Between Judicial Enabling and Adversarialism: The Role of the Judicial Officer in Protecting the Unrepresented Accused in Botswana in A Comparative Perspective
Between judicial enabling and adversarialism: The role of the judicial officer in protecting the unrepresented accused in Botswana in a comparative perspective

R.J.V. Cole*

ABSTRACT

The role of the judicial officer in Botswana’s adversarial system has evolved over the decades. Traditionally, the judicial officer in the adversarial system plays a neutral role while the parties present their cases. The semblance of neutrality compels the judicial officer to remain passive and refrain from interfering with the process. Over the years, the courts have recognised that the unrepresented accused cannot get a fair trial as she is unaware of the rules of procedure and evidence. This being the case, the unrepresented accused cannot effectively participate in the proceedings. Consequently, the courts have over the years stated that judicial officers have a duty to assist unrepresented accused persons. This position was recently given added impetus by the Court of Appeal. This article discusses the duty of the judicial officer to the unrepresented accused and its implications for Botswana’s adversarial system. In so doing, comparative analysis is made with Australia, South Africa and to some extent Namibia, which share similar (adversarial common law) systems with Botswana.

1. INTRODUCTION

The Court of Appeal recently in the case of Nieklas Willem v The State,1 reiterated the duty of judicial officers to advise unrepresented accused persons of their procedural rights. In so doing, the Court was not venturing into pristine environment. What is symbolic about this judgment, however, is that the Court urged the relevant authorities to come out with a check list for the guidance of judicial officers, indicating that it continues to be inundated with appeals relating to omissions by judicial officers to advise unrepresented accused of their procedural rights. The Court noted that this leads to a waste of valuable time in dealing with such irregularities and the concomitant enquiry into whether miscarriage of justice has occurred.

It is interesting to note that the Court did not itself take the opportunity to make a comprehensive (if not exhaustive) list of instances

---

* Lecturer, Department of Law, University of Botswana, LLB (Hons) (FBC-USL), LLM (UNISA), LLD (Stell).

wherein judicial officers have a duty to assist the unrepresented accused. This of course was an opportunity missed. A missed opportunity because cases dealing with judicial advice generally refer to specific rights and are mostly dealt with by the High Court. Nieklas on the other hand provided an opportunity for a comprehensive guide to be provided in a single case by no less than the highest court of the land. The rippling effect of this case, however, is that the direction of the Court requiring a checklist has received initial response by the authorities. Under the direction of the Chief Justice, the Registrar and Master of the High Court circulated a circular\(^2\) to judicial officers, listing instances where judicial guidance should be given to unrepresented accused persons. The list places a duty on judicial officers to;

“(a) Advise an unrepresented accused person at the onset of the constitutional right to legal representation at [her] own expense,
(b) Advise an unrepresented accused person of the right or purpose (meaning) of cross-examination,
(c) Advise an unrepresented accused person of any special statutory defences available to him/her,
(d) Advise an unrepresented accused person of the right to address the Court at the close of the trial or in mitigation and
(e) Advise an unrepresented accused person about exceptional extenuating circumstances in the case of compulsory sentences.”

This document is by no means a Judicial Circular and was only intended as a temporary stopgap measure, awaiting the formulation of a comprehensive judicial guide or checklist. Indeed, the compilation of a standard checklist for judicial officers is impending. While the Registrar’s Circular is not law and while the Court of Appeal itself abdicated from setting a comprehensive guide, the Court ignited a chain of events which demand an excursion into the judicial duties in relation to the unrepresented accused.

The purpose of this article is two-fold. First, it seeks to discuss the duty of the judicial officer in relation to the unrepresented accused. In so doing, it catalogues and discusses the areas covered by the Registrar’s Circular as well as other possible areas. It may be seen, admittedly, as a precocious endeavour at setting the groundwork for what is to be expected in the final instruction to judicial officers. Second, it is envisaged that the direction given by the Court in Nieklas will consequently reinforce the participation of judicial officers in criminal trials. This article, therefore, discusses the implications of this for Botswana’s adversarial system. The second part of the article discusses the role of a judicial officer in the adversarial process. The discussion views her role against the inquisitorial

\(^2\) Registrar’s Circular No. 1 of 2010.
backdrop. The third part highlights the plight of the unrepresented accused. The fourth part seeks to conceptualise the role of judicial officers in offering assistance to the unrepresented accused. The case law of a number of jurisdictions form the basis of the discussion. Also, comparative analysis is made between Botswana, Australia, South Africa and to some extent Namibia. This creates an opportunity to benchmark Botswana against other jurisdictions influenced by the common law adversarial tradition and measure Botswana’s fair trial credentials. The fifth part discusses the judicial enabling role of the judicial officer and specific areas where judicial officers are required to give assistance to the unrepresented accused. The sixth part highlights the implications of judicial enabling. Part seven, the conclusion, underscores the fact that judicial enabling is fuelled by the demand of a fair trial which in turn has brought significant change to the landscape of the criminal process.

2. THE ROLE OF THE JUDICIAL OFFICER

Two principal procedural models have evolved worldwide, the adversarial and inquisitorial models. The role of judicial officers is to some extent determined by a cleavage of dichotomy setting apart these two models. The role of the judicial officer is for practical purposes, determined by the model within which she operates. While the judicial officer mainly remains aloof in the classical adversarial system, she takes control of proceedings in the inquisitorial tradition.

2.1 The judicial officer and the adversarial system

Judicial officers ascertain facts – barring the jury system – and apply the law to those facts in order to resolve disputes placed before them. But the mode of fact-finding is tailored to a large extent, on the procedural model wherein the judicial officer operates. In Botswana, a judicial officer presiding over a criminal matter is governed by the Anglo-American adversarial tradition. The classical feature of this arrangement dictates that the judicial officer is disengaged from the contest and allows the parties to present their case. This

---

restrained posture symbolises an impartial and disinterested umpire. 4Since it is the responsibility of the parties to present their evidence, the judicial officer serves as a gatekeeper and ensures that the rules of evidence and procedure are observed. The judicial officer guides the process by way of procedural and evidential rules. Questions relating to the admissibility of evidence are primarily raised by the parties and determined by the judicial officer. This means that proof lies with the parties. If the accused is unrepresented she has to face a trained prosecutor. The chances of success of an unrepresented accused facing a trained prosecutor are likely to be compromised. The difficulty with having a passive judge is that the discharge of procedural and evidential responsibility lies with the parties and this puts the unrepresented accused in an unfavourable position. 5Since each party “owns” its evidence in the adversarial contest, the parties may be selective in the presentation of their evidence, keeping away vital evidence that is damaging to their case and are openly bias in their conduct of the case. 6Adversarial lawyers contend that cross-examination is a vital tool in unearthing the truth. Perhaps this should complement the “passivity” of the adversarial judge. The parties dig in themselves primarily through cross-examination. Cross-examination is the principal mechanism for unearthing the truth. 7On the other hand, a digging-in judicial officer as is the case with the inquisitorial investigating judge will certainly have significant powers that allow her to unearth the truth. After all, she is able to summon evidence and witnesses without the possibility of being accused of descending into the arena. Inquisitorial lawyers for their part, contend that cross-examination only serves to discredit a truthful but vulnerable or intimidated witness. 8This, according to them, is a veritable

5 Allan Lind, Thibaut and Walker, op.cit. at p. 1143.
weakness in the adversarial contest. But the main obstacle facing the judicial officer in Botswana’s adversarial system is orality. The principal mode of ascertaining the truth is by oral evidence. Since witnesses are called to support a particular side, the tendency of witness loyalty and bias cannot be ruled out. Ultimately, the judicial officer is left to depend on what counsel, the witnesses and exclusionary rules allow to be filtered into the system. Clearly, the judicial officer relies on the parties to unearth the truth. This in itself is a barrier to unearthing the truth, a situation that is not made any easier when the accused is unrepresented.

The unrepresented accused is not equipped to participate fully in the adversarial trial. Because of this, the unrepresented accused suffers substantial disadvantage. Classical adversarial adherence is, therefore, unsustainable and the judicial officer cannot bury her head in the sand in ostrich-like fashion, while the unrepresented accused suffers injustice. This will make a mockery of the whole process, especially as the State has the distinct advantage of investigating powers and permanent prosecutorial staff and offices. The State investigates, scoops up vital documents and interviews all possible witnesses, which the accused is usually unable and not permitted to do. That a trained prosecutor then marshals the evidence in the face of an unassisted accused does carry undertones of medieval inquisitions. The adversarial system, therefore, can only operate fully if the accused is assisted through procedural and evidential hurdles.

2.2 The judicial officer and the inquisitorial system

In the continental inquisitorial system, the judicial officer is traditionally an investigating judge. She controls the investigations and dominates the trial. The prosecutor, therefore, is not an active player and the imbalance that is synonymous with the adversarial process is removed. An investigating judge or juge d’instruction plays a dominant role as early as the pre-trial stage in that it is she who investigates the crime and collects the evidence. She generally interrogates the accused and witnesses, confronts them with each other, orders for searches and seizures and commissions experts to assist in the investigations. In the adversarial contest, these would be seen as very wide powers and in any event, functions that normally fall within the purview of the police. In the inquisitorial system, the results of the investigations, statements

---


11 Ploscowe, op.cit. at p. 373; Thibault, Walker and Allan Lind, op.cit. at p. 388; Lind, Thibaut and Walker, at p. 276.
of witnesses and the accused’s statement are compiled into a dossier.\textsuperscript{12} The evidence is thus developed for both sides by the judicial officer.\textsuperscript{13} To this extent, there is relative balance between the prosecution and the accused.

3. THE CIRCUMSTANCES OF THE UNREPRESENTED ACCUSED

3.1 The circumstances of the accused during the investigation

The accused is at her most vulnerable during the investigation process. The overwhelming shock that the potential loss of liberty inflicts on the individual is immeasurable. This is particularly aggravating in the case of first offenders. The accused is basically at the mercy of the police and has little or no access to the outside world, should the police decide to incarcerate her during investigations. As is typical of adversarial systems, in Botswana, investigations are conducted solely by the police. Neither the judiciary nor the accused are involved. In fact, the accused is an object of the investigations. Witnesses and exhibits are basically seized by the police and the accused is not given access to the proceeds of the investigations as and when they yield results. Though it is said that the accused is not compelled to answer to questions put to her by the police, adverse inference may be drawn from refusal by the accused to answer incriminating questions.\textsuperscript{14}

3.1.1 Lack of legal representation

The right to legal representation is guaranteed by section 10(2)(d) of the Constitution.\textsuperscript{15} However, it is doubtful whether this provision extends to pre-trial investigations.\textsuperscript{16} Unfortunately, case law on the right to legal representation is limited to the trial of the proceedings. In actual fact, no legal sanctions attach for deprivation of the accused of access to legal representation at the pre-trial stage. Consequently, the accused’s rights are severely curtailed at this stage. Since, judicial officers are not involved at this stage, the accused

\textsuperscript{12} Ploscowe, \textit{op.cit}, at p. 376; Lind, Thibaut and Walker, \textit{op.cit} at p. 276; Goldstein, \textit{op.cit} at p. 1019.
\textsuperscript{13} Thibaut, Walker and Allan Lind, \textit{op.cit} at p. 388.
\textsuperscript{14} \textit{Attorney-General v Moagi} [1981] B.L.R. 1 (CA).
\textsuperscript{15} The section provides: “Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice.” (emphasis added).
is left at the mercy and devices of the police.\textsuperscript{17} In the absence of judicial and constitutional pre-trial legal representation guarantees, the police often operate on the premise that access to counsel at this stage is granted as a matter of courtesy.\textsuperscript{18}

### 3.1.2 Confessions

The accused is usually an object of the investigations. More often than not, the bulk of the State’s case will emanate from information they obtain from the accused. The monotony of the evidence of investigating officers narrating what the accused told them or what the accused pointed out is all too familiar.

Though the law requires that confessions made to the police should be confirmed in writing by a judicial officer as a requirement for admissibility in court,\textsuperscript{19} this is not a sufficient safeguard for ensuring that confessions are obtained freely and voluntarily. Sometimes, suspects are made to appear before judicial officers to make confessions through threats.\textsuperscript{20} It must be noted also, that while judicial confirmation is required as a condition for the admissibility of confessions, this does not apply in relation to admissions. Evidentially, therefore, confessions can be admitted under the guise of admissions. This is because the distinction between confessions and admissions are a matter of definitional technicality.\textsuperscript{21} A Confession is defined

\textsuperscript{17} Molatlhegi reiterates that the presence of a legal representative during interrogations will go a long way in protecting suspects against possible police abuse. See B Molatlhegi, \textit{op.cit} at p. 187.

\textsuperscript{18} See Molatlhegi, \textit{op.cit} at p. 460; Ntanda Nsereko, \textit{op.cit} at p. 213.

\textsuperscript{19} Section 228(1)(ii) of the Criminal Procedure and Evidence Act provides that confessions made to police officers are inadmissible as evidence in court unless they are confirmed in writing in the presence of a judicial officer; in the case of Kgaodi \textit{v} The State [1996] B.L.R. 23(CA) at p. 28C-F Amissah JP rationalised the section thus: “The provision prohibits the admission in evidence of confessions made to police officers \textit{simpliciter}. It does not matter whether the confession to the police officer is voluntary or not. The object of the prohibition is obviously to avoid arguments at trial over whether confessions to police officers were freely made, without inducement, physical or otherwise. As is well known, allegations are often made of police officers torturing or beating up suspects and accused persons or using other unlawful means in order to obtain statements which advance the investigation or prosecution of the cases. Some of these allegations have been found to be true by the courts although the majority of them often turn out to be unfounded. True or not, it is in the interest of justice that these charges, or opportunities for them to be made, should be minimised, if not altogether eliminated. The prohibition discourages the police from using force or other forms of inducement in extracting confessions to bolster up their cases, because if the court would not admit any confessions obtained by them at all, there should be no need for them to use unlawful methods to obtain them. But in order not to exclude genuine confessions made by accused persons even if made to police officers altogether, the law permits the admission of such confessions if “confirmed and reduced to writing in the presence of a magistrate or any justice who is not a member of the Botswana Police Force.”; Ntanda Nsereko, \textit{op.cit} at p. 213; Molatlhegi, \textit{op.cit} at p. 460.

\textsuperscript{20} In the case of \textit{S} \textit{v} Baalakanî Moloïse [1977] B.L.R. 28 the accused was taken before a District Commissioner to make a statement. The reason given by the accused for making the statement was – “I was asked to go to make [sic] statement before the D.C. by the C.I.D. Police.”; in \textit{State} \textit{v} Ramatswïdi [2005] 1 B.L.R. 452 the accused alleged that he had spent two days in police cells and was told by the investigating officer that he would only be released if he made a confession to a judicial officer.

\textsuperscript{21} Corduff \textit{J} stated in \textit{State} \textit{v} Moïthoîkë [1981] B.L.R. 219 at p. 223: “This is a very restricted and artificial definition and the only purpose it serves is to free a greater number of statements from the effects of the Second Proviso [That is, S 228(1)(ii) of the Criminal Procedure and Evidence Act], which requires that confessions made to police officers are inadmissible unless they are confirmed in writing in the presence of a magistrate or any justice.”
as an unequivocal admission of guilt, the equivalence of a guilty plea in a
court of law.\textsuperscript{22} Therefore, for a statement of the accused to amount to a
confession, it must amount to an admission of all the elements of the offence.
In addition it must negative all defences. Admissions on the other hand, relate
to the acceptance of certain facts as true.\textsuperscript{23} In this regard, several pieces of
self-incriminatory statements are admissible without judicial endorsement
merely because the statements do not amount to admissions of all the elements
of the offence and do not negative possible defences. Consequently,
admissions may possibly be admitted without proper legal safeguards, merely
because they do not satisfy the classical definition of a confession in
Botswana. These same admissions when pieced together, may lead to an
inference of the accused’s guilt. The overly narrow definition of a confession
therefore means that an accused may in actual fact be recruited to incriminate
herself under circumstances that are far from being voluntary, and such self-
incriminating statements are admissible in court as admissions.\textsuperscript{24} The
artificial distinction between confessions and admissions means that
admissions which implicate the accused are admissible in evidence whether or
not they are confirmed in writing by a judicial officer. This is so because
statements that do not amount to an unequivocal admission of guilt of all the
elements of an offence, do not amount to a confession.\textsuperscript{25} They are admissible
in the absence of judicial confirmation. The prosecution’s case can, therefore,
be built from bits and pieces of admissions. All such admissions are
admissible without the judicial supervision provided for by section 228(1)(ii).
This effectively allows the admitting into evidence of confessions through the
back door, under the guise that they are admissions. When once the pre-trial
process is tainted with unfairness, the trial proper is at the risk of being unfair
also.

\textsuperscript{22} Mohalenyane \textit{v} The State [1984] B.L.R. 291; \textit{R v Becker} 1929 AD 167; see also \textit{State v Miclas Habane}

\textsuperscript{23} Desai and Another \textit{v} The State [1985] B.L.R. 582.

\textsuperscript{24} Murray J stated in \textit{State v Mosarwa and Mapisi} High Court, Criminal Trial No. 37 of 1985 (Unreported),
that a better definition of a confession would be: “An admission made at any time by a person accused of
an offence, stating or suggesting the inference that he committed that offence.”; Corduff J stated in \textit{State v Moithoke op.cit.}
ote 21 at p. 223 supra: “This is a very restricted and artificial definition and the only
purpose it serves is to free a greater number of statements from the effects of the Second Proviso [That is, S 228(1)(ii) of the Criminal Procedure and Evidence Act], which requires that confessions made to police
officers are inadmissible unless they are confirmed in writing in the presence of a magistrate or any
justice.”

\textsuperscript{25} Desai and Another \textit{v} The State op.cit. note 23 supra; Mohalenyane \textit{v} The State op.cit. note 22 supra; \textit{R v Becker} 1929 AD 167; \textit{State v Miclas Habane op.cit.} note 22 supra; \textit{Martlouw v The State op.cit.} note 22 supra; \textit{Moseki v The State op.cit.} note 22 supra; \textit{State v Khama op.cit.} note 22 supra; \textit{State v Ramatswidi op.cit.} note 20 supra; \textit{Mashabile v The State} [1984] B.L.R. 96 (CA).
3.2 The circumstances of the accused at trial

When we read our law books and discover that up until eighteenth century Europe, accused persons were not allowed to defend themselves nor have legal representation; and that torture was part of the criminal process, we react with shock and disdain. Barring the medieval sanction of torture, the plight of the present-day unrepresented accused raises stark similarities. The State conducts investigations, collects all relevant documents and interviews possible witnesses. The accused usually cannot do this. The evidence is presented in court by a trained prosecutor and the unrepresented accused is clueless as to the intricacies of the process. The majestic and subliminal solemnity of the courtroom, more than ever leaves the unrepresented accused awestruck and in great trepidation.

In the adversarial trial, while the accused is presumed innocent, she stands the risk of conviction if she is unable to make a full answer to the prima facie case of the prosecution. Effective defence only comes with active participation by the accused at the trial. This includes the ability to object to prosecution evidence, the opportunity to cross-examine prosecution witnesses, to call and examine witnesses of her own and to make final submissions. It is obvious that the ability of the unrepresented accused to participate at her trial is patently compromised due to the intimidating atmosphere in the court room and her lack of legal knowledge. This has legal implications and patently renders the trial unfair. It need not be emphasised that the consequences of conviction can be severe. They include incurring a criminal record which can lead to denial of social privileges, civic rights, and even imprisonment. Public conscience therefore cannot permit a system wherein the accused cannot make use of the legal safeguards open to her, but faces the risk of losing her liberty. In this regard, judicial enabling plays a crucial protective role in respect of the unrepresented accused. The role of the judicial officer, therefore, in guiding the unrepresented accused through the legal hurdles of the adversarial system cannot be understated.

---

26 Ploscowe, op.cit. at p. 376.
28 Attorney-General v Moagi op.cit. note 14 supra.
4. JUDICIAL ENABLING

4.1 Judicial enabling in Botswana

Recognition of the plight of the unrepresented accused and the demand for judicial assistance is well settled in Botswana case law. This stems from the duty on the court to ensure that the accused gets a fair trial.\(^{30}\) Thus in the case of *Mmopi and Another v The State*\(^{31}\) Murray J had this to say:

“When a person is on trial for a serious offence and does not have the advantage of legal representation I consider that it is essential that the magistrate should offer advice by way of explaining court procedure to such a person. An unrepresented accused is under a severe disadvantage. If he is given no assistance on matters of procedure that one would not necessarily expect to be known to an unrepresented accused person injustice could easily result.”\(^{32}\)

Similarly, in *Tshukudu v The State*\(^{33}\) Dibotelo J (as he then was) noted that:

“After the foregoing exchanges between the appellant and the magistrate the trial duly proceeded and as I have already stated the appellant was convicted at the end of the trial in which the learned magistrate merely stated at the close of the prosecution case that the appellant's rights had been explained to him without recording what he told the appellant by way of explanation of his rights or what those rights were. In my view it is often not enough for a trial court, especially where an accused is not represented by counsel, merely to record that it had fully explained to the accused his rights without briefly recording on the record what those rights were and any such omission may be fatal to a conviction.”\(^{34}\)

In *State v Matlhogonolo Masole*,\(^{35}\) O'Brien Quinn CJ wrote:

“Where a single charge or a single count charges two or more offences that charge or count is bad for duplicity. But it is for the

---

\(^{30}\) *Lesetedi and Another v The State* [2001] 1 B.L.R. 393; *Gare v The State* [2001] 1 B.L.R. 143 (CA); *Morobatseng and Others v The State* [2003] 1 B.L.R. 466.


\(^{32}\) *Ibid* at p. 10F-H.

\(^{33}\) [2000] 1 B.L.R. 400.


accused to raise that point before his plea is taken or, as soon as the evidence discloses duplicity in the charge or count, in cases where duplicity is not immediately apparent. However, where, as is the usual position here, an accused is not legally represented, the Magistrate or Judge trying the case should examine the charge or count and if he considers it to be defective on grounds of duplicity or for any other reason it is his duty to raise the point and, if necessary, have the charge or count amended or withdraw or to refuse to accept it at all.”

4.2 Judicial enabling in Australia

In the case of Dietrich v the queen, the High Court of Australia noted the inherent unfairness characteristic of trials wherein accused persons are unrepresented. The Court recognised the fact that lack of legal representation places the accused at a disadvantage. The Court reiterated that a proper defence of the accused requires a proper knowledge of the rules of evidence and procedure. Highlighting the legal complexities faced by the unrepresented accused and the need for professional guide, the Court had this to say:

“Skill is required in both the examination in chief and the cross-examination of witnesses if the evidence is to emerge in the best light for the defence. The evidence to be called on behalf of the accused, if any, must be marshalled so as to avoid raising issues which will be damaging to the case for the Defence. A decision must be made whether the accused is to give evidence on oath, is to make an unsworn statement or is to remain mute. Competence in dealing with these matters depends to a large extent upon training and experience. And, as Murphy J pointed out in McInnes, an accused in person cannot effectively put some arguments that

36 Ibid at pp. 204-205; In Rabonko v The State [2006] 2 B.L.R. 166 Lesetedi J noted at p. 168C-D: “An accused person has in terms of s 10(1) of the Constitution an entitlement to a fair trial. In my view, a fair trial cannot be realised where an accused person does not understand the import of the criminal proceedings which he is facing nor have a rudimentary idea as to how not only to present his case but to conduct his defence by way of putting the essential elements of his defence to the prosecution witnesses. That there is a duty upon a presiding judicial officer to assist an accused person who is unrepresented and seems not to understand the court procedures, in the conduct of his defence has been expressed in a number of cases.”; Lord Weir JA also remarked in Gare v The State op.cit. note 30 supra at pp. 148G-149A that: “In any trial where the accused person defends himself, either because he chooses to do so or because he cannot afford a legal representative, an onerous responsibility lies on the judge to ensure that he receives a fair trial. There will be cases where the accused may be able to conduct his case with skill and there will be cases in which the issues at the trial will be obvious to the meanest intelligence. In such cases it will probably be unnecessary for the judge to intervene. On the other hand there will be cases where the issues are not straightforward. In such situation the judge will have to be vigilant to ensure that the defence case does not go by default because of lack of skill or comprehension on the part of the accused. No hard and fast rules can be laid down as to when or to what extent a court should intervene on behalf of accused persons. Each case depends upon its own circumstances.”

37 (1992) 177 CLR 292; see also R v Zorad (1990) NSWLR 91 at 95.
Counsel can, such as an argument that, although on the evidence the accused is probably guilty, he is not guilty beyond reasonable doubt.”

Similarly, in *Mc Innis v R*, Murphy J remarked quite pointedly that:

“The notion that an unrepresented accused can defend himself adequately goes against experience in all but the rarest cases. Even an experienced lawyer would be regarded as foolish to represent himself if accused of a serious crime.”

Judicial enabling is a settled practice especially in magistrates’ courts. In this regard, judicial officers would ask the unrepresented accused pertinent questions and also give her an opportunity to speak. The judicial officer would outline the relevant aspects of the offence, point out possible mitigating factors to the accused and also provide general guidance on evidential matters.

The Criminal Trial Bench Book specifically provides for judicial enabling. In this regard, judicial advice should be given to the unrepresented accused at the commencement of the trial, and where appropriate, as the trial proceeds. The judicial officer is thus under a duty to outline various procedural options, modes of objection, the order of evidence, the right to make submissions, the manner of leading evidence-in-chief, and the right to cross-examination.

### 4.3 Judicial enabling in South Africa

Judicial enabling is underscored by sections 35(3)(f) and (g) of the South African Constitution. These provisions are set within the context of the right to a fair trial. Section 35(3)(f) which caters for the right to legal representation, demands that the accused be informed of the right. Section 35(3)(g) is to the effect that where it is necessary to provide the accused with legal aid, she should be informed of this entitlement. The courts have stated that the duty to point out the right to legal representation to the accused lies with the judicial officer. Though the constitutional provisions relating to judicial enabling are

---

38 *(1979) 143 CLR 575.*
42 *Ibid*.
43 *S v Pienaar* 2000 (2) SACR 143 (NC); *S v Radebe* 1988 (1) SA 191 (T); *S v Mabaso* 1990 (3) SA 185 (A).
limited to the right to legal representation, a number of cases impose a general duty on judicial officers to assist unrepresented accused persons.

A general rule providing that judicial officers assist unrepresented accused persons is established in South African case law. In this regard, judicial officers have a general duty to ensure that unrepresented accused fully understand their rights, otherwise, the trial may be rendered unfair. This duty is said to have a close connection with the judicial oath to uphold the Constitution as well as the constitutional demand to promote the objects of the Bill of Rights, in the development of the common law. Consequently, judicial officers have a duty, among others, to alert unrepresented accused of unfavourable presumptions, the right to testify and the effect of failure to do so and the purpose of cross-examination.

It is clear that judicial enabling is embedded in modern adversarial systems. In this regard, the gulf between adversarialism and inquisitorialism is bridged. Judicial guidance to the unrepresented accused is central to the right to a fair trial. The application of judicial enabling by the courts of Botswana puts their jurisprudence at par with those of other reputable legal systems. This element of collegiality is an important yardstick and a positive measure of the commitment of the courts of Botswana to fair trials.

4.4 In search of definition

At the heart of the above cases which have embraced judicial enabling, is the recognition of the plight of the unrepresented accused in the criminal process and the corresponding need for judicial intervention. The judicial officer has become a third factor participant in criminal proceedings, the first and second factors being the prosecution and the accused respectively. As a third factor participant, the judicial officer exercises her duty in ensuring that the trial is fair. Judicial enabling can therefore, be referred to as a process wherein a judicial officer engages in a “hand-holding” process, guiding the unrepresented accused through the trial process by informing her of the procedures. Judicial officers have become more visible participants in criminal adversarial proceedings. Effectively, the demand for fairness has resulted in a tripartite

---

44 S v May 2005 (2) SACR 331 (SCA). See also S v Ndlovu 2002 (2) SACR 325 (SCA); S v Mambo 1999 (2) SACR 421 (W); S v Manale 2000 (2) SACR 666 (NCD).
45 S v Radebe op. cit. note 43 supra.
47 S v Lango 1962 (1) SA 107 (N).
48 S v Makhuho 1990 (2) SACR 320 (O).
49 S v Lekhetho 2002 (2) SACR 13 (O); S v Mashaba 2004 (1) SACR 214 (T).
system of proof, as the aloofness of the adversarial judge is displaced by a more visible arbiter. No doubt, judicial enabling imposes a positive duty in assisting the unrepresented accused in presenting her defence.

Essentially, failure to advise an accused of her right to cross-examination, to make closing submissions, to give evidence and to call witnesses among others, will vitiate the proceedings if the accused has suffered prejudice. Several of the cases that have insisted on judicial enabling have married their reasoning with a prerequisite that the judicial officer plays a role in assisting the unrepresented accused to present her case. It has been firmly stated that this represents an essential element of the right to a fair trial.51 It is clear, therefore, that the expansion of the judicial role is founded on the fair trial imperative.

5. INCIDENCE OF JUDICIAL ENABLING

5.1 Areas covered by the Circular

It is now settled that procedural rights should be explained to the unrepresented accused. A number of the areas that require judicial advice were noted in the Circular and will now be considered.

5.1.1 The duty to advise the unrepresented accused of the right to legal representation

While it is settled that judicial officers should intervene and advise accused persons of their procedural rights, judicial approach tends to indicate that no legal consequence follows in the event of failure to do so, where the accused has suffered no prejudice.52 There is no constitutional mandate on the judicial officer to advise the unrepresented accused of her right to legal representation, nor have the courts interpreted the duty as such. Therefore, while a legal duty rests on judicial officers to advise an unrepresented accused of her right to legal representation, this duty is watered-down by the absence of constitutional backing. In the case of Moroka v the state53 the appellant was not informed of the right to legal representation during the trial. Counsel for the appellant argued on appeal that this was irregular and should vitiate the proceedings. The Court noted that there was a common law right of an accused to access legal advice and legal representation. The Court stated that that right has been enshrined in section 10 of the Constitution. In relation to the issue whether a

---

judicial officer had a duty to advise an accused of her right to legal representation, the Court held that the duty was not mandatory or peremptory. The Court stated that it is rather a salutary practice which should be followed in every case.\(^{54}\) In the Court’s view, whether failure to advise the accused will vitiate the proceedings will depend on whether there has been a failure of justice. The Court found that there was no failure of justice.

The Court relied on section 13(3) of the Court of Appeal Act\(^ {55}\) which provides that notwithstanding the fact that a point raised on appeal might be decided in favour of the appellant, the court may dismiss the appeal where there has been no substantial miscarriage of justice. The Court stated that the question whether an irregularity has resulted in a failure of justice will depend upon “whether the Court hearing the appeal considers, on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no resultant failure of justice.”\(^ {56}\)

This decision is most unfortunate. The fact remains that the evidence against an accused may appear overwhelming and there may seem to be proof of guilt beyond reasonable doubt, simply because the accused did not have legal representation. This is because the unrepresented accused might not be able to test the credibility of the evidence and the witnesses as a trained lawyer would. Often, where a lawyer appears halfway through a trial where a conviction seemed inevitable, the lawyer would materially turn around the events in favour of the accused as material discrepancies and weaknesses in the evidence of the prosecution would be unearthed. Therefore, the “overwhelming evidence test” that courts so often use to override material irregularities is not safe-proof.

The right to legal representation is a fundamental right, perhaps the most important, since with effective legal representation the accused’s other procedural rights will ultimately be protected. It is the right of all rights. One would think, therefore, that the bearer of such an important right should be informed of it. Unfortunately, the Court did not regard the duty to inform the accused of her right to legal representation as a right in itself. It would appear that the duty was rather regarded as a procedural step, breach of which will merely lead to a simple irregularity. In a criminal trial, the accused has a constitutional right to legal representation. A right is meaningless to the bearer if she is unaware of it. While recognising the duty of judicial officers to inform accused persons of the right to legal representation, the Court ruled on

\(^{54}\) Similar decisions were reached in Rakgole v The State [2008] 1 B.L.R. 139 (CA); Phologolo v The State [2007] 1 B.L.R. 61; Masango v The State [2001] 2 B.L.R. 616; Ramogotho v Director of Public Prosecutions [2007] 1 B.L.R. 334 (CA); Chanda v The State [2007] 1 B.L.R. 400 (CA); Bojang v The State [1994] B.L.R. 146; Leow v The State [1995] B.L.R. 564.

\(^{55}\) Cap 04:01.

\(^{56}\) Moroka v The State op.cit. note 53 supra at p. 140D-E. Citing section 13(3) of the Court of Appeal Act.
the basis of the evidence, that there was no failure of justice even though the Court could not tell how the prosecution’s evidence would have fared under the microscopic cross-examination of a lawyer.

In contradistinction with Botswana, a somewhat reinforced commitment to legal representation finds expression in South African jurisprudence. The tone of the case law lays emphasis on the duty to inform the accused of the right to legal representation. The philosophical undertone of this duty is informed by the reasoning that a right is of no use to a person if she is not aware of it. But more importantly, the duty to inform an accused of her right to legal representation is supported by the constitutional imperative. Section 35(3)(f) of the South African Constitution provides that an accused must be informed of the right to choose and to be represented by a legal practitioner of her choice. The accused must be informed that she has a right to communicate with her legal representative and if this is not possible, she should be provided with an interpreter. A failure on the part of the judicial officer to inform the accused of this right may result in a complete failure of justice. It has unfortunately been held, however, that the accused will suffer no prejudice where, having regard to the evidence, the accused would have been convicted anyway.

The South African courts have also held that the courts have a duty to encourage the accused to obtain legal representation in respect of offences that attract severe penalties such as life imprisonment. South Africa, unlike Botswana, has a public funded legal aid system. The courts have therefore decided that the accused should be informed of her right to legal aid if she is too poor to hire a lawyer. This position is informed by the fact that merely informing the accused of her right to legal representation is insignificant if she cannot afford a lawyer. The South African system thus ensures a deeper commitment to ensuring that accused persons are made aware of their right to legal representation.

5.1.2 The duty to advise the unrepresented accused of the purpose of cross-examination

The right of an accused to cross-examine the witnesses of the prosecution is engraven in section 10(2)(e) of the Constitution of Botswana. Cross-
examination is one of the fundamental pillars of the Botswana procedural system.\textsuperscript{64} It is essential to the element of confrontation on which the adversarial tradition rests.\textsuperscript{65} The accused’s right to cross-examination is closely related to her right to be present during the trial. An accused can only confront her adversary if she is present and has heard the evidence.\textsuperscript{66}

The right to cross-examination is a fundamental right, breach of which amounts to a serious irregularity. Cross-examination puts the veracity and credibility of a witness’s evidence to the test, while also allowing the accused to put her version of the events to the witness. In \textit{Kebadireng}, after a witness had testified, the trial magistrate granted the prosecutor’s request to “withdraw” the evidence of the witness. On review, the Court held that once a witness had testified, she should be cross-examined. Therefore, the accused was denied the right to cross-examine the witness. The Court held that, there were no legal consequences where the evidence against an accused is overwhelming despite a breach of the right to cross-examine.\textsuperscript{67} The Court noted also that there was sufficient evidence from other witnesses to convict the accused and that the accused was permitted to cross-examine those witnesses, although it is not clear whether the trial magistrate relied on the evidence of the witness who was not cross-examined.

In \textit{State v Tsatsi piet and another},\textsuperscript{68} both accused persons elected to give evidence on oath. The prosecutor cross-examined each accused but the accused were not permitted to cross-examine each other. The Court laid emphasis on the constitutional guarantee of the right to cross-examination, stating that the right extends to the evidence of co-accused persons and their witnesses. The Court did not state whether the evidence of each accused implicated the other. The Court noted the possibility that a witness may have evidence which might assist the accused in her defence. The accused should therefore not be prevented from putting questions to such a witness. The Court, it appeared, found it necessary to consider whether it could still convict on the basis of other evidence. In the Court’s view, there was a total miscarriage of justice and the irregularity in failing to give the accused an opportunity to cross-examine was of such a nature that the accused were prejudiced.

The case of \textit{Rabonko}\textsuperscript{69} illustrates the manifest injustice that may

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{64} \textit{State v Kebadireng} \cite{1984 B.L.R. 167}.
  \item \textsuperscript{65} R. Ellert, \textit{Nato “Fair Trial” Safeguards: Precursor to an International Bill of Procedural Rights}, The Hague, M. Nijhoff \citeyear{1963}, p. 30; As Cassim notes, “Cross-examination is regarded as an example of confronting one’s adversary. Thus, the right to challenge evidence may well include the right to confrontation.” F. Cassim, “The Rights of Child Witnesses Versus the Accused’s Right to Confrontation: A Comparative Perspective,” \textit{36(1) Comparative and International Law Journal of Southern Africa} \citeyear{2003}, p. 65 at 66.
  \item \textsuperscript{66} \textit{State v Etang Thai and Another} \citeyear{1971 B.L.R. 25}.
  \item \textsuperscript{67} \textit{State v Kebadireng} \cite{op.cit. note 64 supra}.
  \item \textsuperscript{68} \citeyear{1971 B.L.R. 59}.
  \item \textsuperscript{69} \textit{Op.cit.} \cite{note 36 supra}.
\end{itemize}
\end{footnotesize}
occur where an accused who clearly does not understand the legal process is left to her own devices. In this case, the accused was charged with the offence of attempted rape. After the complainant had testified, the accused asked her only one question which was: “did I rape you?” When called upon to present his defence, the accused merely stated that he will rely on the medical report. The report indicated that there was no evidence of penetration. The Court noted that the accused’s purported cross-examination and defence showed that he was under the misapprehension that he was facing a charge of rape and not attempted rape. The Court opined that the trial magistrate should have explained what the real charge was and explained the object and purpose of cross-examination to the accused. The Court noted that a trial cannot be fair if the accused is unable to defend himself by putting essential elements of his defence to the prosecution witnesses.

In Motswedi and Another v The State, the Court emphasised on the duty of judicial officers to ensure that accused persons are afforded an opportunity to cross-examine a co-accused. This can be broadly translated as a duty to advise the accused of her right of cross-examination. The duty is not limited to merely indicating to the accused that she has a right to cross-examine. The full purpose of cross-examination should be explained such that the accused is able to exercise the right as best as she can. However, while noting the fundamental importance of the right to cross-examination, the Court noted that having regard to the accused’s confession, no prejudice had occurred.

In what can be described as an exemplary example of the judicial enabling process, the Court in Mponda v The State digressed on the approach to be employed in explaining the accused’s right of cross-examination. The Court noted that not only should the judicial officer explain that the accused is entitled to cross-examination, she should also explain what is expected of cross-examination. The Court suggested that:

“It might be prudent, and I say this by way of suggestion only, for a magistrate to say to an unrepresented accused, who appears to him to need assistance, that, if he disputes material allegations made by the witness, that he, the magistrate, will help him. The magistrate might properly offer to turn the version that the accused may subsequently wish to lay before the court in the course of his case into questions of the witness. Such offer might be made if the accused (a) should state that he feels he is unable to effectively question the witness himself; (b) should wish the magistrate to put

71 Ntwayame v The State [2008] 1 B.L.R. 167 (CA); Rabonko v The State op.cit. note 36 supra.
questions upon his behalf; and, (c) tells the magistrate the gist of his case where it conflicts with the evidence that the witness about to be cross-examined has given. It should be stressed by the magistrate to the accused that he is free to take his own course and is under no obligation to accept the advice of the magistrate. It is of course important that the magistrate should fully record the nature of the exchange between himself and the accused if he considers, in the exercise of his discretion, that it is appropriate for him, by way of helping the accused to present his case, to take the course I have outlined as in certain circumstances being desirable.”73

The Court suggested that the position taken in the South African cases of S v Sebatana74 and S v Dipholo75 be followed. In those cases, it was emphasised that the judicial officer should assist the unrepresented accused in her cross-examination by asking her if she agrees to the material allegations made against her in the evidence of the witnesses. In this way, matters in dispute will be brought to light.

Mponda recognises that judicial assistance to the unrepresented accused during cross-examination is part of the general duty of the judicial officer in assisting the accused to present her defence. No doubt, the phenomenon of a more visible judicial officer playing a more dynamic role in ensuring fair treatment of the unrepresented accused is recognisable. On the basis of Kebadireng, Motswedi and Rabonko however, failure to exercise this duty will bear no consequences if the accused is not prejudiced.

73 Ibid at p. 291A-D. In Rabonko v The State [2007] 1 B.L.R. 31 at p. 32E-G, Lesetedi J had this to say: “A judicial officer trying a case in which an unrepresented accused seems to be at sea and unable to either cross-examine or appreciate what the purpose and import of cross-examination is in my view does have a duty to advise an accused person as to the purpose of cross-examination. For to know of the existence of a right and not to know how to exercise it is of cold comfort to the beneficiary of the right. A judicial officer must however be careful to not descend into the arena and carry out the cross-examination on behalf of an accused person. A failure by a judicial officer to advise an unrepresented accused person not only of the right to cross-examination but also its object, may result in a failure of justice where an accused person seems to have no idea of either the existence of the right or how to exercise it.”; in State v Ncube [2008] 1 B.L.R. 64 at p. 68D-F, Newman J noted that: “In my view, it is proper practice for a trial magistrate to advise an unrepresented accused, at the commencement of the state’s case or, at the latest, after the first prosecution witness has testified in-chief, of his right to ask relevant questions of each prosecution witness, which need not be limited to matters raised in-chief, and which are aimed at: (a) casting doubt on the accuracy of the evidence given by the witness in-chief; (b) extracting from the witness evidence supporting the accused’s version of the facts in issue; and (c) in appropriate circumstances, discrediting the witness’s reliability as a witness.”; evidence of judicial officers generally assisting unrepresented accused and assisting them to cross-examine witnesses, has been traced to the eighteenth century. See J.H. Langbein, The Origins of Adversary Criminal Trial, Oxford, Oxford University Press (2003), pp. 314-321.
74 1983 (1) SA 809.
75 1983 (4) SA 757.
5.1.3 The duty to advise the unrepresented accused of special and statutory defences

It is well established that judicial officers are under a duty to inform accused persons of statutory and other defences that may be open to them. In Botswana, this issue has mainly been determined in sexual related offences. Thus in the case of *State v Bareki*\(^{76}\) it was held that on a charge of rape, where the complainant is alleged to have been under the age of sixteen years, if the accused is undefended he must be alerted of the defence provided by section 147(5) of the Penal Code. This section provides a defence in respect of persons charged with having unlawful carnal knowledge of a girl under the age of sixteen.\(^{77}\) The section provides the accused with a defence if the accused can show that he had reasonable cause to believe, and did believe that the victim had attained the age of sixteen years.\(^{78}\) The Court apparently noted that the accused should be alerted of the defence, since having regard to the evidence, he stood the risk of being convicted of defilement if the victim was in fact below the age of sixteen years.

In *Gare v The State*,\(^{79}\) the appellant was convicted by a magistrate's court on a charge of having had carnal knowledge of a girl of less than sixteen years of age in contravention of section 147 of the Penal Code. The appellant admitted that he had sexual intercourse with the complainant. He was not represented at the trial and the inept manner in which he conducted his case would seem to suggest that he had little understanding of the issues and was almost certainly unaware of the special defence set out in section 147(5) of the Penal Code. The evidence of the prosecution established that the complainant was fifteen years old. The accused did not address the issue of age. The complainant testified that she told the accused that she was fifteen years old and he did not dispute this in cross-examination. He admitted to having sexual intercourse with the complainant, stating that she was his girl friend. While it was clear that the complainant told the accused that she already had a boy friend, the appellant did not cross-examine the complainant on her physical development. In fact, this issue did not appear on the record. The accused did not avail himself of the special defence set out in section 147(5) of the Penal Code. Zietsman JA\(^{80}\) held that in view of the obvious ineptness with which

---


\(^{77}\) This offence is akin to statutory rape.

\(^{78}\) The section reads: “It shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the person was of or above the age of 16 years or was such charged person’s spouse.”

\(^{79}\) *Op.cit.* note 30 *supra*.

\(^{80}\) Aguda ag JP dissenting.
the accused conducted his defence, and his probable ignorance of the special defence, the court should have provided him with an explanation of the special defence.81 The Court noted that the accused was entitled to a fair trial in terms of section 10 of the Constitution and that the magistrate was under a duty to explain the existence and meaning of this defence to him. In the circumstances, the conviction was quashed.

5.1.4 The duty to advise the unrepresented accused of the right to address the court at the close of the trial and in mitigation

Section 181 of the Criminal Procedure and Evidence Act provides for the prosecution and accused to address the court after all the evidence has been led. The duty of the judicial officer to make an unrepresented accused aware of this was declared in Walter Madisa v The State.82 This case, as with other cases involving breaches of procedural rights, indicated that failure of an accused to address the court was inconsequential where no prejudice occurred.83 The case, however, amply demonstrates a factual situation where a procedural mishap would result in prejudice. In this case, the appellant was convicted of assault occasioning actual bodily harm upon an allegation of a woman with whom he was cohabiting, that he had kicked her on her private parts, resulting in bleeding. The appellant and the complainant had three children together. The complainant in fact testified that she only became aware that she was six months pregnant as a result of a medical examination conducted after the

81 Lord Wier JA who concurred with Zietsman JA noted at p. 149A-F: “In the present case, the appellant faced a serious charge, that of unlawful carnal knowledge of a female under the age of 16 years. The Penal Code provided him with the defence that if it appeared to the court that he had reasonable cause to believe and did in fact believe that the complainant was 16 years or over he would be acquitted. At the start of the trial the charge was read over to the appellant and he said that he understood it. The special defence was not. I do not go so far as to say that there was any requirement to read out the terms of the statutory defence at the start of the proceedings although my own inclination, particularly in the case of an unrepresented and illiterate accused, would have been to do so. Moreover if, as the trial progressed it became clear to the court from questions put in cross-examination that this accused clearly understood the issue and the nature of any defence open to him, there would have been no need for the court to intervene with assistance. But in this case, studying the record of proceedings, it appears to me that the appellant had no idea what was the true issue. Indeed from such questions as he asked, it seems that he was under the impression that he was facing a charge of rape and that what he was seeking to establish was a defence of consent. Be that as it may, at no stage as the trial proceeded it become apparent that the appellant had any idea that the statutory defence existed or was open to him. This should have become obvious to the magistrate after the appellant's very brief cross-examination of the first witness, who was the complainant. The complainant stated that the appellant had asked her age and she told him that she was 15 years old. There was no cross-examination of this vital piece of evidence and, in my view, the magistrate ought to have intervened there and then to draw the appellant's attention to the special defence and ask him if he wished to ask the complainant any questions on the matter. Moreover when the appellant came to give evidence himself, he said noting that could have had any bearing on the special defence and by refraining from intervening, the magistrate let the opportunity pass for this possible defence to be put forward.”

assault. At the close of the evidence, the trial magistrate stood the matter down at lunch time, indicating that the matter will proceed after lunch. When the matter resumed, the magistrate by inadvertence, proceeded to deliver judgment and sentence without inviting the parties to make submissions. The Court noted that since the complainant had been pregnant several times before, regard being had to her evidence that she only realised that she was six months pregnant during the medical examination, counsel for the accused might have wanted to address the court on her credibility. Though the Court could not speculate what counsel could have said, it concluded that the accused was prejudiced under the circumstances. In any event, closing addresses are crucial to the criminal process as they allow the accused to call the court’s attention to salient matters in an endeavour to influence the court in finding in its favour.

Another process wherein an accused endeavours to influence the decision of the court in its favour is through mitigation. When once convicted, the accused would implore the court to pass the lenient most possible sentence. In this regard, the accused should be given an opportunity to address the court. The accused would normally bring mitigating factors to the attention of the court. That the accused addresses the court in mitigation is of paramount importance as the information presented assists the court in arriving at an appropriate sentence.84

It is an established rule of law that a convicted accused has a right to be heard and lead evidence in mitigation.85 In Ofetotse v The State,86 the Court noted that despite the absence of any statutory provision relating to mitigation, this is a well established rule of practice in the courts of Botswana and must always be followed. The Court noted that failure to accord the accused an opportunity to mitigate amounts to an irregularity and the sentence cannot stand.87 The courts have held that to remedy, the irregularity, the matter should be remitted to the trial court to hear evidence in mitigation and then pass sentence. However, in order to avoid the delays that this route is bound to create, the appellate courts have in practise, imposed sentence themselves, after consideration of the conditions under which the offence was committed or allowing the parties to file documents relating to mitigation.88

In the case of Gaotlhobogwe v The State,89 the Court noted that an assessment of the proper sentence to be passed is as important as any other stage of the criminal process. In this regard, to prevent or discourage a convicted person from addressing the court or giving evidence in mitigation will amount to a serious irregularity. Without specifically stating the duty of

87 Seakwa and Others v The State op.cit note 85 supra; Ofetotse v The State op.cit. note 86 supra.
88 Seakwa and Others v The State op.cit note 85 supra; Ofetotse v The State op.cit. note 86 supra.
the judicial officer to inform the accused of her right to mitigate, the Court cited extensively from the South African case of *R v Chinyani*, where it was noted that the most desirable practice was to ask the defence after conviction, whether it desires to say anything in relation to conviction. It has been contended that section 274 of the South African Criminal Procedure Act obliges the judicial officer to allow the accused an opportunity to lead evidence and address the court in mitigation.

It must be noted that in *Gaotlhobogwe*, the accused was represented by counsel. One must speculate that had the facts been different, the Court would have stated the duty to call upon the accused to mitigate as it has so often done with other procedural rights. The facts are that after conviction, counsel instructed the accused to go into the witness box as he intended to lead evidence in mitigation. The judge retorted that he may not go into the box. This reaction was apparently provoked by the fact that counsel did not seek leave of the court and further that previous convictions were not yet put to the accused. Though counsel did not further indicate that he intended to put the accused in the box, he proceeded to address the court in mitigation from the bar. Also, when asked by the Court during the appeal proceedings, what his client would have said in mitigation, counsel’s reply did not reveal anything substantial that would have persuaded the trial court to pass a different sentence. In fact, it was on this basis that the Court came to the conclusion that the accused was not prejudiced.

The duty of the judicial officer in relation to the unrepresented accused has been highlighted. The Court in *Kelebile v The State*, noted that the issue of mitigation is not a ritual that lacks real content. In passing sentence, justice can only be done if the judicial officer is aware of the personal background and personal circumstances of the accused. These issues are important factors in weighing aggravating and mitigating factors. The Court was of the view therefore that a judicial officer has a duty to probe the accused so as to elicit all the factors relevant to passing sentence. The Court stated that there are differences in the psychology and customs of people. Difference in circumstances and conditions cover a broad spectrum of subjective and objective considerations. Sentencing should therefore be made within the social context of the accused’s situation. Therefore, even where the accused states that she has nothing to say in mitigation, the court has a duty to probe the accused.

---

90 1956 (1) P.H. H65.
91 Act 51 of 1977.
92 Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche and Van der Merwe, *op.cit.* at p. 292. Section 274 reads:

“(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.”

5.1.5 The duty to advise the unrepresented accused about exceptional extenuating circumstances in the case of compulsory sentences

In its bid to curb certain socially undesirable acts, Parliament has intervened to enact minimum sentences in respect of certain offences. In this regard, statute provides for compulsory minimum sentences which judicial officers are bound to follow. There are a number of such legislations in Botswana. Whether the intention of Parliament is to stamp out such crimes by deterring would-be offenders with stiff penalties, to incapacitate offenders in respect of certain crimes that the society considers being serious or prevalent, or to ensure that the measure of retribution is proportionate to the crime committed is a matter for conjecture. What is clear, however, is that the taking away of judicial discretion in sentencing has led to obnoxious consequences wherein accused have sometimes received severe sentences for trivial conduct, merely because the crime they committed carry statutory minimum sentences even though the gravity of their conduct did not deserve such sentences. Cases where judicial officers apply mandatory sentences which are disproportionate to the conduct of the accused usually attract public outcry. It is interesting to note that similar sentiments have been echoed in Parliament as well, even though they are the creators of such provisions.94

The legislature found a solution to the problem caused by minimum sentences, by legislating an escape clause which permits judicial officers to circumvent statutory minimum sentences “where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate ...”.95 While it is clear that judicial officers should consider exceptional extenuating circumstances before imposing sentence in respect of offences carrying minimum sentences,96 there is no authority that the unrepresented accused should be

94 In the words of Dibotelo J (as he then was) in the case of Matomela and Another v The State [2000] 1 B.L.R. 396 at p. 399D-G, “In my view, the often resorted to practice of enacting mandatory minimum sentences for certain types of offences constitutes a threat to the independence of the courts as envisaged by the Constitution and the practice by the legislature of arrogating to itself the functions reserved for the judiciary by the Constitution is clearly undesirable and should be discouraged or discontinued as it erodes the discretionary powers of the courts in sentencing offenders. It is ironic and sad and I often observe with detached amusement that whenever there is a public outcry arising from what the public perceives as injustices meted out by the courts when they impose mandatory minimum sentences which have been prescribed by the legislature, some members of the legislature also blame the courts in such situations instead of owning up and shouldering the blame. There is a real danger in my view that the often resorted to practice of prescribing mandatory minimum sentences may in the near future bring very unhealthy conflict between the legislature and the judiciary.”

95 Section 2 Penal Code (Amendment) Act 39 of 2004, incorporated into the Penal Code as section 27(4).

96 State v Khumo and Another [2007] 3 B.L.R. 844.
invited to address the court or lead evidence on the matter. However, there is evidence that suggests that judicial officers may well be following the practice of inviting accused to address them on exceptional extenuating circumstances.97

Perhaps, a word on extenuating circumstances is in order at this stage. The question of extenuating circumstances usually arises in respect of sentencing in murder cases. The Penal Code98 provides for the death penalty except where there are extenuating circumstances.99 In other words, the court should impose the death sentence for the offence of murder except it finds extenuating circumstances. In relation to extenuating circumstances, the accused should be permitted to lead evidence and address the court if she so desires. However, the courts are bound to look for extenuating circumstances from the evidence led during trial.100 The analogy of extenuating circumstances in respect of section 203(2) of the Penal Code offers little assistance to the exceptional extenuating circumstances debate since accused persons are always represented in cases of murder and defence attorney would usually indicate that she intends to lead evidence or address the court on extenuating circumstances. Also, it has been held that the accused has no onus to prove extenuating circumstances, nor does the State have an onus to disprove it.101 What seems clear is that the court should consider extenuating circumstances on the basis of the trial evidence, and should also permit the defence to lead evidence or address the court on same if it so desires. Consequently, there is no onus on the court to invite the defence to raise extenuating circumstances.

5.2 Other possible areas

5.2.1 The duty to explain the unrepresented accused’s rights and options at the close of the prosecution’s case

Section 180(4) of the Criminal Procedure and Evidence Act provides that at the close of the prosecution’s case, the court is required to ask the accused if she intends to adduce evidence in her defence. It follows that, at the close of the

---

97 In State v Mayo op.cit. note 95 supra, the accused was convicted of the offence of robbery. Before passing sentence under section 292(2) of the Penal Code which provides for a minimum prison term of 10 years, the records show that the accused was invited to address the Court on exceptional extenuating circumstances. In passing sentence Chinhengo J noted at p. 740B-C, “I asked the accused if there were any exceptional extenuating circumstances which would constrain or require me to impose a sentence other than the minimum mandatory sentence and he was unable to point out to me.”

98 Cap 08:01.

99 Section 203(2) of the Penal Code.

100 Tsae v The State [2003] 2 B.L.R. 55 (CA); Losang v The State (Practice Direction) [1985] B.L.R. 281.

101 Tsae v The State op.cit. note 100 supra; Kelaletswe and Others v The State [1995] B.L.R. 100 (CA); Ntesang v The State [1995] B.L.R. 151 (CA).
case of the prosecution, the judicial officer has a duty to explain to the accused her rights and options, should the accused be found to have a case to answer. This involves a whole corpus of rights relating to the conduct of the defence. They include the right to give evidence, the right to make an unsworn statement, the right to remain silent and the right to call witnesses. These rights and their implications should be explained in full.

The courts have exemplified the process to be followed in explaining the rights of the accused at the close of the prosecution’s case. In *Mmopi and Another v The State*, the Court noted that an unrepresented accused is under severe disadvantage and that if the judicial officer fails to explain matters of procedure to her, injustice could easily result. The Court further noted that the judicial officer should explain to the accused that she will be afforded an opportunity to state her side of the case. She should point out to the accused person what the issues were and invite her to tell her story. The Court also held that should the accused person thereafter remain mute, the judicial officer should carefully note on the record what she has said to the accused person, read it over to her and invite the accused to comment on what she has recorded. The courts are unanimous in their conclusion that failure to comply with section 180(4) is fatal to a conviction.

### 5.2.2 The duty to explain unfavourable presumptions to the unrepresented accused

While the prosecution usually has the onus of proving its case against the accused, Parliament sometimes legislates presumptions that relieve the State of its onus in respect of some elements of the offence. These presumptions normally conclude a state of affairs unfavourable to the accused, on the basis of a basic fact, leaving it to the accused to disprove the concluded state of affairs. Usually, the State will only have to prove a single basic element from which the guilt of the accused may be inferred, unless she proves the contrary. Such reverse onuses are unfavourable to the accused and places her at the risk of conviction merely because the prosecution has proved the basic fact. Several legislations in Botswana contain such provisions. However, there is a dearth of authority on the duty of the judicial officer in relation to an accused who is faced with an unfavourable presumption.

---

103 [1986] B.L.R. 8; it was noted in *Tsae v The State* op.cit. note 100 supra that the court is not obliged to advise the accused directly when she is represented as this can be left to counsel. Obviously, the court will have to verify from counsel whether she has explained the accused’s rights and make a note of this in her records.
104 It was also held in *Tsie v The State* [1999] 2 B.L.R. 305 that the judicial officer should make notes of his advice to the accused and record the answers of the accused.
105 *Mhaladi v The State* [1990] B.L.R. 168; *State v Molatlhegi* op.cit. note 102 supra; *State v David Rantabana and Another* op.cit. note 102 supra; *Obonetse Ngakaemang v Regina* op.cit. note 34 supra.
In the case of *Mosanana v The State*, the appellant had been charged under the Stock Theft Act on two counts of receiving stolen stock which she either knew or had reason to believe had been stolen. The appellant was acquitted on the substantive counts but convicted on lesser charges of receiving stock without having reasonable cause for believing at the time of acquisition that such stock was the property of the person from whom it was received. The evidence showed that the appellant was given the cattle by a debtor, in satisfaction of a debt owed by the latter to the former. At the time, the appellant was sick and in bed, but asked one Opelo to check the cattle. As a result of the appellant’s conversation with Opelo, she was satisfied that the cattle belonged to the debtor. While the cattle were unbranded, Opelo testified that other cattle of that age in Botswana are not usually branded. In reaching a decision, the magistrate relied on section 4 of the Stock Theft Act which provided that:

“A person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen stock or stolen produce without having reasonable cause, proof of which shall be on such first-mentioned person, for believing at the time of such acquisition or receipt that such stock or produce was the property of the person from whom he received it or that such person was duly authorised by the owner thereof to deal with it or dispose of it, shall be deemed to be guilty of an offence.”

The magistrate found that the appellant did not prove that she had reasonable cause for believing that the cattle belonged to the debtor. The Court, on appeal, disagreed with this finding. The Court stated that the appellant did show that she had reasonable cause for believing that the cattle belonged to the debtor. The Court stated that the appellant did ask Opelo to check the cattle and that the latter found nothing amiss. It was also the evidence of Opelo that he found nothing unusual with unbranded cattle. Over and above this, the Court stated the duty of judicial officers where an

---


unfavourable onus is placed on an accused. The Court noted that in such a case, the judicial officer should “explain to the accused in clear terms that to escape conviction he has to prove certain matters and he should fully explain what these matters are. In other words, the accused should be given fair notice of any issues not stated in or apparent from the substantive charge.” In the Court’s view, failure to inform the accused may prejudice her in the conduct of her defence. In the circumstances, the Court felt compelled to set aside the conviction.

The dearth of authorities in this area presents a perfect opportunity to engage in some comparative analysis. The Namibian case of *S v Kau and Others* presents a crystal exemplification of the duty of the judicial officer in bringing the purport and effect of an unfavourable presumption to the attention of the unrepresented accused. In that case, sixteen appellants all illiterate, were charged and convicted of the offence of wrongfully and illegally hunting specially protected game. The legislation proscribing this conduct provided that no person other than the lawful holder of a licence shall hunt specially protected game. On appeal, the appellants argued among other things, that the trial magistrate erred in failing to explain the existence and implications of the presumption created by section 85(2) of the Nature Conservation Ordinance. The section imposed an onus on the appellants (then accused) to prove that they had a licence to hunt. The Supreme Court held that the appellants being illiterate were not expected to know of the provision merely by its mention on the charge sheet. The appellants, therefore, required a proper explanation of the import of the provision. In the Court’s view, only a lawyer or magistrate could make such an explanation. The Court held that as the accused were unrepresented, the magistrate had a duty to explain the provision and the shifting of the onus. Failure to explain the presumption was held to amount to an irregularity, thereby rendering the trial unfair. The Court proceeded to set aside the conviction.

The South African Courts have also in a number of cases ruled that judicial officers have a duty to explain unfavourable presumptions to the unrepresented accused. In *S v Cross*, an accused had failed to pay his monthly instalments in respect of a maintenance order. When once the prosecution had proved failure to pay, an onus fell upon him to establish

109 *Mosanana v The State* op.cit. note 107 supra at p. 31.
111 Section 26(1) of the Nature Conservation Ordinance 4 of 1975 as amended.
112 The section provides as follows:

>> “Whenever any person performs an act and he would commit or have committed an offence by performing that act if he had not been the holder of a licence, registration permit, exemption, document, written permission or written or other authority or power (herein in this section called the necessary authority) to perform such act, he shall, if charged with the commission of such offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.”

113 1971 (2) 356 (R,AD); *S v Lango* op.cit. note 47 supra; *S v Kekwana* 1978 (2) SA 172 (NKA); *S v Brown* 1984 (3) SA 399 (KPA); *S v Khumalo* 1979 (4) SA 480 (TPD).
inadequate means to pay. The trial magistrate did not explain this onus to the accused. The accused in his evidence, made a vague attempt to explain his finances. The Court, on appeal, noted that it was clear that the accused was unaware of the necessity of producing concrete facts and figures in order to establish his assertion that he was unable to pay during the period in question. The Court, therefore, laid down a rule of practice that where an unrepresented accused is charged with the offence of failure to pay maintenance, the judicial officer should explain the onus resting on the accused. The Court stated that the accused should be informed that it is insufficient to make a bald statement on oath asserting inability to pay but that all the relevant facts and figures and documentary evidence available should be produced in order that the court may properly adjudicate on the matter.

The Court’s rationale in *Kau* was that the appellants being unrepresented, had no way of knowing about the import and effect of the presumption if the magistrate did not explain it to them. Of significance is the Court’s view that it is unwise to assume that the magistrate’s failure to warn the appellants of the presumption did not result in prejudice because the magistrate did not rely on the presumption. The Court noted that the prosecution did not lead evidence to prove that the appellants did not have the relevant permit and must have therefore relied on the presumption to prove the appellants’ guilt. While the Court held that the failure to inform the appellants of the presumption rendered the trial unfair, it also took into consideration the fact that the trial court also failed to inform the appellants of other rights to which they were entitled. This case, therefore, reinforces the general duty of the judicial officer to bring the attention of the accused to her procedural rights.

*Cross* underscores the judicial enabling duty of the judicial officer. It can be seen that the Court’s reasoning was based on the fact that the judicial officer should give the unrepresented accused sufficient and detailed information of what is required for her to put up a proper rebuttal. The accused carries the risk of non-persuasion and it is therefore vitally important that this is brought to her attention. It will amount to “trickery” to convict an accused with the aid of a statutory presumption which effectively excuses the prosecution from proving an element of an offence because that element is proved by virtue of the presumption, while at the same time demanding that the accused disproves the presumed facts, if the accused is unaware of the onus or evidential burden placed on her.

---

114 Failure to ask the appellants to what extent they admit or deny issues raised in their plea and that they are not obliged to answer questions; failure to advice the appellants of their right to legal representation; failure to advise the appellants of their right to cross-examination.
5.2.3 The duty to advise the unrepresented accused of the possible conviction of a lesser offence

There are occasions where the prosecution fails to establish the offence with which the accused is charged because they have not established one or more elements constituting the offence. However, it might still be possible to convict the accused of a lesser offence on the basis of the evidence adduced. For example, a person may be convicted of an attempt to commit an offence for which she was charged where the evidence establishes attempt but fails to establish the substantive offence. Also, a person charged with defilement may end up with a conviction for indecent assault. Where it is apparent to the judicial officer that the accused might be convicted of a lesser offence, she must advise the accused of this possibility.

In the case of State v Bareki, the Court held that on a charge of rape, where the accused is unrepresented, he must be informed of the fact that a conviction of defilement is a competent verdict, where it is alleged that the victim is under the age of sixteen years. In this regard, the accused must be given an opportunity of addressing the additional issues such as the age of the victim. The Court noted that section 10(2)(b) of the Constitution of Botswana provides that an accused be informed of the offence for which he is charged. In the Court’s view, therefore, a judicial officer has a duty to inform an unrepresented accused of the possibility of conviction of an alternative offence. Since the particulars of the offence had made no reference to the age of the victim, the accused could not have adverted his mind to the issue of age or its relevance.

In the case of Chalaomane v The State, the appellant had been charged with the offence of shop-breaking and theft. The only evidence proved against the appellant was that he was in possession of goods stolen from the shop in question. The trial court did not warn him of a possible conviction of the offence of receiving stolen property and proceeded to convict him of that offence. The Court noted that the trial court should have warned the appellant of the risk of conviction on the alternative offence of receiving stolen property as stipulated by section 194 of the Criminal Procedure and Evidence Act. The Court noted, however, that the evidence

---

115 Section 187 of the Criminal Procedure and Evidence Act Cap 08:02. See generally sections 187 to 197 of the Criminal Procedure and Evidence Act.
116 Section 188 of the Criminal Procedure and Evidence Act.
119 Ibid.
121 Section 194 of the Criminal Procedure and Evidence Act provides: “When a person is charged with any offence mentioned in sections 300 to 305 of the Penal Code (relating to burglary, house-breaking and similar offences) and the court is of the opinion that he is not guilty of that offence but that he is guilty of any other offence mentioned in those sections or in sections 317 to 320 of the Penal Code, he may be convicted of that other offence although he was not charged with it.”
related solely and entirely to possession of stolen goods. As this was the sole issue, the appellant had an opportunity of defending himself in relation to possession and did so on the basis of an alibi and denial of possession. The defence was rejected. Therefore, according to the Court, the appellant was not prejudiced in any way. The Court held that there was no substantial miscarriage of justice, and dismissed the appeal.

In *Bareki*, the Court aligned its argument with the constitutional right of the accused to be informed of the offence with which she is charged. According to the Court, where it is possible that an accused may be convicted of an offence with which she was not charged, the judicial officer has a duty to inform the accused accordingly and she must be afforded an opportunity to defend herself on any additional issues that the situation may present. The procedural question that arises is, at what stage the warning should be made. Should it be made as soon as the possibility of a lesser charge is clear or apparent. The problem here is that at the time the issue of a possible alternative verdict registers itself, the judicial officer may not be sure whether she would convict the accused of the substantive or lesser offence. The question of whether the accused will be convicted of the substantive or lesser offence would depend on what finding of fact the judicial officer will make at the end of the day, having regard to the evidence. In other words, it would depend on which side the judicial officer believes. Again, the possibility of an acquittal would not be entirely ruled out. Even, and assuming that the possibility of a conviction for a lesser offence loomed at the time the State closed its case, the evidence of the defence might tilt the ground in favour of an acquittal. It should be said therefore, that the judicial officer should fulfil this duty as soon as it becomes apparent that an alternative verdict is possible. Though *Chalaomane* and *Bareki* do not give directions as to how the court should exercise its duty, the case of *State v Sethunya*122 is of valuable assistance. Relying on the constitutional right of the accused to be informed of the charges against her, the Court noted that the duty arises “as soon as the possibility of a conviction of another offence enters the mind of the trial judge.”123 In a master stroke, the Court set out the duty and its procedural implications when it noted:

“The judge should remember that the accused comes to contest the charge in the indictment. He may be put at a disadvantage by finding during the trial that he has to meet an allegation that he committed another offence. The accused must be protected in such circumstances and an adjournment should be granted in exceptional circumstances. There is no fixed time in a trial when a warning

123 *Ibid* at p. 485H.
should be given to the accused but obviously the sooner it is given the better. It may well be that the alternative offence does not arise in the judge's mind until the accused has given evidence or even when his witnesses have given evidence, if that be the case, the trial judge should give his warning then or anytime before he delivers his judgment but the warning must be given before judgment is delivered and the accused must be allowed to recall State witnesses if he so wishes, to give further evidence and if necessary to recall or call further witnesses.”

This ensures that the accused is given an opportunity to defend herself fully, and to attend to any additional issues that the possible new charge may present. It is founded on the constitutional requirement that an accused should not be convicted unless she has been informed of the charges she is facing. The effect of informing the accused of the possible lesser offence is that the trial is re-set and the accused is able to recall the witnesses so as to cross-examine them on the basis of the new charge.

5.2.4 Analysing the trend of the case law

The cases discussed above illustrate that the courts have consistently reminded judicial officers of the judicial enabling process. This forms part of the self-correction element in the system. Courts continue to remind themselves of the rules that bind them as well as making corrections from within. In Nieklas, the Court of Appeal went a stage further by directing that the message be disseminated directly to judicial officers via a checklist. This should create an ever-present reminder to judicial officers of the judicial enabling process. While noting that failure to advise the accused results in procedural failure, the courts rely significantly on the prejudice clause. Effectively, this takes other

124 Ibid at p. 486A-C. In the case of State v Fihlani [1987] B.L.R.225 the Court noted at pp. 226H-227C that:
"The essential principle which emerges is that as soon as the possibility of a conviction of another offence enters the mind of the trial judge he must always ensure that that course will involve no risk of injustice to the accused and that he has had the opportunity of fully meeting that alternative in the course of his defence. The judge should remember that the accused comes to contest the charge in the indictment. He may be put at a disadvantage by finding during the trial that he has to meet an allegation that he committed another offence. The accused must be protected in such circumstances and an adjournment should be granted in exceptional circumstances. There is no fixed time in a trial when a warning should be given to the accused but obviously the sooner it is given the better. It may well be that the alternative offence does not arise in the judge's mind until the accused has given evidence or even when his witnesses have given evidence, if that be the case, the trial judge should give his warning then or anytime before he delivers his judgment but the warning must be given before judgment is delivered and the accused must be allowed to recall State witnesses if he so wishes, to give further evidence and if necessary to recall or call further witnesses."

125 Ibid; Moeti v The State [1998] B.L.R. 55. In Dick v The State [2007] 2 B.L.R. 592, the Court noted that although it was proper for a judicial officer to warn an accused if he was contemplating convicting him on a substituted charge, the failure to warn him did not always result in a failure of justice. For example, injustice would not result where the evidence led related to the accused's possession of stolen property and his explanation or lack of explanation for such possession, had been fully contested at the trial.
interests into consideration. As noted in *Makwapeng v The State*, if failure by the court to advise the accused would by itself result in vitiation of the trial, even where there is overwhelming evidence to convict, this will affect the credibility of the judiciary. In addition, one must say that victims of crime and the wider societal interests would not be served if those that are obviously guilty were allowed to escape on the basis of mere technicalities.

However, the application of the prejudice rule to the failure to advise an accused of her right to legal representation is a source of discomfiture. To say that the conviction should stand because the evidence is overwhelming, is to some extent, out of place in the adversarial context. The evidence may be overwhelming because it was not subject to challenge from an expert in the art of cross-examination. Lawyers sometimes take over cases midstream from self-actors who would be faring badly in defending themselves due to their lack of legal knowledge. In such cases, due to their legal skills, the lawyers would be able to turn around the fortunes of an accused, where a conviction had previously seemed imminent. One can therefore never conjecture what effect legal representation could have had on the process. The cross-examination might have been different, and the lawyer could have produced evidence or witnesses that the accused was aware of but did not appreciate their value and so did not present such evidence or call such witnesses to testify. There are issues that only a lawyer could unearth due to her legal skills. Therefore, the evidence against the accused may very well be overwhelming, not because she is guilty, but because she did not have adequate representation. In this regard, failure to advise an accused of her right to legal representation is not a mere technical matter that can be overlooked. Such failure by itself, should render the trial unfair except where it is shown that the accused was aware of the right.

6. **THE IMPLICATIONS OF JUDICIAL ENABLING ON THE ADVERSARIAL PROCESS**

Effectively, judicial enabling mimics the inquisitorial system to some extent. The judicial officer is a more active participant. To some extent, it can be said that she “investigates” the accused’s case. Clearly, for the judicial officer to be able to assist the accused in cross-examination as suggested in *Mponda*,

---

126 In *Kau v The State and Others op.cit.* note 110 supra at p. 23 of the cyclostyled copy, the Namibian Supreme Court stated that “…it cannot be said, in the absence of representation on their behalf, that all the evidence which should have been placed before court was in fact placed before the court or that State witnesses were properly cross-examined and tested or that the cases of each of the appellants were properly presented.”

127 As Jansen JA noted in *S v Shabancru* 1976 (3) SA 555 (A) at p. 558F: “The case against the appellant on the merits certainly appears to be formidable and to have fully justified the conviction. But, on the other hand, it is impossible to say what effect a properly conducted defence could have had on the ultimate result.”
Sebatana and Dipholo, she would have to inquire from the accused what her defence is and what aspects of the testimony she should like to dispute. The same approach applies if the judicial officer were to assist the accused in stating her defence or plea in mitigation. This, however, does not mean that the judicial officer crosses the well over to the inquisitorial camp as proof primarily rests with the parties. The State investigates its case and initiates proceedings and the judicial officer merely comes to the aid of the accused to ensure that the trial is fair. This underlying reasoning of judicial enabling and judicial advice is clear from the cases advocating this approach.128

Practical lessons can be learnt from judicial enabling. The two principal procedural systems can no longer exist in purist isolation of each other. This lends credence to the argument that the inter-marriage between the adversarial and inquisitorial systems is an inevitable necessity. Consequently, devout discipleship and extreme reverence to idealist models should water down. Realistically, none of these models can remain purist and an inevitable intermix has occurred over the years with each system borrowing from the other.129 Scholars have time and again debunked the stereotype of confining procedural systems in polarised continuums.130 As criminal justice systems undergo the inevitable process of reform, the line of distinction between the models becomes increasingly blurred.131 Due to the fair trial imperative, one can say that the judicial officer in Botswana, is not expected to maintain the classic adversarial posture.

Judicial enabling inevitably results in a distortion in rules of procedure and potentially, the order of proceedings. With time, what might have previously seemed a distortion of the rules, have developed into normative rules of their own. In 1984, the Court stated in Seakwa and Others v The State132 that it might be necessary to suspend the rules of procedure to allow the unrepresented and illiterate accused to articulate herself. However, judicial enabling has come a long way since 1984. What seemed a deviation from the rules then, has solidified into normative significance. So while judicial enabling is bound to affect the rules of procedure, it has attained a

128 Rabonko v The State op.cit. note 36 supra; State v Bareki op.cit. note 51 supra; State v Sethunya op.cit. note 51 supra.
129 Thibault, Walker and Allan Lind, op.cit. at p. 388; Goldstein, op.cit. at p. 1025. While accepting that reforms are desirable, Damaska warns that, “The transplantation of factfinding arrangements between common law and civil law systems would give rise to serious strains in the recipient justice system. The interaction between the contemplated transplant and the new environment must be carefully studied, and the question must always be considered whether the recipient culture is prepared – or can be readied – to live with the wider effects of contemplated reform.”: M. Damaska, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments,” 45(4) American Journal of Comparative Law (1997), p. 839 at 851-852; see also H.T. Edwards, “Comments on Damaska’s Of Evidentiary Transplants,” 45(4) American Journal of Comparative Law (1997), p. 853 at 859.
131 As Hayden and Anderson comment, it seems doubtful that a pure adversarial system exists in the United States or that pure inquisitorial systems exist in Europe. See Hayden and Anderson, at pp. 22-23.
7. CONCLUSION

It is irrefutable that judicial enabling has precipitated a metamorphosis of the adversarial system in Botswana. One might be tempted to say that having regard to the case law, judicial enabling gave birth to a new progeny which is inconsistent with puritan adversarialism: “the over-speaking judicial officer”. In this regard and accepting that the pure adversarial breed is no longer sustainable in Botswana, the active participation of the judicial officer can now be referred to as part of the process. Thus the unpalatable tag, “the over-speaking judicial officer”, becomes a thing of the past. Criminal trials can now be described as a tripartite dialogue involving the disputants and the judicial officer. The judicial officer elicits evidence especially from the accused, with the aim of assisting her through the process. In assisting the accused, obviously the judicial officer will raise questions which are geared towards arriving at the truth, a trait consistent with the inquisitorial investigative judge. Essentially, we recognise a new strain of adversarialism or perhaps, one may say that the line between the adversarial and inquisitorial dichotomy now suffers from a blur. This is representative of the bridging of the cleavage between the adversarial and inquisitorial models.

It is clear that the underlying factor for the more visible judicial officer is the need for a fair trial. It appears politically (or “judicially incorrect”) incorrect in modern democracies, to conduct trials without the participation of the accused. The present judicial ideology of fair trial involves judicial enabling which takes the form of a hand-holding process. Judicial enabling is clearly a by-product of the fair trial imperative. This has inevitably resulted in a welcome dilution of adversarialism at the altar of fair trial rights.