' divide in courts between those who are familiar with the law and those who are not:

Those who are trained in law learn to speak a specialized language. When talking about the law with others who are similarly trained, lawyers become the 'we' who know the laws, excluding the 'they' who do not. And the adversarial nature of legal practice in common-law legal systems also encourages a 'we-they' attitude to emerge. 'We' are the forces of justice in the world who are on the right side of this case; 'they' are the opponents who want to thwart 'us' at every turn. Legal discourse is in an important way, then, dependent on a variety of 'we-they' subdiscourses for its internal structure.<sup>40</sup>

40 KL Scheppele 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2079.

Those coming into the courts for the first time are often expected to express themselves within constraints, such as those governing the discourse, which are not always made explicit. Consider, for example, some of the constraints imposed on witnesses in a formal courtroom setting.

1. A witness may not ordinarily repeat what other persons have said about the event being reported [hearsay].
2. A witness may not speculate about how the situations or events being reported may have appeared to other people or from other perspectives.
3. A witness may not ordinarily comment about his or her reactions to, or feelings and beliefs about, events being reported.
4. In responding to a question, a witness is ordinarily restricted in digressing from the subject of the question to introduce information about what he or she believes critical as a preface or qualification.
5. A witness may not normally incorporate into his or her account any suppositions about the state of mind of the persons involved in the events being reported.
6. Value judgments and opinions by lay witnesses are generally disfavoured.
7. Emphasis through repetition of information is restricted.
8. Substantive information may not be conveyed through gestures alone.
9. A witness is generally forbidden to make observations about the questions asked or to comment on the process of testifying itself.<sup>41</sup>

O' Barr and Conley comment that

These restrictions and prohibitions are supported by the statutory or common law of evidence or by unwritten custom widely followed in formal courts. Yet reflection on how we ordinarily speak suggests that each forbidden practice is common, if not essential, in everyday narration.<sup>42</sup>

What witnesses may say is restricted by these rules, yet none of the rules is usually made explicit. In addition, during the course of a trial, there are different rules that apply at different stages, depending on the requirements of the

41 WM O'Barr and JM Conley 'Litigant satisfaction versus legal adequacy in small claims court narratives' IN Levi and AG Walker (eds) *Language in the Judicial Process* (1990) New York: Plenum Press 101.

42 O'Barr and Conley 102.

discourse type in operation. The rules underlying courtroom discourse are commonly taken for granted by court officials, yet may cause bewilderment to an accused who

knows that something is going on, knows that it concerns him, but what is it? It is the routine operation of a taken-for-granted and implicit network of signs, gestures and cues which routinely transmits messages between the performers in a complex information game.<sup>43</sup>

So, for example, most of the explanations by magistrates in the sample, while outlining some of the evidentiary requirements of cross-examination, do little to indicate how an accused is meant to conduct the process. Extract 7 is an exception and provides an example of a magistrate who does explain some of the underlying conventions of cross-examination to an accused who is about to embark on a cross-examination.

#### *Extract 7*<sup>44</sup>

*Magistrate:* Een vraag op 'n slag, u maak die vraag klaar, u wag vir die getuie om daarop te antwoord en dan vra u die volgende vraag.<sup>45</sup>

## **2.2 Inappropriate speech acts in the courtroom**

An indication to an undefended accused of how the dialogue should be conducted is as important as an explanation of the actual cross-examination process. The cross-examination of a witness is a specific type of discourse which requires specific speech acts (i.e. directed argument and question posing) while restricting others (i.e. extensive narration, the expression of opinions, assertions of innocence etc). When the accused has an opportunity to testify under oath, mastery of a different sort of discourse is required, in which the dominant mode is a narrative one. The rules of the discourse for this part of the trial are entirely different from those for cross-examination, and the posing of questions by an accused at this stage would be inappropriate. An analysis of our sample indicates that the types of discourse required at the various stages of the trial proceedings are seldom explained by magistrates (extract 7 is an exception). This often results in an accused adopting a speech act which is restricted by the implicit rules of the particular discourse type required at the

43 Carlen 76.

44 *S v Phillips*, Wynberg Magistrates' Court, criminal case number 3/1146/94.

45 Authors' translation: One question at a time, you complete the question, you wait for the witness to respond and then you ask the next question.

time. Extract 8 provides an example of an accused attempting to explain his version of events, instead of addressing specific questions to a State witness, during cross-examination:

#### **Extract 8**

*Magistrate:* Okay, you now get an opportunity to *cross-examine* the accused. If the witness said anything with which you do not agree you may now *argue* the point with him. If there is any aspect of his testimony which you do not *question* the Court will assume that you agree with it – do you understand your rights?

*Accused:* I understand.... I don't really have any questions but can I please *say* something?

*Magistrate:* Go ahead.

*Accused:* Look, to tell the truth I may have been mistaken about waiting for the robots to change and....

*Magistrate:* (interrupts) No, no, no you are not going to be allowed to say anything to the Court yet – the Court thought that you wanted to say something else. You wanted to *explain* what happened at the traffic lights, but the Court does not know what happened there. The witness has told the Court what happened there and if you *claim* that his version is incorrect then you must *put questions* to him and then he in turn will have an opportunity to respond – but if you do not care to *debate* it with him then the Court will have to assume that you agree with his version of events. Do you understand?<sup>46</sup>

In the magistrate's original explanation, her instruction to the accused is ambiguous: 'If the witness said anything with which you do not agree you may now argue the point with him.' It is only when the accused responds inappropriately that the magistrate explains more about the underlying rules of the discourse: 'if you claim that his version is incorrect then you must put questions to him and he in turn will have an opportunity to respond.' The magistrate enforces the rules in operation at each stage of the proceedings strictly: 'No, no, no you are not going to be allowed to say anything to the Court yet – the Court wanted to say something else.' Yet while she expects the accused to be bound by the rules of the discourse, she does not fully explain to him what

these are. What the accused is about to say is relevant (what happened at the traffic lights) but the speech act he adopts is inappropriate. It should be noted though that the Magistrate allows him to continue after he states, 'I don't really have any questions.' What he begins to say comes in the form of an admission, 'Look to tell the truth I may have been mistaken about waiting for the robots to change.' However, what is expected of him at this stage of proceedings is to put relevant questions and argue the points which are in dispute, not to make admissions. These admissions will be assumed by default, i.e. if the accused does not contest an allegation, 'If there is any aspect of his testimony which you do not question' then 'the Court will assume that you agree with it'. There will be an opportunity for the accused to explain later what his version of events is during evidence-in-chief. In cross-examination, however, the rules of the discourse do not provide for explanation, but require argument and debate. Only later on, during the cross-examination process does the magistrate go on to explain these requirements in more detail, 'you must put questions to him and then he in turn will have an opportunity to respond'.

In extract 9, an accused is given an opportunity to explain his version of events, under oath, during evidence-in-chief. In this instance, the accused starts to ask a question. However, because the discourse type required in evidence-in-chief is different, the speech act he chooses is inappropriate:

#### **Extract 9**

*Magistrate:* Die aanklaer het nou sy saak gesluit. U kry die geleentheid om u saak *voor* die Hof *te lê*. Op hierdie stadium van die verrigtinge kan u stilbly as u wil of u kan u weergawe – u *verduideliking* – vir die Hof kom gee. As u u weergawe of verduideliking vir die Hof wil kom gee sal u getuiebank toe moet kom – u sal die eed moet neem en die Staatsaanklaer sal vir u vrae kan vra. U kan op hierdie stadium van die verrigtinge stilbly as u wil maar as u wil stilbly dan het die Hof niks van u kant af nie. Wat u gesê het toe u gepleit het – die vrae wat u gevra het en die stellings wat u gemaak het aan die getuies – dit is nie getuienis in u guns nie. Die Hof kan dit nie in aanmerking neem tensy u dit onder eed herhaal. Verstaan u dit?

*Accused:* ..., my – my vrae is net die, my Edelaagbare...

*Magistrate:* (interrupts) Nee, meneer, daar is nie 'n vraag op die stadium nie. Luister maar net.

46 S v Solomons, Wynberg Magistrates' Court, criminal case number 3/6/94.

*Accused:* O.

*Magistrate:* U kan stilbly as u wil of as u wil hê dat die Hof u weergawe of u verduideliking in ag moet neem dan sal u dit onder eed *moet kom sê* en dan sal die Staatsaanklaer vir u vrae kan vra.<sup>47</sup>

Evidence-in-chief is governed by a different set of rules to those which regulate cross-examination, both in terms of what is relevant and what is admissible, and accused persons can at this point give their version of what happened. They need not only restrict themselves to debating disputed parts of the version outlined by the State witness/es. In terms of what the discourse allows, they can now tell their story, complete with justifications. It is at this point that the magistrate will allow for extensive narrative on the part of the accused. In extract 9, the accused responds to the invitation to present evidence-in-chief by introducing the fact that he has some questions he wants to ask, 'my vrae is net die'. The magistrate quickly points out that this speech act (asking a question) is inappropriate: 'Nee, meneer, daar is nie 'n vraag op die stadium nie...'. Despite having listed the evidentiary rules governing evidence-in-chief in some detail, i.e. explaining to the accused the choice that he has between testifying and remaining silent, and the consequences of each, the magistrate fails to illuminate the discourse requirements of evidence-in-chief, for example, that presenting a narrative at this stage is an appropriate speech act and asking questions is not.

In each of the above explanations, it might have been helpful for the accused had the magistrate given the accused additional information in which the requisite rules of the particular discourse are made explicit. Both explanations only tell the accused, in essence, what the evidentiary rules require. In

47 *S v Geduld*, Wynberg Magistrates' Court, criminal case number 5/678/94.

Authors' translation: *Magistrate:* The prosecutor has now closed his case. You get the opportunity to present your case to the Court. At this stage of proceedings you can remain silent if you wish or you can give your version – your explanation – to the Court. If you want to give your version or explanation to the Court you will have to come to the witness stand – you will have to take the oath and the prosecutor will be able to ask you questions. You can remain silent at this stage of proceedings if you wish but if you remain silent then the Court will have [heard] nothing from your side. What you said during your plea – [and] the questions and statements you put to the witnesses – that is not evidence in your favour. The Court cannot take it into account unless it is repeated under oath. Do you understand?

*Accused:* ...my – my question is just this, your Worship....

*Magistrate:* No, sir, there are no questions at this stage. Just listen.

*Accused:* O.

*Magistrate:* You can remain silent if you wish or if you want the Court to hear your explanation then you will have to repeat it under oath and then the Prosecutor will be able to ask you questions. (Authors' emphasis)

many of the cases in the sample, accused persons use inappropriate speech acts, particularly during cross-examination, when they appear to want to give their side of the story rather than do what is required, i.e. debate the disputed elements in the testimony of a State witness.

By contrast we show below, in *S v De Linney*, how a defence counsel's knowledge of the rules of the courtroom leads to a rigorous and effective cross-examination of a State witness.<sup>48</sup> The accused was charged with culpable homicide (first charge) and driving a motor vehicle while under the influence of liquor (second charge).

### 2.3 Appropriate speech acts in the courtroom

When the defence counsel in *S v De Linney* has an opportunity to cross-examine the State witness (the police officer who arrested the accused) he immediately sets about casting doubt on the witness's recollection of events. His first questions are all directed at testing the memory of the witness:

Sersant kan u onthou hoe u inligting bekom het om hierdie ongelukstorie te nader?...

Was u toe op daardie stadium op Dieprivier stasie gewees?...

Was u met patrollie besig? Kan u min of meer onthou in watter omgewing u beweeg het toe u daardie radioberig ontvang het?...

Goed en kan u min of meer onthou hoe lank dit u geneem het vanaf die stadium wat u die radioberig ontvang het, tot en met u opdragting op die toneel, omtrent hoe lank het dit geneem?<sup>49</sup>

The counsel's initial line of questioning forces the witness to admit his uncertainty regarding his recollection of incidents which are peripheral to the accident itself. All the questions are relevant in that they are related to the events which took place during the evening of the accident. The witness has to answer the questions as best he can and the result is an uncertain performance. Where the witness had previously answered questions from the prose-

48 *Wynberg Magistrates' Court*, criminal case number 5/321/94.

49 Authors' translation: *Sergeant*, can you remember how you received information regarding the accident?

Were you at Diepriver station at the time?...

Were you busy patrolling? Can you remember more or less in what area you were moving when you received the bulletin?...

Okay and can you remember more or less how long it took you from when you received the bulletin to when you arrived at the (accident) scene, about how long did that take you?

cutor confidently, his answers are now vague and uncertain '...ek dink ek was met patrollie besig' (I think I was busy patrolling) and '...ek kan glad nie sê waar presies ek was nie' (I really cannot say precisely where I was). The defence counsel prefaces more than one of his questions with 'kan u min of meer onthou...' (can you remember more or less) which serves to emphasize the uncertainty around the witness's recollection of events.

It is also clear that the witness is aware of the subject position of the defence counsel, i.e. that he is a lawyer, and accords him more respect than policemen show (in this sample) to undefended accused who cross-examine.

The defence counsel exploits the witness's vacillation to offer a version of events which shifts the blame from the accused:

*Counsel:* Nou sersant, ek gaan nou vir u iets vra. As u nie in staat om dit te beantwoord nie, dan moet u liever vir ons sê u is nie in staat om te antwoord nie, maar ek gaan aan u 'n stelling maak en probeer bepaal of u in staat is om 'n opinie daaroor te vorm, al dan nie....<sup>50</sup>

Here counsel's use of the plural 'ons' (us) implies that the witness has to answer, not only to him but also the other officers of the court, including the magistrate. In this way, he invests his question with more authority than it actually has. The defence counsel casts further doubt on the credibility of the witness here by stating his intention of testing to see whether or not he (the witness) is in any position to voice his opinion, '...ek gaan aan u 'n stelling maak en probeer bepaal of u in staat is om 'n opinie daaroor te vorm, al dan nie....'

The defence counsel speaks with a certain authority, to which he and others may believe he is entitled, and he is accorded the subject position which he claims.

Counsel then prises an admission from the witness that he is unable to contradict what the accused has alleged:

*Counsel:* Ja, met ander woorde, van u eie waarnemings, kan u nie sê dat dit wel nie so kon gebeur het nie, indien die beskuldigde so getuig nie?

*Witness:* Nee, ek kan nie sê wat daar wel gebeur het nie, wanneer hy die persoon getref het nie....<sup>51</sup>

50 Authors' translation: *Counsel:* Now sergeant, I am going to ask you something. If you are not in a position to answer then you had rather tell us that that you are not, but I'm going to put a statement to you (anyway) and try to ascertain if you are in a position to form an opinion, or not.

51 Authors' translation: *Counsel:* Yes, in other words, by your own admission, you are unable to say that it didn't happen that way, in case the accused testifies to it.

*Witness:* 'No, I cannot say what actually happened there, when he hit the person....'

In *S v De Linney*, the defence counsel is effective in creating doubt about the testimony of the witness by using directed argument specifically to erode his credibility. Lawyers appear to construct and argue a case better than undefended persons. This seems to be due, in part, to their understanding of the law which is honed through years of experience, and, in part, because they are aware of the requirements of the discourse. Lawyers are also able to claim a subject position that has more power than the one typically available to undefended accused. This is because it is recognised in the discourse of the courtroom that lawyers have studied the law, and know the requirements of the discourse. Thus, despite the fact that undefended accused persons and lawyers are engaging in the same activity when they cross-examine, some participants in the trial (at least) accord them different subject positions. Magistrates, too, issue instructions and make judgments which are informed by their experience of the law. In the next section of the paper, we examine the type of explanations typically given by magistrates in the sample, and consider the extent to which they are made accessible to unrepresented accused persons.

## THE EXPLANATION OF RIGHTS

### 3.1 Typical examples of magistrates' instructions

Magistrates balance a number of considerations when they explain to unrepresented accused persons what their rights and duties are at different stages of the trial. They attempt to transform the legislation and common law, much of which contains technical terms and expressions, into language which can readily be understood by persons who have less experience of the legal process. If, however, magistrates issue instructions which are oversimplified, they run the risk of omitting an important right or duty for the sake of expediency. If, on the other hand, they explain in terms which are laden with legal jargon there is a danger that the average unrepresented accused will not understand what she is meant to do. In giving an explanation, magistrates have the task of finding a position between the two extremes which, firstly, is adequate in terms of the legislation, and, secondly, is within the comprehension of an unrepresented accused. The most common type of explanation by magistrates for cross-examination is one which sets out the basic evidentiary rights in plain language. The following are typical examples:

#### Extract 10

*Magistrate:* U het nou gehoor wat die getuie vir die Hof sê. U het die reg om *vrae te vra* as u nie saamstem met sy getuienis nie, of as hy *leuens vertel* volgens u, dan moet u nou vir hom *vrae vra* dat die Hof kan hoor wat is u kant van die saak. As u nie *vrae vra* nie, kan die Hof sy getuienis aanvaar. U moet ook *u weergawe* stel van hoe die voorval gebeur het, dat die Hof sy kommentaar daarop kan hoor. Verstaan u dit?<sup>52</sup>

52 *S v Barends*, Wynberg Magistrates' Court, criminal case number 3/636/94.

Authors' translation: You have now heard what the witness tells the Court. You have the right to *ask questions* if you do not agree with his testimony or, if he *told lies* according to you, then you must *ask him questions* now so that the Court can hear what your version of the case is. If you do not *ask questions*, the Court can accept his testimony. You must also put *your version* of how the incident happened, so that the Court can hear what his response is. Do you understand this? (Authors' emphasis)

#### Extract 11

U het nou die reg om die getuie te kruisverhoor. Dit beteken u kan vir haar *vrae vra* en met haar *stry*. As sy enige iets gesê het waarmee u nie saamstem nie, is dit *belangrik* dat u vir haar daarvoor *vra*. Want as u dit nie doen nie, gaan die Hof haar getuienis kan aanvaar as die waarheid of die Hof kan aanvaar dat u met haar saamstem oor die dele waaroor u nie *gestry* het nie. Nou as *u weergawe* van die gebeure enige – enigsins anders is as wat sy sê, dan behoort u aan haar te sê volgens u wat die *korrekte weergawe* is sodat die Hof haar reaksie kan hoor. U kan maar voortgaan.<sup>52</sup>

Both explanations contain expressions which would be familiar to persons who have no experience of legal matters. Words and phrases such as '*vrae vra*' (ask questions), '*stry*' (argue), '*as hy leuens vertel*' (if he is lying), '*as u nie saamstem*' (if you do not agree) and '*u weergawe*' (your version) are geared towards giving unrepresented accused a sense of what it is they need to do. These expressions recur in explanations in the sample, where accused persons are routinely instructed to argue, ask questions and give their version of a disputed event, when cross-examining a State witness. Such explanations capture the essence of what is required during the cross-examination process, but they usually do so at the expense of important detail. While cross-examination is about arguing, questioning and giving a '*version*' it is also about undermining credibility and creating doubt. The sort of explanations to undefended accused people shown above can provide a misleading caricature of what cross-examination is about, with certain aspects of the procedure being emphasized while others are ignored. There is a risk that the instruction to '*stry*' and '*vrae vra*' when not coupled closely enough to the facts in dispute in a particular case may lead to petty squabbling and irrelevant questioning.

Indeed, this is what happens in extract 12, where the magistrate issues an explanation which, because it is over-simplified, is not only inadequate, but also misleading:

52 *S v Foster*, Wynberg Magistrates' Court, criminal case number 3/767/94.

Authors' translation: You now have the right to cross-examine the witness. This means that you can *ask her questions* and *argue* with her. If she has said anything *with which you disagree*, it is *important* that you *ask her* about it. Because if you do not do it, the Court can accept her testimony as the truth or the Court can accept that you agree with her over those parts you did not *dispute*. Now if *your version* of these events is different in any way from what she said, then you should put it to her what according to you the *correct version* is so that the Court can hear her reaction. You may continue. (Authors' emphasis)

### Extract 12

As u enige deel van sy getuienis *betwis*, moet u nou met hom *stry*. As u nie met hom *stry* nie, gaan ek aanvaar u stem saam. As hy iets uitgelaat het, *stel* dit aan hom dat die Hof kan hoor wat hy daarvoor sê. Verstaan u dit meneer?<sup>52</sup>

The response from the accused suggests that he has interpreted the explanation literally as he engages the witness in a series of challenges and contradictions:

*Accused:* Daar wat jy nou staan jy kan lieg ook wat jy daar staan hierso.

*Witness:* Ek lieg nie.

*Accused:* Jy lieg ja, jy gaan mos nie die Hof die waarheid vertel nie man.

*Witness:* Ek skel saam jou nie. Ek het klaar die Hof die waarheid gegee.

*Accused:* Dat jy moet onthou jy het gesweer, niks verdere vrae nie Edele.<sup>53</sup>

In this exchange the accused is doing exactly what he has been told by the magistrate. He is challenging the witness 'stry' and disputing his version, 'betwis'. Yet, this is an example of ineffective cross-examination, because the argument is directionless and not linked specifically to those facts which are in dispute. Rather, the debate takes the form of generalized accusations and contradictions. The magistrate does not specify in the explanation that the argument 'stry[d]' to which he is alluding must be carefully directed. The accused responds to the invitation by attacking the credibility of the witness and suggests that he would lie under oath, 'dat jy moet onthou jy het gesweer'. The accused's cross-examination does not counter any allegations the witness may have made. What follows is an exchange which is irrelevant and does nothing to further the case for the defence. The accused has been told to argue but it has not been explained what it is he should argue about.

52 *S v Philander*, Wynberg Magistrates' Court, criminal case number 3/1287/94. Authors' translation: If you dispute any part of his testimony, then you must *argue* with him now. If you do not argue with him, I will assume you agree. If he left something out, *put* it to him so that the Court can hear what he has got to say about it. Do you understand sir?

53 Authors' translation: *Accused:* You can lie there (under oath in the witness stand) as well as you would if you stood over here.  
*Witness:* I'm not lying.  
*Accused:* Yes you are lying – you're not going to tell the truth to the Court.  
*Witness:* I won't argue with you. I have already given the truth to the Court.  
*Accused:* Just remember that you have sworn (taken an oath), no further questions your Honour.

It is tempting to isolate a poor or oversimplified explanation of rights and duties by a magistrate as the reason for an undefended accused's inability to comprehend what is required of him. It is apparent from the sample, however, that it is not the explanation of rights alone which is decisive in determining to what extent the undefended accused person is able to articulate his case. Undefended accused persons who enter the court for the first time are confronted with an unfamiliar and intimidating environment. However, the explanation of rights which magistrates issue can exacerbate rather than ease the sense of disorientation experienced by an already nervous and anxious unrepresented accused. In the next section we focus on the problems unrepresented accused may experience as a direct consequence of the explanation given by a magistrate. This does not preclude other features of the courtroom which themselves induce anxiety or confusion on the part of the accused.

## 3.2 Common problems with magistrates' explanations

### 3.2.1 A case study

*S v Watkins* is a case from the sample in which the accused was unrepresented.<sup>54</sup> We first consider the explanation of cross-examination rights by the magistrate in this case, and then explore the accused's response to the instructions.

The magistrate informed the accused, before the testimony of the first of the State witnesses, that if he wanted to make notes he could do so. He did not, however, explain why such notes should be made or inform the accused that he would have an opportunity to cross-examine the witnesses after they had testified.

The first State witness was a medical doctor who confirmed that the accused was at least moderately under the influence of alcohol and in no condition to drive a vehicle safely. After the conclusion of the doctor's testimony the magistrate invited the accused to cross-examine:

You are afforded the opportunity now to take the witness under cross-examination. It means that you can ask questions and put statements to the witness. I expect that you will also ask questions over those parts of the witness' evidence where he is making a mistake and you will be al-

54 *S v Watkins*, Wynberg Magistrates' Court, criminal case number 5/585/94.

lowed to ask questions about anything not mentioned by the witness which you feel is important to this case. Do you understand?

The accused is thus told that he can ask questions, make statements regarding the evidence of the witness, and ask about anything which the doctor may have omitted. There is, however, much about the requirements of the discourse of cross-examination which is left unsaid in the explanation. For example, the accused is not warned against extensive narrative nor told what kinds of questions should be posed and what kind of statements should be made. Although the accused signals his intention to cross-examine, 'Well there's only one question basically', in fact, he launches into a justification of his actions, which is inappropriate at this stage of the trial.

*Accused:* 'Well there's only one question basically. I only actually had two bottles of beer after I finished work and that was approximately eight o'clock. I finished work at eight o'clock and I was at Marina De Gama. After the work, my client asked me if I'd like a drink, so we had two bottles of beer each and then he produced a bottle of Hebrew Jewish wine, because the previous day was a Jewish holiday. Now, I'd never tasted this wine, but apparently since we - we had the bottle all to ourselves, so we had approximately half a bottle each, but I only realised the next day, I said to Arnold Chen, I said what was the alcohol volume, he said it was 18% alcohol by volume, so I'm saying that this report was written, you say, at twenty past eleven, so at the time of the accident, which was about twenty past nine I believe, would that have affected me in two hours?'

This passage is almost exclusively made up of mitigating factors outlining the accused's reasons for drinking alcohol on the day, and contains only one question, which is not strictly relevant to the cross-examination.

The narrative above bears little relationship to a cross-examination of the doctor, on the basis of his testimony, but would be more appropriate during the accused's presentation of evidence-in-chief, as his version of what happened. It is common for unrepresented accused persons to respond to a State witness, who invariably has volunteered information which is damaging to the accused's case, by giving their side of the story. This is a perfectly natural reaction on the part of the accused. Yet, the structure of the trial process is designed in such a way that the accused's own account comes only after the State has closed its case. This means that the accused has to endure what often are hostile State witnesses giving their version or versions of events in dispute.

It is hardly surprising, then, that so many of the unrepresented accused persons in the sample fail to cross-examine when invited to do so, but try instead to tell their own story of what happened. Extensive narrative explication is, however, usually considered an inappropriate speech act during cross-examination.

The structure of the trial is rarely explained to an accused person in advance. For example, an accused person is seldom told that he must first listen to State witnesses and cross-examine them, and that only later will he himself be allowed to testify under oath and express his own version of events. The basic instructions from magistrates explaining cross-examination, i.e. to ask questions and argue, if they are not linked to specific details of a case, are ineffective if the accused is expected to carry them out in the manner of a skilled and experienced cross-examiner. Further, in the case in question, the magistrate also fails to explain from the outset what the distinction is between the discourse requirements of cross-examination and those of evidence-in-chief.

The accused continues his cross-examination of the State witness by attempting to justify his behaviour further:

No well, I'm saying I wasn't travelling fast, because when I actually - my mind was off the subject altogether, to be quite honest, it was totally off, not thinking, I had more stressful problems and I'd stopped smoking as well about two weeks prior and, you know, the matter of the fact is the car I hit in front was the Conquest. There was limited damage, so I wasn't travelling fast.

*Magistrate* (intervening): Yes, but the doctor won't be able to solve your problems there.'

With this interjection, the magistrate momentarily interrupts the accused's account by indicating that he is not engaging in the appropriate activity, but she fails to direct him to a more fruitful line of inquiry, i.e. to ask the witness questions relating to his testimony. When the accused continues with his narrative the magistrate interrupts again:

*Magistrate:* Ja, but is there something that you would like to ask the doctor now that he can answer?

This is the first time since the magistrate's original explanation that she has stated specifically that the accused must ask the witness questions which are directly relevant to the testimony of the witness. It is only at this point that the accused admits that the witness's account was accurate, 'Oh no I don't think so, he said exactly what was written at twenty past eleven, you know...'

The accused's cross-examination amounts to little more than an extended narrative which is largely irrelevant to the testimony of the witness. Some of the responsibility for this can be attributed to the magistrate's explanation of cross-examination, which did not make clear that questions should be limited to the witness's testimony, and that only statements related to this testimony should be made. As a result, the accused construed the explanation as an invitation to give his version of events. The wording of the explanation in this particular case suggests that the accused is entitled to do three different sorts of things when cross-examining the witness:

1. put general questions and statements: 'It means that you can ask questions and put statements to the witness';
2. ask specific questions: 'I expect that you will also ask questions over those parts of the witness's evidence where he is making a mistake'; and
3. ask questions which he himself wants to raise: 'You will be allowed to ask questions about anything not mentioned by the witness which you feel is important to this case'.

One of the implications generated by this explanation, i.e. that the accused can put general questions and statements to the witness, is misleading. So, even though the other instructions are appropriate, the explanation is misleading because the limits within which the accused can ask questions and put statements are not drawn explicitly enough. In his cross-examination, the accused fails to put relevant questions to the witness at all.

The second witness for the State in this case was the arresting officer, a police sergeant. He made several statements in the course of his testimony which were potentially damaging to the case for the defence. The most important of these were that the lighting was good (the accused had said it was poor) and that the accused was heavily (not moderately, as the accused had claimed) under the influence of alcohol. After the witness's testimony the accused was invited to cross-examine, without being given any further explanation of the process, although he was asked if he understood what he should do:

Once again you are afforded the opportunity to also take this witness under cross-examination sir, do you understand?

This invitation is representative of the fact that few magistrates in the sample give a detailed explanation to the accused when they are required to cross-examine for a second or third time.

In his cross-examination, the accused fails to dispute at all the witness's assertion that the road was well lit. This is a direct contradiction of what the accused had alleged earlier (i.e. that the visibility was poor). Although the magistrate is aware that this fact is disputed, he fails to call any attention to the discrepancy, and the witness is allowed to stand down without any further questions being posed.

The accused's cross-examination of both the doctor and the sergeant is ineffective, despite the magistrate's explanation. An examination of the transcript shows that the magistrate, on several occasions, fails to illuminate the implicit assumptions governing court proceedings, which make certain actions and speech acts appropriate while disqualifying others. Two important omissions in the magistrate's instructions above are:

- a) The overall structure of the trial is not explained. For example, the magistrate does not tell the accused ahead of time that he will have an opportunity to cross-examine and present evidence-in-chief.
- b) The constraints of the requisite discourse types, cross-examination and evidence-in-chief, are not explained. For example, the magistrate does not tell the accused that cross-examination requires the posing of specific questions and the use of directed argument relevant to the testimony of the State witness/es, and that evidence-in-chief, in turn, requires a sustained narrative on the part of the accused.

However, even when these points are fully explained, there still is no guarantee that the accused will be able to implement all that he has been told. It might, nevertheless, be of some assistance to accused people if magistrates themselves ensured that the instructions they issue are relevant, by making explicit the link between the procedural requirements (for example, that cross-examination requires the posing of specific questions and the use of directed argument) and an issue in dispute.

In *S v Watkins*, the accused's lack of legal experience and understanding of the discourse type, and what it requires, contributes to his ineffective cross-examination, which is little more than a series of justifications in which he fails to address any of the facts in dispute.

### **3.2.2 Difficulties that unrepresented accused experience with explanations**

Consistently, the explanations in the sample were adequate in terms of what is prescribed by the law, yet it is evident that the vast majority of undefended accused in our sample experienced difficulty when required to cross-examine

or present evidence-in-chief effectively. There are several possible reasons for this. The combination of the unfamiliar surroundings and proceedings of the legal process and the fact that many accused are poorly educated, creates a host of potential difficulties for persons coming into the courtroom for the first time. For the purposes of this paper, however, we focus on some of the possible problems which arise from the magistrate's explanation of rights.

#### **(a) Over-elaboration**

Some magistrates may assume that a detailed explanation of rights which gives full expression to the intricacies of the legal process might adequately prepare the undefended accused for what lies ahead. Instead, it is more likely that the converse is true. In a study of accused persons in the Magistrates Courts in England, Pat Carlen found that an explanation from a magistrate which is legally comprehensive would not necessarily be comprehended because:

Given... defendants made fearful by an unfamiliar, ritualistic (i.e. the out-of everyday) setting, it is situationally impossible for most defendants to participate in the information game of which they are both subject and object. Yet persistent attempts are made to explain the formal rules to them, it being taken for granted that improved communication in court will make the proceedings more just. A documentary analysis of the verbatim records of actual court hearings and of the negotiations which occur in and around courts, however, suggest that 'going through the motions' of explaining legal procedures and meanings to defendants adds confusion to confusion. Indeed, defendants often manifest a sense of mounting absurdity as they learn that, situationally, the logic of the law is opposed to a commonsense interpretation of formal rules.<sup>57</sup>

So, even a detailed explanation of the requirements of cross-examination or evidence-in-chief may prove ineffective simply because an unrepresented accused person might still not understand the implications of the instruction.

#### **(b) Over-simplification**

Magistrates often simplify explanations of legal requirements on the assumption that if an instruction is issued in an abbreviated form it will be understood better or more easily. We have already seen that this kind of explanation can potentially pose a different problem to an undefended accused, as certain

parts of an explanation are over-emphasized at the expense of others.<sup>58</sup> For example, during cross-examination, magistrates often underscore the need for argument and question-posing, yet may neglect to make these instructions relevant to the case at hand by explaining specifically what parts of the State witness's testimony should be disputed.

#### **(c) Neglecting to explain the rules of the discourse**

We have also shown that another problem accused persons commonly experience is that while magistrates may explain the evidentiary requirements of a particular stage of the trial, they rarely expand on the requirements of the discourse type.<sup>59</sup> So, for example, magistrates seldom make the distinction between the rules governing the discourse of cross-examination and those governing evidence-in-chief.

### **3.2.3 In search of a solution**

The difficulties experienced by undefended accused when attempting to comprehend an instruction should serve also to emphasize the unenviable predicament faced by magistrates on a daily basis in the lower courts. Is there an 'ideal' formula which might strike a happy balance between over-elaborate and over-simplified, inform the accused of underlying rules of the discourse, yet not hopelessly confuse him in so doing? The simple answer is no. Even when an instruction is concise and made relevant by being coupled to the requirements of a case there cannot be any certainty that it will be comprehended by an accused. Carlen writes that

even if the defendant understands the wording..., he seldom understands its procedural or juristic significance. He has, in fact, no knowledge of the rules which will operate to give significance.<sup>60</sup>

Yet, an awareness of the enormity of the task faced by undefended accused persons, and the potential for confusion and misunderstanding when they are called upon to cross-examine or present evidence-in-chief, should not be a cause for despair. Rather, an awareness by magistrates of the problems listed above should serve as a first step towards enabling the accused in the courtroom.

58 See extracts 10-12 and following text.

59 See extracts 8 and 9 and following text.

60 Carlen, 86.

57 Carlen 84.

## THE INVOLVEMENT OF THE MAGISTRATE

A magistrate may intervene on behalf of an accused in, for example, a cross-examination, if she feels that the rights of the accused are being compromised. Indeed, it is incumbent on the magistrate to assist the accused

by putting pertinent questions to place the accused's defence properly before the court without in any way jeopardizing an impartial judgement. The court must guard against too glib an acceptance of an accused's apparent ability to cross-examine. This can too easily lead to the drawing of adverse inferences against the accused.<sup>61</sup>

What is prescribed by legislation and by case law, however, provides a general framework within which there is room for magistrates to exercise their discretion during the trial. This includes the extent to which accused are allowed to indulge in narrative, and also the nature and frequency of magisterial intervention during the procedure, both by way of clarification and by the posing of questions.

We have already noted that all the magistrates in the sample issue explanations of rights which are adequate in terms of what is required by law. We also found, however, that some magistrates were more willing than others to assist unrepresented accused in putting their questions in a form which was appropriate in the context of the cross-examination process.

Elsewhere in the paper, we have given examples of magistrates rebuking accused persons for choosing inappropriate speech acts, for example, for indulging in extensive narrative during cross-examination, or asking questions when they are, in fact, required to testify under oath.<sup>62</sup> In other cases, however, magistrates show considerable empathy for the plight of those appearing before them and are prepared to allow for the difficulties experienced by unrepresented accused persons.

In the next section, we examine examples of magisterial assistance to unrepresented accused at three important stages of the cross-examination process: the explanation of rights; during the accused's cross-examination; and immediately after the accused has completed the cross-examination of a State

61 Du Toit et al s 166.

62 See extracts 8 and 9 and following text.

witness. We first consider two extracts in which the respective magistrates not only explain the evidentiary requirements of cross-examination, but also make it clear what type of questions are important in each case.

### Extract 13

Mnr..., die Staat het nou getuïenis aangebied in die geval dat u met *vingerafdrukke* verbind word na bewering. Nou kan u vrae stel aan die persoon om die getuïenis te weerlê. As u beweer dat die *vingerafdrukke* op 'n onskuldige manier daar kon beland het dan moet u maar *vrae stel* en dan 'n verduideliking ook gee hoekom dit sou daar gekom het. Verstaan u dit?<sup>63</sup>

### Extract 14

Ja mevrou jy het nou gehoor wat die getuie vir die Hof sê. U het die reg om *vrae te vra*, as u nie saamstem met sy getuïenis nie of hy vertel leuens volgens u, dan moet u nou vir hom *vrae vra* dat die Hof kan hoor wat is u kant van die saak. U moet ook *u weergawe* aan die getuie stel wat in die *winkel* gebeur het volgens u dat die Hof sy kommentaar daarop kan hoor. Verstaan jy dit?<sup>64</sup>

The two magistrates both explain the requirements of cross-examination in a simplified form using everyday terms such as 'vrae stel' (put questions), 'vrae vra' (ask questions) and 'u weergawe' (your version) but, importantly, both make the instruction relevant by immediately and directly linking it to what is in dispute, 'vingerafdrukke... daar kon beland het...' (fingerprints ...could have got there...) in extract 13 and '...wat in die winkel gebeur het....' (what happened in the shop) in extract 14. The language of the explanations is simple and both magistrates link the general instructions to specific questions which the accused needs to ask the witness.

63 *S v Mayekiso*, Wynberg Magistrates' Court, criminal case number 3/1329/94. Authors' translation: Mr..., the State has led evidence concerning this incident that you are allegedly connected with fingerprints (at the scene of the crime). Now you can put questions to this person to dispute this evidence. If you claim that the *fingerprints* got there in an innocent way then you must put *questions* to him and also give an explanation as to how it would have landed there. Do you understand this? (Authors' emphasis.)

64 *S v Bester*, Wynberg Magistrates' Court, criminal case number 5/508/94. Authors' translation: Yes madam you have now heard what the witness had to say to the Court. You have the right to *ask questions*, if you do not agree with his testimony or if he told lies according to you, then you must *ask him questions* now so that the Court can hear what your side of the case is. You must also give *your version* to the witness of what happened in the *shop* according to you so that the Court can hear his response to that. Do you understand? (Authors' emphasis)

Extract 15 demonstrates how a magistrate actively encourages and assists an accused's cross-examination of a State witness. The accused pleaded guilty to the theft of a bicycle, saying that he had committed the crime while under the influence of alcohol.<sup>65</sup> After the first witness (the complainant) had testified, the magistrate explained the cross-examination process to the accused. The accused declined to cross-examine, however, admitting his guilt:

#### Extract 15

My Edele, ek het nie 'n vraag vir haar nie, omrede ek erken ... so ek kan dan nie stry nie my Edele.<sup>66</sup>

The accused conceded that he stole the bicycle. The complainant testified, however, that when she approached him afterwards, he denied stealing it. Even though the accused initially declined to cross-examine the magistrate repeatedly refers to this discrepancy until it is addressed:

*Magistrate:* 'Goed, sy sê ook dat u aan haar gesê het dat u geen kennis van die fiets dra nie....

*Accused:* Ja.

*Magistrate:* Wil u vir haar daarvoor vra?

*Accused:* Ekskuus?

*Magistrate:* Wil u haar vra oor wat sy gesê het dat u geen kennis dra van die fiets nie, sy sê u het vir haar so gesê?

*Accused:* Die rede vir hoe ek so gesê het is omdat ek nie geheur het nie, maar wat haar vriend vir my sê, toe sal dit my bykom dit kan moontlik wees my Edelaybare.<sup>67</sup>

The accused is not following the rules of cross-examination; he addresses the magistrate instead of the witness and he selects an inappropriate speech

65 *S v Foster*, Wynberg Magistrates' Court, criminal case number 3/767/94.

66 Authors' translation: Your worship I do not have a question for her, because I admit... (my guilt) so I can't argue your worship.

67 Authors' translation: *Magistrate:* Okay, she also says that you told her that you know nothing about the bicycle.

*Accused:* Yes.

*Magistrate:* Do you want to question her on this?

*Accused:* Excuse me?

*Magistrate:* Do you want to question her on what she said – that you know nothing about the bicycle, she says this is what you told her?

*Accused:* The reason why I said that is because I didn't remember at the time but when her friend mentioned this it occurred to me that it might have happened.

act – he does not put a question to the witness or engage her in debate. Yet the assertion itself, '...omdat ek nie geheur het nie, maar wat haar vriend vir my sê, toe sal dit my bykom dit kan moontlik wees my Edelaybare', is relevant to that part of the case in which a discrepancy exists. The magistrate re-directs the accused's contention in a way which is more in keeping with the discourse of cross-examination, by rephrasing it as a question to the witness:

*Magistrate:* Wil u enige iets daarop sê? Hy sê toe u vriend vir hom spreek het hy onthou dat hy nou dalk kennis dra van die fiets.<sup>68</sup>

In doing so, the magistrate herself initiates an exchange between accused and witness despite the initial reluctance on the part of the former to cross-examine. There is no questioning, debate or argument, yet the magistrate facilitates communication between the accused and the witness, despite the fact that some of the rules governing the discourse of cross-examination are, strictly speaking, not being followed.

After the testimony of the second witness (an eye-witness and a friend of the complainant), the accused once more declines to cross-examine adding only that he had not been alone as alleged, but had instead been in the company of his younger sister:

U Edele wat ek te sê het vanmore in die Hof ek ken nie vir haar nie en ek kan nie met haar stry nie en – maar soos ek die naasteby weet was ek en my suster saam met mekaar gewees, 'baby' suster, so ek ken nie vir haar nie, ek het nie vrae om vir haar te vra nie.<sup>69</sup>

Again the accused's speech act is inappropriate in terms of the requirements of the discourse of cross-examination. He addresses his response to the magistrate and declines to argue or ask questions. The magistrate is nonetheless prepared to legitimize the accused's assertion (in the context of the cross-examination) by herself putting it to the witness in the form of a question:

Wat is u kommentaar op die stelling wat hy gemaak het?<sup>70</sup>

The magistrate in this example, unlike many others in the sample, was willing to intercede in the cross-examination process when she felt that there

68 Authors' translation: *Magistrate:* Do you have anything to say to that? He says that when your friend mentioned it to him he remembered that he now indeed did have knowledge of the bicycle.

69 Authors' translation: Your worship all that I can say today in this Court is that I don't know her and can't argue with her – but what I can recall to the best of my recollection is that my sister was with me, my baby sister, but I don't know her and can't put any questions to her.

70 Authors' translation: *Magistrate:* What is your response to the statement that he made?

were points which needed clarification. This she does despite the accused being:

- a) unwilling to cross-examine; and
- b) unwilling (or unable) to use speech acts which are appropriate for cross-examination.

Where an accused is unable to meet requirements which are implicit in courtroom discourse, it is especially important that magistrates ensure that the defence is articulated.

Our next example is one of magisterial involvement after the accused has concluded his cross-examination of the State witness.<sup>71</sup> The accused was charged with the theft of a case of cooldrink from the back of a truck, and pleaded not guilty. The first witness was the complainant, a worker on the truck who claimed that he had seen the accused loitering near the truck and later running away (although he had not witnessed the actual theft). The accused's cross-examination of the witness amounted to little more than a protestation of innocence and did little to challenge the witness's version. After the accused had concluded the cross-examination the magistrate asked the witness several additional questions in order to clarify what had happened:

Waar het jy gestaan toe jy eers vir die beskuldigde opgemerk het?  
Het jy self gesien dat hy die kus afhaal?  
Hoe lank was jy in die winkel voordat die voorval plaasgevind het?<sup>72</sup>

These and other questions (about the time sequence of events, etc) are not partial to either side, but merely serve to throw more light on the incident in question. If the magistrate does not do this in a case where the sequence of events is disputed it could be to the detriment of the accused who is required to highlight such differences during cross-examination. As we have seen from our sample, accused persons often choose either not to cross-examine, or do not do so very effectively. Where it is apparent that there are unresolved discrepancies which exist, the magistrate should not hold these against the accused, but attempt, where possible, to resolve them.

In this section we have examined some examples of useful magisterial involvement, at three important stages of the cross-examination process:

71 *S v Doolings*, Wynberg Magistrates' Court, criminal case number 3/957/94.

72 Authors' translation: Where were you standing when you first saw the accused?  
Did you see him removing the case yourself?  
How long were you in the shop just prior to the incident?

- a) during the explanation of rights – by suggesting the nature of questions which need to be asked;
- b) during the accused's cross-examination of a State witness – by facilitating the exchange by putting, for example, assertions in the form of questions; and
- c) after the accused has concluded the cross-examination of a State witness – by asking additional questions of the witness if there are obvious discrepancies which remain.

However, we also found that some magistrates either interceded infrequently or not at all, whether to encourage accused persons to cross-examine or to ask questions themselves in order to resolve obvious contradictions.

#### 4.1 Magistrates' judgments

Pat Carlen, in *Magistrates' Justice*, writes that 'the main decision-making processes in the lower courts revolve around the question, "What kind of person is the defendant?"'. This consideration is one which magistrates routinely encounter when contemplating the facts of a case. Carlen, discussing appropriate responses and behaviour for parties appearing in court, suggests that:

The paramount need of them all is to maintain credibility with the magistrate. One performance lacking in credibility may mean that future performances will be played with a handicap. Therefore all items of information that are presented to the magistrate as either evidence, facts diagnoses or expertise have to be plausible. Police, solicitors and probation officers give various accounts as to what magistrates find 'plausible', but, in each case, plausibility is situationally defined as meeting the demands of a justice situationally defined by particular magistrates.<sup>73</sup>

How then do magistrates ascertain what constitutes a credible or plausible performance? When passing judgment, magistrates usually explain why and how they reached their decision. Typically, a judgment also encapsulates the main arguments for the State and the defence. Magistrates frequently acknowledge that their judgments are influenced by their impressions of the central characters in the trial. These impressions are, in part, formed on the basis of the stories told by the latter as they refute, during cross-examination, and recount, during evidence-in-chief, their version of events. Kim Lane

73 At 59.

Scheppele comments on the importance of such story-telling in the courtroom context as follows:

In law, both at trial and on appeal, all courts have is stories. Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about the events. And when litigants come to court with different stories, some are accepted and become 'the facts of the case' and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.<sup>74</sup>

For example, the following is a typical finding by a magistrate during judgment:

**Extract 16**

Die Hof verwerp dan die beskuldigdes se weergawe oor die gebeure, aanvaar die Staatsgetuies s'n en bevind dan die Staat het sy saak bo redelike twyfel bewys en beide beskuldigde word skuldig bevind soos aangekla.<sup>75</sup>

We should, however, immediately draw a distinction here between the story (the evidence in a particular case) and the telling of it. In the majority of trials, magistrates would arrive at a decision based on the weight of the evidence indicating either that the accused is guilty or innocent. In some cases, however, the magistrate may have come to a verdict on the basis of only the evidence led by a single State witness, which has been disputed by the conflicting testimony of an accused person or persons. In such cases magistrates might arrive at a verdict that is influenced, at least in part, by their impressions of the credibility of both witnesses and accused.

We examined more closely what magistrates, during their judgments, cite as important in ascertaining the plausibility of an accused or witness. It appeared that spontaneous, logical and chronological accounts appeared to create a favourable impression while conversely, accounts which were dis-

74 Scheppele 2083.

75 *S v Lombaard and another*, Wynberg Magistrates' Court, criminal case number 3/172/94.

Authors' translation: The court then rejects the accuseds' version of events, accepts that of the State witnesses and finds that the State has proved its case beyond reasonable doubt and both accused are found guilty as charged.

jointed, unsystematic or jumbled invariably led to adverse inferences being formed by many magistrates. So magistrates tended to describe a favourable impression in terms which tended to recur in judgments, 'spontaan' (spontaneous), 'chronologies' (chronological), 'sonder leiding' (without prompting), 'logies' (logical), 'openlik' (openly), 'waarskynlik' (credible), ('geen onwaarskynlikhede') (no inconsistencies), 'geen wesenlike weersprekings' (no obvious contradictions), 'sinvolle' (meaningful), 'vrae openlik beantwoord' (questions openly answered), and 'getuienis wat gestaaf is' (evidence which is corroborated) being amongst these. When magistrates described what contributed towards a poor impression being created the following expressions were typical; 'verhaal wat nie sin maak nie' (a story that doesn't make sense), 'weersprekings' (contradictions), 'onwaarskynlik' (unlikely), 'belangrike aspekte van sy verdedeging vergeet' (forgot important aspects of his defence), 'verduideliking verskil aansienlik' (explanation differs noticeably) 'kon nie verduidelik' (could not explain), 'die klagster se getuienis was nie in geskil geplaas nie' (the complainant's testimony was not placed in doubt). It was noticeable that, in those instances in the sample where a magistrate made reference to a good impression, it was directed, almost without exception, at a State witness. Conversely, where there is mention made of a poor impression which was created this was invariably directed at accused persons.

Magistrates of necessity need to make decisions which are in part based on their impressions of accused persons and witnesses, particularly when the facts are in dispute. However, from the cases in the sample, it appears that magistrates may form these impressions by using criteria which are unfairly applied to undefended accused. For example, during cross-examination, accused persons are routinely told to argue and ask questions. This many of them do, only to be told later, during the magistrate's assessment of the evidence, that they are being judged by a set of criteria of which they were unaware (that they also should have been spontaneous, logical etc). Yet the typical undefended accused person is disorientated by courtroom proceedings and is unlikely to produce a logical and chronological presentation:

How many times does one know of cases where a defendant in court gets so tied up – if one saw him outside – one suddenly finds that he knows exactly what he wants to say – but the circumstances of the court are so that he can't – he ... may be confused or may be in a difficult state, or may be very nervous.<sup>76</sup>

76 English Probation Officer, quoted in Carlen 84.

A magistrate's judgment of an unrepresented accused should be tempered by the awareness that it is likely that the accused will have difficulty with the discourse requirements and may be nervous and easily confused in the courtroom context. We found that in some cases a simplified explanation of rights was issued (which fulfils procedural requirements) by a magistrate, who, later during judgment, remarks that she has drawn adverse inferences because of the way the accused has told a story. It appears in such instances that the magistrate is taking the accused's legal inexperience into account by simplifying the explanation of rights into everyday language (telling the accused to 'argue' and 'ask questions') only to later imply during judgment that adverse inferences have been drawn against the accused because he was not sufficiently spontaneous or chronological.

We found that the expectations set out by some magistrates in the explanation of rights to the accused, during the course of the trial, bore little resemblance to the criteria by which those magistrates made their judgments.

#### Extract 17

Die klaer het 'n *gunstige indruk* by die Hof gelaat. Hy het die gebeure *spontaan* en *chronologies* weergegee *sonder leiding* deur die aanklaer. Sy verhaal is *logies* en *waarskynlik*. Hy het vrac *openlik* beantwoord.<sup>77</sup>

#### Extract 18

Beide *Staatsgetuies* was *goeie getuies*. Hulle het mekaar *gestaaf*... Elkeen het 'n *chronologiese* en *sinvolle* relaas gegee van sy, of haar ervarings. Daar is *geen wesenlike weersprekings* in hul getuienis te vind nie, en ook *geen onwaarskynlikhede* nie.

Die *beskuldigde* ... het 'n *swak indruk* gemaak. Sy het haar *weerspreek*. Haar verduideliking ... was *sinneloos*. Die Hof aanvaar dat die *Staatsgetuies* geen rede, of motief het om leuens te vertel oor die punte waaroor *beskuldigde* verskil nie, en *die Hof aanvaar hulle weergawe*... *In die lig van hierdie feit en die beskuldigde se swak vertoning vind die*

77 *S v Phillips*, Wynberg Magistrates' Court, criminal case number 3/1146/94. Authors' translation: The complainant made a favourable impression on the Court. He recounted the events spontaneously and *chronologically without being led* by the prosecutor. His account is *logical* and *credible*. He answered questions *openly*. (Authors' emphasis.)

*Hof* dat... die Staat sy saak bo redelike twyfel bewys het, en *die beskuldigde word skuldig bevind* soos aangekla.<sup>78</sup>

An unrepresented accused whose testimony is inconsistent and erratic may be guilty of nothing but a failure to orientate himself to the requirements of courtroom discourse. Magistrates and lawyers alike appear to share implicit assumptions which influence and inform legal reasoning – a collective mind-set hardened in the habit-forming repetition of courtroom procedure. Those coming into the courts for the first time are often expected to express themselves within constraints which are not always made explicit. These taken-for-granted assumptions which underlie the legal process should be re-examined by those who dispense justice and it should be carefully considered whether the interests of a fair trial are served if such assumptions and expectations remain in place. Scheppele remarks that there is a danger of the courts harbouring a blinkered view of the truth:

[T]he construction and selection of descriptions of events in the social world is not just the process of gathering up facts the way one might gather up stones on a beach. The process of making a bit of information, an insight, or a description of experience into a 'fact' is in itself an important part of what it means to engage in the practice of lawyering or judging and, while it is governed by legal rules in some limited ways, this activity is largely the product of legal habit. Gifted practitioners know without reflection how to make accounts into legal narratives the way native speakers of a language know how to express thoughts in grammatical sentences. But that does not mean that those who can do it know how to describe systematically what they have done. Those trained in the law learn to see the world in particular ways, and the particular ways come to be seen unproblematically as the only truth there is. There seems to be no question or choice about it. It just is.<sup>79</sup>

78 *S v May*, Wynberg Magistrates' Court, criminal case number 3/853/94. Authors' translation: Both State witnesses were good witnesses. They *corroborated* each other... Both gave *chronological* and *believable* accounts of their experiences. There are *no apparent contradictions* in their testimony, *nor were there any inconsistencies*. The *accused* ... made a *poor impression*. She *contradicted* herself. Her explanation *did not make any sense*. The Court accepts that the State witnesses have no reason, or motive to lie on those points over which they disagree with the accused, and *the Court accepts their version*... *In the light of this fact and the accused's poor performance the Court finds that...* the State has proved its case beyond reasonable doubt and that *the accused is guilty* as charged. (Authors' emphasis.)

79 Scheppele 2088.

## Conclusion

The magistrate, the prosecutor and the defence lawyer each has an intimate understanding of the requirements of the law because of study and the familiarity bred by constant exposure to the legal process. However, for the many people who enter the courtroom for the first time, usually as witnesses or accused, the functioning of the legal process can be a disorientating and disempowering experience.

To Steytler, the decisive factor which determines whether the unrepresented accused will receive a fair trial is the extent to which a particular magistrate is prepared to use her discretion and allow for the disorientation experienced by most accused persons. In *The Undefended Accused on Trial* he expresses the concern that this discretion may not always be exercised in the accused's best interests:

Since the quality of the assistance rendered to the accused, the extent of the control exercised over the prosecution, and the comprehensiveness of the factual base established for decisions, are in the final analysis discretionary, a prosecution-minded judicial officer may defeat the objectives of these duties.<sup>80</sup>

Yet judicial discretion is not an absolute concept, but rather is, as Ronald Dworkin demonstrates, relative to its specific context.<sup>81</sup> He illustrates this point by likening judicial discretion to the hole in the doughnut which is defined by 'a surrounding belt of restriction'.<sup>82</sup> Discretion exercised by a magistrate or judge is subject to the common-law principles regulating the trial process. Dworkin makes the point concisely when he writes that

An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion.<sup>83</sup>

80 Steytler 231.

81 R Dworkin *Taking Rights Seriously* (1977) Bath: Pitman Press.

82 Dworkin 31.

83 Dworkin 33.

A magistrate has an obligation to ensure that the trial is fair. If she fails to intercede when it is evident that the unrepresented accused is being disadvantaged because of his lack of understanding, then she is not merely failing to exercise due discretion but failing also in the exercise of her prescribed duty.

In our sample, we encountered different types of explanations from various magistrates. In almost all cases the instructions given to unrepresented accused were adequate in terms of what was required by law. Yet, we also discovered that even very good explanations did not necessarily lead to the accused understanding what was expected of him. It appears that this is due, in large part, to the disorientation and sense of unfamiliarity experienced by the average unrepresented accused person. There is a need for magistrates to be able to identify and be sensitive to the kinds of problems experienced by unrepresented accused in the courtroom and, having done so, to make allowances for these when arriving at a judgement.

This paper makes no claim to being an exhaustive study of the extent of disempowerment suffered by undefended accused in the courtroom. Rather, it is hoped that highlighting some of the issues that undefended accused face may go some way to deepening magistrates' awareness of what they can do to give undefended accused an equal chance in the system of justice.

## Appendix A

### Method of analysis

Previous research (DS Hansson 'Differences in the comprehensibility of testimony' (1985) MSocSci thesis, University of Cape Town) has shown that undefended accused in the lower courts in South Africa (the vast majority of whom are Black and Coloured South Africans) are invariably convicted. The suggestion made in the previous research is that it is not coincidental that the least empowered members of this society fare worst in the courts, and that, at some level, race and class are variables that affect the outcome of trials involving undefended accused persons.

The purpose of this investigation, however, was to isolate the aspects of magistrates' court trials that disadvantage undefended accused. We hoped to show that there are features of trials that can be attended to by magistrates, and judicial training officers, in order to improve the performance of unrepresented accused.

It was decided to work with transcripts of cases from the Magistrates' Courts. Before we began the analysis, we knew that all the cases we were working with were cases that had already been transcribed, i.e. they were cases that had gone on appeal or review, or cases in which the accused had not been acquitted. If anything, this made us believe that we had erred on the side of caution, in terms of the types of explanations we were likely to get from magistrates, since, in most of the cases, we assumed that magistrates would be more, rather than less careful, if they suspected that a case would be reviewed by a higher court.

The approach that we took in the analysis was one which we drew from Linguistic Pragmatics, and to some extent from Discourse Analysis. Having first surveyed the data (i.e. the 96 cases), we noticed that there was some pattern in all the cases. The explanations that magistrates gave all seemed to follow a fairly definite format, and in an overwhelming majority of cases, the subsequent performance of the unrepresented accused was abysmally unsuccessful. It seemed to us that there was no point at all in simply counting and recording the number of unrepresented accused who had failed to carry out instructions as given by magistrates in a given year, at a given court. We wanted to see if there was anything systematic in what the magistrates were

doing, or not doing, that resulted in the situation that unrepresented accused were completely unable to use the instructions that they were given to perform adequately in cross-examination or in presenting evidence-in-chief. We thought that if we could find something systematic then this would serve as the basis for further analysis in other cases of the same kind, in other situations.

It is very easy to quantify the situation of undefended accused crudely: the vast majority are convicted. It is also possible to quantify the amount of crucial information that accused persons are given by magistrates. By and large, this information is adequate in terms of what the law specifies. However, it is overwhelmingly obvious that unrepresented accused persons are generally convicted. Setting aside the crude conclusion that the reason that unrepresented accused are convicted is because they are guilty as charged, we need to look for explanations for the high percentage of convictions of unrepresented accused.

Since legal trials are entirely conducted through the medium of language, i.e. everything that happens in a trial happens in and through language, we decided to analyse the language of the trials, as recorded in the transcripts. We used 96 cases as our data base. The reason that we chose this method of analysis is that the language used in each case was very similar: the magistrates were saying almost the same things, in terms of the instructions they gave. We thus decided that the essential features of the explanations were similar enough for us to use them comparatively, and to try to assess to what extent variations in the manner of explanation would have different effects on the performance of unrepresented accused persons. Since we could not manipulate the explanations or the performances experimentally, we sought different permutations within the data at hand.

We decided to analyse the nature of the magistrates' explanations, and thereafter, to analyse the nature of the accused's performance. In many cases, there was very little connection. However, once we started analysing what the magistrates were doing in relation to what the accused were doing, we began to see that, in general, unrepresented accused simply did not know what to do, even after the magistrate had provided an explanation. We then began to see if we could find why it was that they did not know what to do, irrespective of how simple and careful the magistrate's explanation was. We looked both within the transcripts, and at the social contexts within which the trials were located.

We found that it is a common feature in all the trials that we have examined that unrepresented accused did not know what they were expected to do and

we believe that (although obvious, and on the surface, unhelpful) there is a generalizable principle, which would account for many other cases in which unrepresented accused are convicted. We do not claim that ignorance of procedure and courtroom discourse are the only reasons for the conviction of unrepresented accused. Our claim is simply that many unrepresented accused are convicted because they do not understand what it is that they have to do when they are conducting their own defence.

In order to say something more helpful than simply that undefended accused do not know what to do we tried to analyse, on the basis of the transcripts we had, what exactly the factors were in undefended accused not understanding the magistrates' instructions. In order to isolate these factors we analysed the transcripts, paying particular attention to the language of instructions, i.e., to the words that conveyed the force of the instructions, the modals. These are words such as *can, must, will, should*.

We did analyse in detail the fact that most of the accused use a different dialect from the standard dialect of English or Afrikaans used in the courtroom. This is a consequence of the fact that the majority of undefended accused in this sample were Coloured or Black South Africans, whose use of non-standard dialects is just a small indication of their limited access to the institutions of power. The use of non-standard dialects is a phenomenon that we merely noted, since dialect-switching for the magistrate on the part of the accused was very obvious in the cases we examined.

We noted that the majority of the accused (from the evidence of the transcripts) were very uncomfortable in the court. They seemed unsure about when to stand and sit, where to stand, how to behave, what to say when and so on. We speculated that this unfamiliarity with the courtroom extended to the kinds of verbal activities they were expected to engage in the courtroom, and indeed, this is what the transcripts reveal. The unrepresented accused do not follow the instructions issued by the magistrates because they do not know what these instructions involve in the context of the trial. Thus, although it is quite likely that accused persons control an entire range of speech acts, they really do not know how to use them efficiently in a context they do not understand.

We speculated that the reason that many unrepresented accused persons cannot produce the requisite speech acts on demand is because they are not really sure what is going on in the courtroom. A trial has a specific structure, a format that is very clear to those who know the script, it is a strange and powerful discourse, governed by rules that they do not understand.

We tried to isolate the nature of courtroom discourse, and to specify what it is that unrepresented accused persons need to know so that they can take advantage of the assistance that magistrates can give them. From our analysis, we concluded that unrepresented accused persons need to know what is regarded as making for a credible witness. It is not clear that this can be easily conveyed to an unrepresented accused with no training in, or exposure to, the discourse of the courtroom. Thus, we tried to separate out the different pieces of information that undefended accused must have in order to begin to function effectively in a trial. Undefended accused need to know who the players are in a trial; they need to know who speaks when; what the structure of a trial is; what they are supposed to do at the cross-examination stage of a trial; what they are supposed to do at the evidence-in-chief part of a trial. They need to know that choosing to speak or to remain silent has implications; they need to know that it is a third person (the magistrate) to whom they are speaking, even when they are engaged in cross-examining a witness, or presenting evidence-in-chief.

We have isolated these factors from an examination of the language of the transcripts. This method of analysis can be applied to other transcripts of other trials. We make no predictions as to the findings of the analysis of other transcripts, countrywide, other than to suggest that the performance of unrepresented accused is correlated with their understanding of magistrates' explanations and instructions. We propose, however, that the basic method used in examining these transcripts can be easily employed in examining the language of other transcripts. Examining trials on the basis of their discourse requirements, the speech act requirements, and the language of the instructions should yield a result that, at least, allows the analyst to make proposals about the sorts of things that magistrates can pay attention to, if they are concerned about the performance of unrepresented accused persons.

## Appendix B

### Speech Act Theory

The development of Speech Act Theory (1962) heralded a breakthrough in the field of linguistic pragmatics and the study of the Philosophy of Language. Speech Act Theory as we know it today is associated most closely with the names of John Austin and John Searle. The major insight underpinning Speech Act Theory is that the language that we use is not merely a set of propositions. Rather, as Austin puts it, we do things with words. Thus, Speech Act Theory is a theory of how we do things with words.

One of the fundamental uses of language, according to Austin, is to do things in the world. Once we examine the ways in which we do things with words, we see that there is a no one-to-one correspondence between propositions and the force that these propositions convey. Thus, "It's cold in here", may well be expressing a proposition about the temperature in the room. It could just as well be a request for the window to be closed or the heat to be turned up, or a comment on the unfriendliness of others in the room. So although a simple proposition has been expressed, i.e. that it is cold in the room, the words could be used to do something else: complain, request, etc.

When we do things with words, Austin says, we perform speech acts. Some examples of speech acts are complaining, requesting, ordering, promising, vowing, apologising. There are often many different ways of performing the same speech act. For instance, 'I deny that I broke the window' is a speech act of denial. However, 'I was asleep in my room when the window got broken next door', or 'It wasn't me', may also function as speech acts of denial. We need not always use the same words to perform the same speech act.

The speaker's intention in making the speech act is referred to as the illocutionary force of the utterance. The illocutionary force of an utterance is not always directly recoverable from the utterance itself but depends on the context of utterance. Thus, some speech acts are more indirect than others.

In some cases, we must use specific words to perform specific speech acts, in order for those acts to succeed. Thus, in a marriage ceremony (which is a particular kind of speech event), the bride and groom must each answer, 'I do', at a particular part of the ceremony, in answer to the question, 'Do you take this man/woman to be your husband/wife?' Unless the exact words are

used, at the prescribed time, the speech act of promising is not felicitous. Moreover, there are other criteria for the success of this speech act: both parties must be single, the person performing the ceremony must be legally empowered to do so, the parties must be of different genders, the parties may not be brother and sister, etc. These are called felicity conditions: a speech act may not be said to be successful unless the felicity conditions for that speech act are met.

When the speech act which is being performed is named, as part of the speech act, this is called a performative. Examples of performatives are, "I promise to tell the truth," "I swear I will do my duty," "I apologise for upsetting you," "I demand compensation."

Certain speech events require specific acts. Thus, a marriage ceremony must include, *inter alia*, the speech act of promising. Taking the witness stand in court requires the speech act of swearing. Cross-examining requires the speech act of questioning, or interrogating. Undergoing cross-examination requires the speech acts of responding, denying, explaining. Providing evidence-in-chief requires the speech act of answering questions, but also of expounding and recounting. Providing evidence-in-chief does not allow for the witness to use the speech act of interrogating. If the requisite speech acts are not performed at the requisite times, then the content may be disregarded, and does not have any legal status.

In the courtroom, the entire event is about doing things with words. In a trial, only words are used to do things. Magistrates hand down judgements and pass sentences: these too are speech acts. Speech acts can be very powerful: a magistrate may say, "I sentence you to five years imprisonment" and these words are reinforced with the power to ensure that an accused is locked away for five years.

Knowledge of which speech acts to use at different parts of a trial is not freely accessible to those who have not been trained in, or exposed to, the rules of a trial. A witness may well know how to interrogate, explain, and deny — in fact, all speakers of a language are generally in control of a broad repertoire of speech acts. However, knowing which speech act to choose requires a mastery of the particular discourse at hand. Those who are not familiar with the culture of the courtroom have no way of following the script that is so predictable to everyone who has this familiarity.

Thus, knowing which speech act to use in a trial, requires that an accused person know

(a) the structure of a trial;

- (b) the different speech acts that are required at the different stages;
- (c) the appropriate manner of encoding those speech acts, i.e., the typical / acceptable way of expressing denial, accusation, interrogation, justification, explanation etc., in other words, knowing how to do things with words.

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