University of Namibia

Faculty of Law

LLB Dissertation

Reciprocal disclosure: A critical analysis of the constitutionality of the provisions on pre-trial defence disclosure in the Criminal Procedure Act No. 25 of 2004 vis-à-vis the right to fair trial in Namibia

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Date of submission: 31 October 2011

Declaration

I, the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

Signature: …… (Nadia Brigitte Nependa)

Date: 31 October 2011

Supervisor's Certificate

I, Clever Mapaure, hereby certify that the research and writing of this dissertation was carried out under my supervision.

Supervisor's signature: ……

Date: ……

Acknowledgements

I would like to thank my supervisor, Clever Mapaure, for all his efforts in guiding me through this paper.

I would also like to thank Professor Nico Horn for his invaluable assistance and commitment throughout the year to the LLB dissertation guidance lectures.

I appreciate the support I received from different libraries within and outside campus. Without this support this paper would not have seen the light of day.

Abstract

This discourse critically examines the constitutionality of the provisions on pre-trial defence disclosure, as proposed in the Criminal Procedure Act No. 25 of 2004 (hereinafter referred to as the Criminal Procedure Act), vis-à-vis the right to fair trial with explicit consideration to the right to remain silent, protection against self-incrimination, the right to be presumed innocent until proven guilty as well as the duty of the State to prove its case beyond a reasonable doubt. The writer hereof then concludes that sections 114 and 115 of the Criminal Procedure Act are indeed unconstitutional as they do not promote the fairness of justice afforded to all accused persons in terms of Article 12 of the Namibian Constitution. The author then goes on to recommend that Parliament repeal sections 114 and 115 of the said Act.

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Chapter 1: Background

1.1. Introduction

In 2004 the legislative arm of Namibia promulgated the Criminal Procedure Act, which was designed to fulfil the shortcomings of the Criminal Procedure Act No. 51 of 1977. However, the Criminal Procedure Act came under fire when members of the legal fraternity and the community at large, challenged its constitutionality. This paper accordingly critically examines the constitutionality of sections 113, 114 and 115 of the Criminal Procedure Act in light of the rights of an accused person to a fair trial.

The first chapter introduces the subject-matter of this paper, the problem statement, the objectives and a brief literature review, to mention but a few. The second chapter traces the genesis of disclosure and the metamorphosis it has since undergone in terms of English law and Roman Dutch law. The third chapter then discusses what the defence is expected to disclose in terms of section 114(2) of the Criminal Procedure Act, the arguments for pre-trial defence disclosure, the effects of such compliance on the various rights to fair trial as well as the consequence of non-compliance of section 114(2). In an attempt to understand the rationale behind pre-trial defence disclosure, the fourth chapter then draws a comparative study of three jurisdictions, namely the United Kingdom, South Africa and Namibia vis-à-vis pre-trial defence disclosure and the fifth and final chapter then concludes and recommends.

1.2. Problem statement

There is a great cause for concern as the Criminal Procedure Act is pregnant with grave injustices vis-à-vis the pre-trial defence disclosure provisions. For this reason, it is imperative to shed light on the constitutional challenges and as such the primary intention of this paper is to ascertain whether or not the provisions on pre-trial defence disclosure in the Criminal Procedure Act are in conflict with the Constitution of the Republic of Namibia.

1.3. Objectives of the research

Firstly, as noted above the main focus of this paper will be the constitutional challenges the Criminal Procedure Act holds. A secondary objective flowing from this paper is the ascertainment of the effects of pre-trial defence disclosure on the rights to fair trial. Thirdly, a further objective of this paper is to determine what the consequences of non-compliance with section 114 of the Criminal Procedure Act would be and fourthly, in order to identify what other jurisdictions have done in an

attempt to bring about equality of arms between the State and the defence, a comparative study was undertaken in terms of the English position on pre-trial defence disclosure as compared to the South African.

1.4. Research questions

In order to fully answer the objectives as listed above, this dissertation will be premised around the following central questions:

1.4.1 Are sections 114 and 115 of the Criminal Procedure Act constitutional sound?

1.4.2 What are the effects of pre-trial defence disclosure on the rights to fair trial? Does pre-trial defence disclosure infringe the accused person's rights to remain silent, to be presumed innocent until proven guilty?

1.4.3. What are the legal ramifications of non-compliance with section 114 of the Criminal Procedure Act? Are those consequences reasonable and justifiable?

1.4.4. What have other jurisdictions such as the United Kingdom and South Africa done in order to bring about equality of arms in criminal proceedings without violating an accused person's constitutional right to fair trial?

1.5. Significance of the research

Due to the limited material available in Namibia vis-à-vis pre-trial defence disclosure, there is a great need to research the matter more thoroughly as it is important to establish the effect of pre-trial defence disclosure on the constitutional right of an accused to a fair trial.

The research is noteworthy as it seeks to provide answers to the pressing questions listed above. It is important to identify the constitutionality of the provisions of sections 114 and 115 and what the effects of pre-trial defence disclosure are on the rights contained under Article 12 of the Constitution as it is essential to ensure that accused persons enjoy a fair trial, given the fact that the State is often in a more advantageous position than the accused.[1]

[1] Horn, N. (2008) *Article 81 of the Namibian Constitution and the New Criminal Procedure Act, Act 25 of 2004.* Windhoek: Orumbonde Press. p31.

1.6. Literature Review

Several academic writers and judges from various jurisdictions have expressed their views on pre-trial defence disclosure and as such the voices of literature argue as follows:

1.6.1. On the constitutionality of pre-trial defence disclosure

On the subject-matter of the constitutionality of the disclosure provisions advocated for in terms of section 114 Criminal Procedure Act, Dausab[2] argues, to a great extent, on the unconstitutionality of sections 113, 114 and 115. The author opines that the duty to prove the guilt of the accused rests on the State squarely, at all material times, and that the accused should never once have to help carry the load thereof.

The argument advanced by Dausab is very significant to this research paper as it is practically the only published paper in Namibia that exhaustively challenges and discusses the constitutionality of the pre-trial defence disclosure. It is argued that the views expressed by Dausab not only support the claims asserted by the writer hereof but also form the core of this dissertation. The views expressed by Dausab provide great insight into pre-trial defence disclosure and its implications on the rights to fair trial. The paper is even-handed as it thoroughly considers both sides of the coin before concluding that pre-trial defence disclosure is unconstitutional.

1.6.2. Effects of pre-trial defence disclosure on rights to fair trial

1.6.2.1. Right to remain silent

Horn[3] contends that the right to remain silent is the most basic due process right. He further identified the vulnerability of accused persons in court proceedings as the State is often better equipped to litigate. The argument advanced by Horn goes to show the importance of having this right protected.

However, Van Dijkhorst[4] refutes this contention by stating that the right to remain silent only protects the guilty and an innocent man is most likely to disclose the basis of his/her defence since he/she has nothing to hide. However, this goes to

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[2] Dausab, Y. (2008) *The disclosure provision in terms of sections 113, 114 and 115 of the Criminal Procedure Act 25 of 2004: their potential effect on the right to a fair trial* in Horn, N. & Schwikkard, P.J. (2008) *A commentary on the Criminal Procedure Act 25 of 2004, Vol. I.* Windhoek: Orumbonde Press.

[3] Horn, N. (2008) *Supra*, p35-37.

[4] Van Dijkhorst, K. (2000) *The right of silence: is the game worth the candle?* International Society for the Reform of Criminal Law as published on http://www.isrcl.org/Papers/van%20Dijkhorst.pdf, p1 (accessed on 16.08.2011).

show the importance of identifying the background of the source used as the view expressed by Van Dijkhorst is biased given the fact that he is a judge by profession and is expected to say such a thing as judges are quite often kept in suspense by the exercising of this right as they would like to do is arrive at the truth almost from the onset.

However, that is not the aim of the adversarial system as the adversarial system places a great emphasis on the protection of this right to remain silent, which is not the case in an inquisitorial system.

1.6.2.2. Right to protection against self-incrimination

Directly linked to the right of an accused person to remain silent is the right against self-incrimination. Dausab[5] opines that the right to remain silent is a constitutional right which protects the accused from making statements that could be self-incriminating.

This goes to highlight the importance of upholding the immunity of accused person to remain silent as there is no duty on them to assist in proving the case of the State.

1.6.3. Case law

1.6.3.1. Historical development of disclosure

Several Namibian and South African precedents were advanced in light of disclosure. The first South African case that dealt with (docket) disclosure was *R v Steyn*[6] in which Chief Justice Centlivres held that statements obtained from witnesses:

> '…are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal or similar step after the decision in the court of first instance.'

Therefore, it is clear to see that in terms of both civil and criminal trials, the defence was only entitled to disclosure at the end of the proceedings. However, it is important to note that the decision in *Steyn* was overturned in the Namibian

[5] Dausab, Y. (2008) Supra, p99.
[6] 1954 (1) AD 324 at 324 F - G.

High Court case of *S v Nassar*,[7] which has been acknowledged as the landmark case on docket disclosure. *In casu*, Muller AJ held that:

> 'the point of department in criminal case was that the accused is presumed innocent until proven guilty. To do justice to this fundamental right it was a pre-requisite that an accused be put in the position where he knows what case he has to face so that he can properly and fully prepare his defence.'

Ultimately, the case of *R v Steyn* and *S v Nassar* reflect the great metamorphosis that disclosure had undergone and as such are used in Chapter 2 to help trace the historical development of disclosure through case law. The case of *S v Scholtz*[8] then went on to list the grounds on which the State may withhold disclosure:

> 'the State shall be entitled to withhold from the accused (or legal representative) any information contained in any such docket, if it satisfies the Court on a balance of probabilities that it has reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against the public interest.'

Therefore, if the State could prove privilege then the Court would not compel disclosure, however, as correctly pointed out by Dausab[9] not every claim to privilege will succeed. In addition, in *S v Angula & Others*[10] the Court held that:

> '…the State would be under a duty to serve on the defence the material upon which the prosecution intended to rely as founding the prosecution case, in matters where the offence involves complexities of fact or law and in which there is a reasonable prospect of imprisonment…The State would also be under a duty to disclose to the defence certain material on which the prosecution does not intend to rely…In the case of minor offences…disclosure should not necessarily follow.'

Consequently, this means that information which the State does not disclose it cannot use in a court of law. Furthermore, the judgment laid down in *Angula & Others* also places the State under a legal duty to disclose material which it does not intend to rely on but as this paper will show, the State will seldom disclose information which is in support of the accused case as they exercise a lot of discretion in prosecutorial disclosure in terms of s113 of the Criminal Procedure Act.

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[7] 1994 NR 233 (HC) in Mapaure, C. & Nghiishililwa, F. (2008) Constitutional law study guide. Department of Public Law and Jurisprudence: University of Namibia. p106.
[8] 1996 (2) SACR 426.
[9] Dausab, Y. (2008) *Supra*, p87.
[10] 1996 NR 323 at 328 C - E.

1.6.4. Law Reform Commissions

1.6.4.1. South African Law Reform Commission (South Africa)

In August 2002, the South African Law Reform Commission published Project 73[11], which considered the probability of South Africa adopting a more inquisitorial approach to criminal trials. The Report revealed that by requiring the State to disclose, the defence is placed in a position where it can take advantage of the 'investigative weaknesses' in the State's case and fabricate a defence that offsets same, however:

> '…four years ago the Commission disapproved of a proposal emanating from the Project Committee dealing with the simplification of criminal procedure that pre-trial defence disclosure should be obligatory. The argument was based on the view that such a duty was in violation of an accused's right to be presumed innocent and the right to remain silent. As the law then stood that view was no doubt correct.'

Therefore, the Commission concluded that the legal duty of the defence to disclose pre-trial infringes the accused person's rights to fair trial. Conversely, Schwikkard[12] argues that:

> '…the purpose of introducing such measures was twofold: first, to address some of the problems that arise where there is a glaring disparity in the equality of arms due to the lack of legal representation of the accused and second, to improve trial efficiency.'

In view of that, Schwikkard believes that pre-trial defence disclosure would ultimately lead to the improved efficiency of the criminal trials and bring about equality of arms, however, there are various counterarguments to this view and they will be discussed in Chapter 3 hereof.

Nonetheless, the Interim Report by the South African Law Commission is beneficial to this paper in that it is useful under Chapter 5 which considers what South Africa has done to achieve an 'equality of arms.' The report is further

[11] South African Law Commission. (2002) Project 73, Fifth interim report on simplification of criminal procedure, A more inquisitorial approach to criminal procedure - police questioning, pre-trial defence disclosure, the rule of judicial officers *and judicial management of trials.pdf as published on www.isrcl.org/Papers/Schwikkard.pdf.* p45.
[12] Schwikkard, P.J. *Does the merging of inquisitorial and adversarial procedures impact the rights to fair trial* (year of publication unknown) as published on http://www.isrcl.org/Papers/Schwikkard.pdf (accessed on 13.08.2011). p1.

substantiated by South African jurist Schwikkard and as such carries much weight in reflecting the South African position.

1.6.4.2. Royal Commission on Criminal Justice (United Kingdom)

The Royal Commission on Criminal Justice also known as the Runciman Commission, consists of impartial experts who are tasked with investigate a specific field of concern at a given time.[13]

The Commission found that pre-trial defence disclosure:

> 'would not only encourage earlier and better preparation of cases but might well result in the prosecution being dropped in the light of the pre-trial defence disclosure, and earlier resolution through a plea of guilty, or the fixing of an earlier trial date.[14]'

It is further argued that pre-trial defence disclosure does not only result in well coached cases but that it would also reduce the number of cases conducted by 'ambush.' In addition, the Commission argued that pre-trial defence disclosure may even result in the withdrawal of criminal cases by the Crown and may contribute to better trial management as early court dates may be allocated, which acknowledges the accused person's right to a trial within a reasonable time.

This report carries significant weight in reflecting the position of the United Kingdom vis-à-vis pre-trial defence disclosure under Chapter 5 hereof and lays the foundation for the counterarguments formulated in response to that.

1.6.4.3. O'Linn Commission (Namibia)

Horn[15] discussed the findings of the O'Linn Commission and opined that:

> 'the O'Linn Commission found that the idea behind pre-trial defence disclosure was to prevent the accused person(s) from fabricating a defence or alibi after having witnessed the police docket.'

[13] *Law Reform* as published on http://www.helpwithlawexams.co.uk/lawreform.html (accessed on 31.10.11).
[14] South African Law Commission. (2002) Project 73, Fifth interim report on simplification of criminal procedure, A more inquisitorial approach to criminal procedure - police questioning, pre-trial defence disclosure, the rule of judicial officers *and judicial management of trials.pdf as published on www.isrcl.org/Papers/Schwikkard.pdf,* p30, para 4.17 and para 4.18.
[15] Horn, N. (2008) *Art. 81 of the Namibian Constitution and the New Criminal Procedure Act, 25 of 2004* in Horn, N & Schwikkard, PJ, (eds) *Commentary on the Criminal Procedure Act 25 of 2004*. Windhoek: Orumbonde Press. p52.

The author then went on to state that the consequence of non-compliance with the provisions on disclosure by the defence is that 'the accused may not cross-examine any State witness or adduce evidence in support of such alibi or refer to the evidence of the aforesaid expert in cross-examination or call such expert witnesses to testify, unless the Court allows a course on good cause shown.[16],

The paper advanced by Horn is essential in proving the effect of pre-trial defence disclosure, or rather the lack thereof, on the rights of an accused person to fair trial. This goes to prove that even though an accused person exercises their constitutional right to remain silent, the ramifications thereof result in an unfair trial being conducted against the accused person as they are no longer afforded the constitutional right under Article 12(1)(d) of the Constitution to call witness (to support their case) or to cross-examine the witnesses called against him/her.

1.7. Research Methodology

1.7.1. Methodology

The type of methodology used was qualitative as opposed to quantitative, the reason for this was due to the limited literature available in Namibia on the subject-matter. Namibian publications were considered as well as appropriate case law and relevant legislation. A desktop study was also performed to help draw comparative studies on the subject-matter with regards to the South African position as well as the English position.

1.7.2. Research design

The research design was analytical as it provided the best answers to the research questions stated above. This paper also provides recommendations, which are to be found under chapter seven hereof.

1.7.3. Source of data collected

The primary use of data used in the advancement of this paper, was gathered from existing literature from various, prominent academic writers in Namibia, South Africa and England. A secondary source of data was case law and how they fit in with the existing and proposed legislation. A third source of data was desktop research as it provided greater access to information relating to the position of foreign jurisdictions vis-à-vis pre-trial defence disclosure.

[16] (ibid.: 54).

Chapter 2: Historical development of disclosure prior to independence and after independence

2.1. Introduction

Over the years there has been a great revolution in terms of the definition of a fair trial and the rights attributed to accused persons to safeguard fair trial. The historical development of disclosure has seen both the advantages and drawbacks of the criminal justice system and as such this chapter traces the evolution of disclosure, pre and post the 1990 Namibian Constitution, identifies the roots disclosure has in English and Roman-Dutch law and considers how such common law principles eventually found their way into statutes.

2.2. Evolution of disclosure

2.2.1. Disclosure pre-independence

Prior to independence in 1990 Namibia, a former colony of Germany and South Africa, was greatly influenced by the Roman-Dutch law and common law of South Africa. Several pieces of legislation passed by the legislative arm of South Africa, consequently automatically applied to Namibia. In addition, several precedents laid down by the South African courts were binding on Namibian courts by virtue of its mandate over Namibia and through the process of *stare decisis.*

Accordingly, the South African case of *R v Steyn*[17] was seen as the *locus classicus* of disclosure in which case the bench upheld the protection against State disclosure in that:

> 'when statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal or similar step after the decision in the court of first instance. This protection against disclosure applies in both civil and criminal trials.'

In a nutshell, the State was lawfully permitted to withhold disclosure until the end of its case or at an appeal level. The ultimate consequence of this was that accused persons found themselves in between a rock and a hard place as no statements were disclosed to them pre-trial, no list of witnesses or police dockets were made available to them, which meant that they were not afforded the *sine quo non* facilities

[17] 1954 (1) AD 324 (F-G).

needed to answer to the case the State presented against it and to prepare a defence.

In addition to the lack of facilities, accused persons were also not provided with adequate time to peruse the information the State had against it as this was only made available to them at the close of the State's case or on appeal, which is justly tantamount to a trial-by-ambush as in most of the instances accused persons didn't have enough time to challenge the authenticity or credibility of the evidence before it.

Accordingly, Dausab[18] maintains that the pre-constitutional era was founded on a 'notion of prevention of crime through securing convictions…As a result of this understanding, the pre-trial procedures that led to the adjudication process often had the propensity to infringe on the rights of individual persons.'

This is also evident in the case of *R v Bryant & Dickinson*[19] the Court held that the discretion to disclose was purely the prerogative of the State and that the State decided exactly how much it would disclose. Some authors[20] believe that the reason for this was that prosecutorial disclosure, at a pre-trial stage, afforded an accused person the opportunity to concoct a meticulous, fictitious defence or alibi to challenge what is contained in the police docket. The pre-constitutional era brought about great hardship for accused persons in that it not only failed to afford the accused person a right to fair trial but that it also hindered the ends of justice as the accused was unaware of the case put before him/her.

2.2.2. Disclosure post-independence

As a result of the many injustices caused by the pre-constitutional era and with the evolution of the Namibian Constitution in 1990 there was a monumental shift in terms of disclosure as Article 12 endorsed the rights of an accused person to fair trial.

Apart from a new constitutional dispensation, the landmark case that reformed our law on disclosure was that of *S v Nassar*.[21] In this case the Court was tasked with identifying in which instances non-disclosure would be legally justified by the State. The Court held that disclosure can only be refused by the State if they can prove

[18] Dausab, Y. (2008) The disclosure provision in terms of sections 113, 114 & 115 of the Criminal Procedure Act (CPA): Their potential effect on the right to a fair trial.' Windhoek: Orumbonde Press, p84-5.
[19] R v Bryant & Dickinson (1946) 31 Cr App 146 it was held that '…the decision to disclose and when to disclose such information was often at the discretion of the State.'
[20] Dausab, Y. (2008) Supra.
[21] 1994 NR 233 (HC) at 261 B–C.

privilege over the said information. Consequently, as Dausab[22] puts it, non-disclosure:

> 'became more difficult to justify.'

The case of *Nassar* also sought to identify the meaning of the word 'facilities' as contained in Article 12(1)(e).[23] The Court held[24] that the word facilities:

> '…included providing an accused with all relevant information in possession of the State, including copies of witness statements, relevant evidential documents as well as an opportunity to view any material video recordings.'

Therefore, the State has to prove privilege over the information which it wishes not to disclose. In the event that the State fails to prove privilege it would be obliged to disclose same to the defence.

Given the above-mentioned, the State is under an obligation, in terms of Article 12(1)(e) of the Constitution, to provide the accused person with adequate time and facilities in order to prepare and present their defence. Therefore, the State must make a full disclosure to the defence and must make known not only those factors that support the State's case but also those that strengthen the defence's case as

> '…the general rule is fully to disclose all relevant information and that information should only be excluded from disclosure in the presence of some legal privilege. Further that not all claims to privilege will justify such non-disclosure…[25]'

Therefore, the final decision in determining legal privilege will lie with the Court. However, as noted in the case of *S v Angula & Others*[26] there are certain grounds on which the State may base its non-disclosure on. Judge President at the time, Justice Strydom, held that the State is entitled to refuse disclosure if: 1) it is to protect the identity and safety of a witness; 2) if disclosure would reveal police techniques and 3) if disclosure would be against public or State interest.

Therefore, it is evident that there has been significant change in terms of disclosure. The advent of a constitutional dispensation in Namibia brought about great amendments vis-à-vis criminal trials and the rights of accused persons. Furthermore,

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[22] Dausab, Y. (2008) Supra, p83.
[23] Article 12(1)(e) of the Namibian Constitution provides that 'all persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial…'
[24] 1994 NR 233 (HC) at 261 B–C.
[25] (ibid.: 87).
[26] 1996 NR 323 at 328 E - H.

as the next section will bring about, there has been a great attempt by the drafters of the Constitution to protect the rights of accused persons.

2.3. Due process and the Constitution

Article 5 of the Namibian Constitution gives the Court the mandate to enforce and uphold the protection of the fundamental rights and freedoms contained in Chapter 3. Now for the purposes of this paper, the fundamental rights that will be focused on are namely the presumption of innocence and the protection against self-incrimination as well as the common law presumption of the right to silence.

2.3.1. Right to silence

The right to silence is a common law right[27] as it forms part of the Judges Rules of 1931,[28] which accused persons are to be informed of by the arresting officer upon arrest. Dijkhorst[29] opines that in a criminal justice system which is adversarial much emphasis is placed on the protection of this right, whereas, in an inquisitorial system accused persons are:

> 'encouraged to offer evidence of their innocent to the police.[30]'

However, this is not the position reflected in Namibia and Chapter 3 debates this topic and its effects on defence disclosure at a greater length.

2.3.2. Presumption of innocence

Article 12(1)(d) of the Constitution provides that all accused persons shall be presumed until proven guilty. It is common cause that Article 12(1)(d) falls under the Bill of Rights, which cannot be derogated from in terms of Article 24(3). Therefore, the presumption of innocence shall operate at all material times in favour of the accused. This right and the effects of pre-trial defence disclosure are discussed in greater detail in Chapter 3 hereof.

2.3.3. Protection against self-incrimination

Article 12(1)(f) of the Constitution protects spouses from incriminating one another. The Article further prohibits the admission of evidence obtained in a manner that contravenes Article 8(2)(b), however, Dijkhorst[31] questions why this section cannot

[27] Dijkhorst, K. (2000) *The right of silence. Supra,* p2.
[28] (ibid.: 3).
[29] (ibid.: 8).
[30] (ibid.: 8).
[31] (ibid.: 2).

be extended to include the prohibition of evidence obtained in a manner that violates fundamental rights of the accused person?

To this end, Dijkhorst's[32] argument does carry a lot of weight as evidence obtained in a manner that contravenes this right would:

> 'render the trial unfair or otherwise be detrimental to the administration of justice.'

Therefore, limitation or abandonment of this right would have severe consequences on the effectiveness of the criminal justice system. In addition, this right against self-incrimination should not only apply to marriages but to all accused persons. This right and the effects of pre-trial defence disclosure on it, are discussed in Chapter 3 herein contained.

2.4. Disclosure and its roots in English and Roman-Dutch law and how they found their way into Statute

2.4.1. English law

Kuo and Taylor[33] noted that in terms of English law, disclosure developed through the common law and is even contained in the Judges Rules of 1931. Disclosure then developed into Statute by virtue of the Criminal Procedure and Investigations Act of 1996. The said Act was subsequently amended in 2004 by the Criminal Justice Act of 2004, which did not only implement stringent conditions with regards to disclosure by the State and police officers but the said Act also introduced reciprocal disclosure into English law. As a result, accused persons are now expected to deliver a statement stating forth the nature of their defence and the issues which are in dispute.

2.4.2. Roman-Dutch law

With regards to Roman-Dutch, disclosure developed through case law, starting with the case of *R v Steyn*[34] where the Court ruled that docket disclosure shall be prohibited until the conclusion of the criminal trial. The main reason for this was that disclosure was seen as a gateway for an accused person to fabricate a defence in light of the viewed docket.

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[32] (ibid.: 2).
[33] Kuo, S.S. & Taylor, C.W. (2006) *In Prosecutors We trust: UK lessons from Illinois disclosure.pdf.* Loyola University Chicago Law Journal, Vol. 38. p711.
[34] 1954 (1) AD 324.

However, the position on disclosure changed with the proposals made by Judge Hiemstra[35] in 1963. A commission led by Judge Botha in 1971 explored the suggestions made by Judge Hiemstra[36] and found that the proposal by Hiemstra were reasonable in requiring the accused person to disclose the basis of their defence in the event that they plead guilty and as such these recommendations were accepted and incorporated into sections 112 and 115 of the Criminal Procedure Act of 1977.

2.5. Conclusion

In 1977 the Criminal Procedure Act was promulgated in an attempt to afford the accused person a greater chance at a fair trial. The State was placed in a position where they had to disclose all relevant and irrelevant information to the accused, however, the case of *S v Angula & Others*[37] found that the State may refuse disclosure where:

> '…such disclosure of information might reasonably impede the ends of justice or otherwise be against public interest…'

Therefore, from the above mentioned it is clear to see the great shift in disclosure provisions. Prior to the Constitution of Namibia, disclosure was uncommon, however, after the 1990 Constitution, disclosure was constitutionally entrenched in the form of Article 12(1)(e).

Nonetheless, in 2004, disclosure then underwent an even greater change – the legislature introduced sections 112-115 of the Criminal Procedure Act No. 25 of 2004, which advocates for a comprehensive pre-trial defence disclosure. The next chapter will closely examine the provisions of pre-trial defence disclosure and its effect on the right to fair trial.

Chapter 3: Pre-trial defence disclosure and its effect on the right to fair trial

[35] Hiemstra, V.G. (1963) *Abolition of the Right not to be Questioned: A Practical Suggestion of Reform in Criminal Procedure* (1963) 80 SALJ 187 in Van Dijkhorst, K. (2000) *The right of silence. Supra*, p31.
[36] Van Dijkhorst, K. (2000) *The right of silence. Supra,* p43.
[37] 1996 NR 323 (E-H).

3.1. Introduction

This chapter discusses what the defence is expected to disclose in terms of section 114(2) of the Criminal Procedure Act, the arguments for pre-trial defence disclosure, the effects of such compliance on the various rights to fair trial as well as the consequence of non-compliance of section 114(2).

3.2. Pre-trial defence disclosure

The arguments advanced in this chapter are not geared towards defence disclosure but they are rather directed against the obligation of an accused to disclose same pre-trial. According to Van der Merwe et al[38]

> 'It is generally accepted that an accused is required to introduce his defence either during the course of cross-examination or by way of explanation of plea in terms of section 115 of the Criminal Procedure Act 51 of 1977.'

However, the Criminal Procedure Act is now seeking to alter this position by demanding that all accused persons disclose pre-trial. The contents of what is to be disclosed pre-trial is discussed below.

3.2.1. What is to be disclosed?

By virtue of section 114(1) of the Criminal Procedure Act, the State may, any stage before any evidence is lead, request the defence to disclose a written statement which must, in terms of section 114(2) set out the following:

1) a comprehensive description of the nature of the accused's defence;
2) the issues in dispute and their motivation;
3) a list of witnesses.

3.2.2. Arguments for pre-trial defence disclosure

3.2.2.1. Efficiency of the criminal justice system

One of the arguments for pre-trial defence disclosure is that it will result in the curtailment of criminal proceedings as only the issues in dispute will then be argued. Griffith[39] also illustrates this by stating that:

> 'The necessity for the prosecution to present lengthy evidence of matters which are not at issue between the parties would be avoided. This should reduce the duration and complexity of the trial

[38] Van der Merwe, S.E. et al. (year of publication unknown) 'Evidence 422; Schwikkard op cit 20' in Van Dijkhorst, K. (2000) The right of silence. Supra, p48.
[39] Griffith, G. (2000) Pre-Trial Pre-trial defence disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000. New-South Wales: NSW Parliamentary Library Research Service.

> proceedings and eliminate unnecessary inconvenience to witnesses whose evidence is not disputed. In addition, the risk of proceedings being terminated or interrupted because of unexpected developments would be reduced.[40]'

Therefore, pre-trial defence disclosure can reduce the length of a trial and result in only dealing with the issues which are in dispute and only calling witnesses, which are needed to support those claims, which consequently also reduces the costs of the State for witness fees etcetera. The costs of the defence in securing a legal representative (if not provided for by the State) will also be reduced as the number of court days will be lessened.

Conversely, pre-trial defence disclosure does not necessarily reduce the duration of the trial as the issues in dispute may be plentiful and multifaceted in nature. Ultimately, the purpose of the criminal justice system is not to curtail criminal proceedings but to ensure that a fair trial is observed throughout the proceedings and that accused persons are only convicted and sentenced once the Courts are satisfied that their guilt has been proven beyond a reasonable doubt by the State. Therefore, there is no harm in carrying out a lengthy proceeding if it is to the benefit both parties.

3.2.2.2. Contempt of Court

Van Dijkhorst[41] is of the opinion that an accused person's refusal to disclose the basis of their defence and their issues in dispute does not only result in unnecessary costs incurred but it is also tantamount to 'contempt of court' as the accused person is actually obstructing the course of justice.

On the other hand, there was been no other argument in support of this one, advanced by other authors and as such the view of Van Dijkhorst is once again biased as his arguments are fuelled by the frustrations he endures whilst the bench. The right to remain silent is a common law principle which cannot be derogated from as there is no duty of the accused to help the State prove its case.

3.2.2.3. Trial-by-ambush

[40] NSWLRC, Discussion paper on Criminal Procedure (1987) n 6 at para 5.10. in Griffith, G. (2000) Supra, p12.
[41] Van Dijkhorst, K. (2000) The right of silence. Supra, p52.

A trial-by-ambush can be said to have taken place where a party to the proceedings is caught off-guard or is unaware of certain facts or evidence in the possession of the opposing party, which is only made known or available to them at a certain point in time during the case of the opposing party, thus giving them insufficient time to investigate and/or challenge the authenticity of same. Griffth[42] suggests that by advocating for pre-trial defence disclosure the defence is prevented from:

> 'taking the prosecution by surprise at trial, leading evidence which the prosecution could not reasonably have anticipated and did not have any opportunity to investigate'.

Therefore, it is alleged that the State is now placed in a position where they are unacquainted with the information or evidence produced by the defence and are not afforded the opportunity to investigate it but surely this cannot be true. However, Griffith[43] contends that:

> 'it will only be infrequently that an experienced Crown prosecutor will be unaware of or be unable to anticipate a defence.'

Moreover, if the State sincerely believes that the information adduced might prejudice its case if no witness(es) is/are called to rebut the evidence or if they cannot investigate the evidence before it, the State is entitled to request the Court to adjourn the matter so as to enabling the State to investigate the evidence before it and call any witnesses to rebut the said evidence. Therefore, pre-trial defence disclosure at the close of the State's case does not necessarily imply that there is no solution.

In addition, the mere fact that charges were levied against the accused person and prosecution instituted indicated that the Prosecutor-General believed that a *prima facie* case existed against the accused person and therefore the State should be put to the proof thereof and not the defence. To this end, in the case of *R v P*[44] it was held that:

> 'it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task.'

Ultimately, it is not the duty of the defence to disclose and place the State is a (more) favourable position than they already are – they have all these resources

[42] Griffith, G. (2000) Supra, p13.
[43] (ibid.: 13).
[44] R v P (M.B.) (1994) 1 SCR 555 as quoted in Griffith, G. (2000) Supra, p16.

at their disposal to help them prove their case against the accused person(s) but yet they still need the accused person to disclose *inter alia* the basis of their defence?

By reading Article 12 of the Namibian Constitution, it is clear to see that the said Article was initially drafted for the protection and promotion of the accused person's rights during trial. Therefore, it can be argued that Article 12 was tailored for the accused person and not the State. 'Article 12 of the Constitution is clearly an effort to balance the situation as it will often lead to unfairness in the conduct of the trial. ' Supporting evidence for this is the fact that the State is always placed in a more powerful position than the defence is as Horn argues that they have a lot of resources at their disposal to litigate, for example the assistance of the police and the disclosure of the police docket.

Whereas, the defence is left at the mercy of the Directorate of Legal Aid, if he is not in a financial position to afford a lawyer, to grant him a legal representative if they so deem fit. Despite the provisions of Article 95(h) of the Constitution stating forth that the government shall provide free legal aid the last part of that provision should also be read 'with due regard to the resources of the State." Therefore if the Directorate of Legal Aid should decide, using their own criteria i.e. the complexity of the case, that this case does not require the funding of the Directorate then the accused person will be left to defend himself/herself in person.

If they are lucky, they will have competent legal representation, failing which they are left at the hands of the State. Having legal representation is a matter of luck as the allocation of legal representation to accused person is in accordance with the resources available to the State. In addition, not only does the accused person depend on State resources but the accused person will also be lucky if he/she finds a competent defence lawyer.

In conclusion, the argument that pre-trial defence disclosure will limit the occurrence of trials conducted by ambush is unfounded. Even in England, English research that the belief that non-disclosure by the accused would lead to a trial-by ambush was based on 1.5% to 10% of the cases,[45] which goes to show that this contention is not based on any concrete or compelling evidence. In

[45] Griffith, G. (2000) Supra, p13.

Namibia, after due consideration was paid to existing literature on the subject-matter, the concept of trial-by-ambush has also not been conclusive.

3.2.2.4. Truth quest

Authors such as Van Dijkhorst[46] contend that the primary function of a criminal trial is a quest for the truth.

> 'I fail to see how the full disclosure of the versions of both state and defence at the outset and the elimination of evidence on that which is common ground can be regarded as unfair. We are, after all, attempting to arrive at the truth, not to obfuscate it.'

Therefore, the author believes that requesting the defence to disclose pre-trial would not term the proceedings unfair as the main purpose is to discover the truth. Conversely, albeit Tanovich and Crocker[47] maintain that 'pre-trial defence disclosure will help facilitate the search for truth in criminal trials'…but they also concede that:

> 'the search for truth is not an absolute in a criminal trial and that it must sometimes yield to other values such as fairness.'

However, it is common cause that our Courts are not concerned with the truth; our Courts are concerned with what can be proved in Court by way of evidence and nothing else. Consequently, justifying the pre-trial defence disclosure with regards to the 'search for the truth' is unmerited as the truth does not carry more weight but rather the evidence adduced to prove the truth.

3.2.2.5. Fabrication of a defence/alibi

Horn[48] noted that the underlying motivation behind pre-trial defence disclosure, concurrent with the argument listed above, was express by the Office of the Prosecutor-General as being the following:

> '…the principle of state disclosure laid down in *Scholtz* and *Nassar* were unfair in that only one party in the adversarial system has to disclose its case, while the defence can wait for the docket. The opportunity to fabricate a defence, so the argument goes, has increased dramatically with the *Scholtz* and *Nassar* judgments…'

However, this is not the argument as there is no duty on the part of the defence to bring to light the nature of its defence and the list of witnesses, which it intends

[46] Van Dijkhorst, K. (1998) 'The Criminal justice system in jeopardy. Is the Constitution to blame?' p138 in South African Law Commission (2002) *Project 73, Fifth interim report. Supra,* p45.
[47] Tanovich, D.M. & Crocker, L. (1994) 'Dancing with Stinchcombe's ghost: a model proposal for reciprocal pre-trial defence disclosure.' Criminal Reports (4th) at n35 at p342 in Griffith, G. (2000) Supra. p16.
[48] Horn, N. (2008) 'Article 81 of the Namibian Constitution and the New Criminal Procedure Act 25 of 2004.' Supra, p52.

to call until the commencement of its case in view of a *prima facie* case. Furthermore, Article 12(1)(d) of the Namibian Constitution guarantees all accused persons the right to be presumed innocent until proven guilty and the Courts do not have pleasure in deciding when this right applies and when it does not – this right is entrenched in the Bill of Rights and thus cannot be derogated from.

Therefore, given the above-mentioned, one can categorically infer from the statement of the Prosecutor-General that the accused has something to hide or cover up and as such would want to fabricate a defence or alibi. This argument is antagonistic and discriminatory to all accused persons as it negates the presumption of innocence. An accused person shall remain to be presumed innocent by the Court until the State leads evidence to prove the contrary hence the allegation of fabrication of a defence, by the accused person, is no valid justification for pre-trial defence disclosure.

To this end, Van Dijkhorst[49] opines that in order to avoid fabrication of a defence or an alibi, the accused should be questioned by examining officer upon arrest and in the presence of his/her legal representative to ensure that the limits of the law are duly observed and the accused's rights are in no way infringed. The author further suggests that the accused must be compelled to answers all the questions put to him by the magistrate and that such:

> '…deposition must be audio-visually recorded and be admissible in court against him.'

Yet the argument still remains: there is no legal duty of the accused to waive their right to remain silent in support of the State's case. As already reiterated above, the burden of proof lies with the State and the accused may not assist the State with pre-trial defence disclosure.

3.3. Effect of compliance with section 114(1) on the rights to fair trial

Each and every argument against pre-trial defence disclosure sprouts out from the very fact that pre-trial defence disclosure violates an accused person's constitutional right to a fair trial in terms of Article 12 of the Constitution, which forms the foundation of the criminal justice system. The right to fair trial encompasses a number of rights, namely the right to silence, the right to be presumed innocent until proven guilty, the right to protection against self-incrimination and the unilateral duty of the State to

[49] Van Dijkhorst, K. (2000) The right of silence. Supra, p47.

prove its case beyond a reasonable doubt. The abovementioned duty and rights will now be discussed in detail in the section following below.

3.3.1. Effect on the right to remain silent

One of the most debated and precarious right in the perspective of criminal proceedings is the right to remain silent. The origin of this right can be traced as far back as common law and statute[50] as well as the English Judge's Rules of 1931.[51]

In South Africa, the right to remain silent is one which is expressly contained in section 35 of the Constitution, however, in the case of *Osman and another v Attorney-General*[52] the South African Court held that this right can be limited in 'appropriate cases.' The judge, however, failed to define what would be an 'appropriate case' to curtail this right. The Court then went on to list the immunities embodied in the right to remain silent. In sum, the Court held that an accused person enjoys general immunity from the use of pain (torture) to answer questions as well as protection against self-incrimination. The Court held further that an accused person also enjoys specific immunity from being forced to answer police questions or questions in the accused box.

Conversely, Van Dijkhorst[53] argues that:

> 'immunity from being questioned is a rule which from its nature can protect the guilty only.'

Van Dijkhorst strongly believes that if an accused person is innocence they will have no difficulty in disclosing:

> '…innocence claims the right of speaking as guilt invokes the privilege of silence.'

However, the mere fact that an accused person opts to remain silent does not mean that the accused is guilty. The drawing of such an inference would lead to a great miscarriage of justice, especially since it is a right upheld and protected by the law.

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[50] Van Dijkhorst, K. (2000) *The right of silence.* Supra. p2.

[51] *R v Kuzwayo* 1949 (3) SA 761 (A) 767 in Van Dijkhorst, K. (2000) *The right of silence: is the game worth the candle?* p3.

[52] 1998 (4) SA 1224 (C).

[53] Van Dijkhorst, K. (2000) '*The right to silence.'* Supra, p9.

However, Van Dijkhorst[54] is of the view that the right to silence is an impediment to 'providing factual evidence.' The author[55] opines that the debate about the right to remain silent is:

> 'clouded by emotional reliance on fairness but only towards the accused – fairness, in the context of criminal justice, is however not one-sided.'

In 1971, a commission[56] led by Judge Botha, based on the proposals made by Judge Hiemstra[57] that the Judges rules be done away with, found the suggestion impractical but recommended that the Judge's Rules be amended so as to motivate accused persons to speak at liberty. The Commission found further that under the adversarial system accused persons cannot be forced to disclose their defence and that the right to remain silent can only come under come scrutiny where the accused decides to remain silent even in the face of a prima facie case.[58] Accordingly, in the case of *S v Matsiepe* the Court found that:

> 'the State case is not strengthened by the accused's silence **unless** there is already a case calling for an answer…'

Therefore, it is not advisable for an accused to exercise his/her right to silent and not testify even in the face of overwhelming circumstances

3.3.2. Effect on the right to be presumed innocent until proven guilty

The presumption of innocence is one of the most fundamental rights on which the Namibian criminal justice system is based on[59]. Presumption of innocence is closely related to the right to remain silent as the accused person should not be compelled to disclose as he has a right to remain silent and that by exercising such right no inferences should be drawn as to his/her guilt as all accused persons have the right to be presumed innocent until proven guilty. Van Dijkhorst[60] argues that the right to be presumed innocent is a universal right in both adversarial systems of law as well as inquisitorial systems and that the presumption is there to:

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[54] (ibid.: 1).
[55] (Ibid.: 1).
[56] Report of the Commission of Inquiry into Criminal Procedure and Evidence [RP78/71] in Van Dijkhorst, K. (2000) *The Right of silence. Supra*, p32.
[57] Hiemstra, V.G. (1963) *Abolition of the Right not to be Questioned: A Practical Suggestion of Reform in Criminal Procedure* (1963) 80 SALJ 187 in Van Dijkhorst, K. (2000) *The right of silence. Supra*, p31.
[58] *Report of the Commission of Inquiry into Criminal Procedure and Evidence [RP78/71] #1.16* in Van Dijkhorst, K. (2000) The right of silence. Supra, p32.
[59] In the case of *S v Nassar* 1994 NR 233 (HC) the Court held that 'the point of department in criminal case was that the accused is presumed innocent until proven guilty.'
[60] Van Dijkorst, K. (2000) *The Right of silence. Supra*, p47.

> 'eliminate the risk of conviction based on factual error.[61]'

Dausab[62] opines that the onus of proving the guilt of the accused person rests on the State:

> 'The presumption of innocence places the onus on the State to prove beyond a reasonable doubt that the accused is guilty of the offence with which he/she is charged. This presumption is a rudimentary element of the adversarial system of administering the conduct of trials. It guides the manner in which the accused person should be treated without making assumptions about the guilt or innocence of the accused person.'

Therefore, in essence no assumptions should be made by the Court or by the State as to the guilt or innocence of the accused until there is overwhelming evidence to support this. But when exactly is a charge said to be proven beyond a reasonable doubt? Lansdown and Campbell[63] suggested that:

> 'what amounts to proof beyond a reasonable doubt is incapable of precision definition and absolute certainty such as is conceivable in the exact sciences is not to be expected in matters of fact. A high degree of probability in the mind of 'the ordinary reasonable man, on mature consideration,' which leaves no doubt to the reasonable, honest mind.'

Therefore, the Court should have no doubt in their mind as to the guilt of the accused. Griffith[64] stated that pre-trial defence disclosure is:

> 'inconsistent with the defendant's privilege against self-incrimination. It is also argued that compulsory defence pre-trial disclosure would be inconsistent with the presumption of innocence.'

In addition, the Report of the South African Commission of Inquiry into Criminal Procedure and Evidence[65] found further that:

> '...to place an accused person in a position in which it is expected of him either to show that he is innocent or to assist in proving the case against him, is in conflict with the long established and generally recognised concepts that the onus rests throughout upon the State and that an accused is at no stage compelled or placed under

[61] Van Dijkhorst, K. (2000) *The right of silence. Supra*, p1.
[62] Dausab, Y. (2008) *The disclosure provision in terms of sections 113, 114 and 115 of the Criminal Procedure Act 25 of 2004: their potential effect on the right to a fair trial,'* in Horn, N. & Schwikkard, P.J. (2008) '*A commentary on the Criminal Procedure Act 25 of 2004, Vol. I*.' p90-1.
[63] (Ibid.: 908).
[64] Griffith, G. (2000) Pre-trial defence disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000. New-South Wales: NSW Parliamentary Library Research Service. p15.
[65] Report of the Commission of Inquiry into Criminal Procedure and Evidence [RP78/71] in Van Dijkhorst, K. (2000) The right of silence. Supra the p32-33.

> pressure to incriminate himself or to reply to accusations of anonymous and unknown accusers with whom he is not confronted....'

Therefore, it is evident that the pre-trial defence disclosure provision is inconsistent with the established duty of the State to prove its case beyond reasonable doubt as well as the presumption of innocence.

3.3.3. Effect on the burden of proof

It is a trite principle of law that 'he who alleges must prove.' Accordingly, in all criminal trials the onus of proving the guilt of the accused person beyond a reasonable doubt is on the shoulders of the State at all material times. Therefore, it is not the duty of the accused person or his/her legal representative to lead evidence prior to the commencement of the defence's case so as to aid the State in proving its case.

> 'This duty is also termed the legal burden of proof or the risk on non-persuasion since the party who bears it must lose if he fails to persuade the Court that his allegation is the true one. It is not discharge if he can establish only that his allegation is more likely to be true than is the opponent's allegation, since this would not provide for the situation where the Court was unable to decide between the contradictory versions.[66]'

Therefore, the State should convince the Court that his/her version is the most plausible one and that the guilt of the accused person has been conclusively proven beyond a reasonable doubt. Conversely, if the State is unable to prove its face beyond a reasonable doubt, the Court will rule in favour of the accused and can acquit the accused person on the charges the State failed to prove irrefutably.

Dausab[67] contends that according to the principles of natural justice the accused person does have a 'responsibility to put his/her version of the case made against him/her. But this does not require the accused to provide an explanation when the State has not even properly put such case to the accused.'

Moreover, what has been stated in Chapter 3 hereof demands emphasis here: the mere fact that the State has levelled a charge(s) against the accused person indicates that the Prosecutor-General believed that a prima facie case existed against the accused person and accordingly instructed the prosecutor to litigate

[66] Landsdown, A.V. & Campbel.J. (1982) (ibid.: 908).

[67] Dausab, Y. (2008) *Supra*, p100.

in the name of the State; therefore, on this ground, the State should be put to the proof thereof and not the defence.

Van Dijkhorst[68] maintains that 'pre-trial defence disclosure is inconsistent with the principle of the burden of the State to prove the accused's guilty without assistance from the defendant and that it amounts to self-incrimination, which is inconsistent with the presumption of innocence.'

Given the above-mentioned it is clearly seen that pre-trial defence disclosure is irreconcilable with the presumption of innocence and the protection against self-incrimination and this is another reason why pre-trial defence disclosure should be repealed from the Criminal Procedure Act.

3.4. Consequence of non-compliance with section 114(1): Inferences

In Namibia, in terms of section 115(1) where an accused fails to give a written statement in terms of section 114(1) or delivers same after the expiry period or where an accused person sets out an inconsistent defence in the same statement or lastly, where the accused, at his or her trial, puts forward a defence that is different from any defence set out in the written statement given in terms of section 114(1) or (4), then the Court may in terms of section 114(2), before sentencing, draw inferences from such failure or defect, which are reasonable and justifiable. However, in terms of section 114(3) an accused may not be convicted of an offence solely on an inference drawn under sub-section (2).

Van Dijkhorst[69] firmly believes that the drawing of adverse inferences is justifiable in that the accused did not comply with the Court but only frustrated the court proceedings and as such should be subjected to punishment.

> 'In the light of the above, non-cooperation, in the absence of an acceptable explanation [not theoretical assumptions of potential explanations] will lead to the conclusion that he has no answer to the charge and is guilty. That is the inference of which he is at risk. Obviously, if there is no evidence that implicates him no finding can be made. But then there will not be a charge in the first place.'

But surely this cannot be the consequence of exercising a legal right to remain silent? The views advanced by Van Dijkhorst holds no water as the view expressed by Van Dijkhorst is one of a judge. And it is highly expected from a judge to make such a statement as the exercising of the right to silence by an

[68] NSWLRC's discussion paper *The Right to silence* n5 at para 4.62 in Van Dijkhorst, K. (2000) *The right to silence*.' *Supra*, p15.
[69] Van Dijkhorst, K. (2000) *The right to silence. Supra*, p53.

accused person can most probably frustrate a judge as they are left curious as to what the case of the defence would be. There is no moral justification for now fast-forwarding the duty of the defence to disclose pre-trial.

Accordingly, in the case of *Osman and Another v Attorney-General*[70] the Court held that the right to remain silent also encompasses the right to not having any negative inferences drawn from the accused's refusal to answer police questions or to testify at trial.

In addition, in the case of *Thebus v the State*[71], the Constitutional Court reversed the decision of the Constitutional Court in drawing a negative inference from the failure of the accused to disclose his alibi prior to the commence of his trial. The Court held that:

> 'once an arrested person has been informed of the right to remain silent and implicitly that she or he will not be penalised for exercising this right, it is unfair subsequently to use that silence to discredit the person.'

3.5. Conclusion

This chapter has irrefutably proven that pre-trial defence is unconstitutional as it goes against the rights to remain silent, the right to be presumed innocent until proven guilty and the settled duty of the State to prove its case against the accused person beyond reasonable doubt. The arguments listed in favour of defence disclosure surely cannot outweigh the fundamental rights of an accused person to fair trial.

[70] 1998 (4) SA 1224 (CC).
[71] Thebus v The State CCT36/02 in the media summary by the Constitutional Court of South Africa as published on http://www.saflii.org/za/cases/ZACC/2003/12media.pdf, p2.

Chapter 4: A comparative study on pre-trial defence disclosure: United Kingdom and South Africa

4.1. Introduction

This chapter considers what other jurisdictions such as South Africa and the United Kingdom have done and suggested in terms of defence disclosure. The motivation for the selection of these two countries is that prior to Namibia's independence, South African Roman-Dutch law and English law played a great role in the criminal justice system of Namibia. Furthermore, a great part of this chapter will purposely be spent on reflecting the English law position on pre-trial defence disclosure as it bears a striking resemblance to the proposed pre-trial defence disclosure provisions in the Criminal Procedure Act.

4.2. United Kingdom

4.2.1. Criminal procedure in the United Kingdom

The criminal justice system in the United Kingdom is by large inquisitorial, meaning that the judge is actively involved in the proceedings and the lawyers assume a passive role.[72] Reciprocal defence disclosure was introduced in the United Kingdom by virtue of section 5, which now requires that the defence should disclose the basis of their defence fourteen (14) days after the Crown presents primary disclosure but what exactly does this entail?

4.2.2. What is to be disclosed?

According to Kuo and Taylor,[73] in terms of section 3(1)(a) of CPIA 1996, the Crown is required to disclose not only information which the Crown intends to adduce in the proceedings against the accused person but also that material, which:

> '…in the prosecutor's opinion, might undermine the Crown's case. The test is a subjective one (based on the opinion of the prosecutor) but it covers a wide range of material to include anything which might weaken the prosecution case against the defendant.'

On this score, it is clear to see that the content of disclosure by the State is in terms of what may advance the defence case but also that which will undermine the Crown's case. No similar provision is made for in terms of the Criminal Procedure Act, therefore, in the case of a Namibian trial the accused person is not provided with information that may undermine the State's case. This is a

[72] Dijkhorst, K. (2000) *The right of silence. Supra*. p8.
[73] Kuo, S.S. & Taylor, C.W. (2006) *Supra*, p711-2.

lesson which Namibia can learn from the United Kingdom and similarly adopt in its legislation.

4.2.3. Objective test in Crown disclosure

Kuo and Taylor[74] suggest that the test to be applied here should be objective as oppose to the current subject test employed by the Crown, as it gives the Crown too much discretion. In an attempt to help the Crown the Attorney-General issued guidelines for the disclosure of 'unused materials,' which relates to evidence in support of the defence case.

4.2.4. Issues with attorney-general's guidelines for disclosure of 'unused materials'

According to Kuo and Taylor[75] the AG's guidelines introduced the term 'unused material' but failed to adequate define the term and as such has a broad interpretation, nonetheless:

> 'the courts continued to progressively expand the remit of the prosecution disclosure obligation. By 1989, the scope of "unused material," as defined in *R v. Saunders and Others No.1*[76], was broad in the extreme: it is clear the term 'unused material' may apply to virtually all material collected during the investigation of a case.'

Given the shortcomings of the Act, the Attorney-General was requested to re-draft the said guidelines but refused to do so and as a result 'the task of providing guidance for prosecutors and the police fell, instead, to the Director of Public Prosecutions. The result was the "Guinness Advice," issued in 1992, which instructed the police to catalogue all materials generated during an investigation, while leaving decisions regarding disclosure to the Crown Prosecution Service (CPS).

The above-mentioned poses a great threat to the right of an accused person to fair trial as the discretion to disclose is left in the hands of the Crown. Even though this is expected under an inquisitorial system[77] it does not mean that it is justifiable. The right to fair trial should be upheld in all types of criminal systems, not just adversarial systems of criminal justice.

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[74] (ibid.: 711-2).
[75] (ibid.: 711-12).
[76] [1996] 1 Cr App R 463.
[77] Dijkhorst, K. (2000) *The right to silence*. *Supra*. p8.

4.3. Development of pre-trial defence disclosure in the United Kingdom

As already noted in Chapter 2, disclosure developed in the United Kingdom by way of common law and by virtue of section 5 of the Criminal Procedure and Investigation Act 1996 (hereinafter referred to as CPIA 1996), as amended by the Criminal Justice Act of 2004, defence disclosure found its way into Statute in 2004. The said section now requires that the defence delivers a statement to the Crown within fourteen days after the State has made primary disclosure,[78] stating forth the nature of the defence and the issues in dispute and the reasons therefore.

4.4. Runciman Commission on trial efficiency

The Runciman Commission[79] found that reciprocal disclosure would result in a reduction in the length of the trial and possible withdrawal of cases by the Crown and as such would be beneficial to the accused person. The Commission also found that when both parties disclose to one another they are able to prepare their case more thoroughly and as such won't be caught by surprise.

Therefore, it is argued that pre-trial defence disclosure does not only result in well-prepared cases but 'it would also keep "ambush defences" to a minimum. In addition, the Commission argued that pre-trial defence disclosure may even result in the withdrawal of criminal cases by the Crown and may contribute to better trial management as early court dates may be allocated, which acknowledges the accused person's right to a trial within a reasonable time.

However, this wasn't always the position reflected in the United Kingdom. Pre-trial defence disclosure was introduced in 2004. Below follows an exposition on the law on pre-trial defence disclosure in the United Kingdom.

4.5. Consequences of non-disclosure by the accused: Inferences to be drawn by the Court

Van Dijkhorst[80] noted that in terms of English law, inferences may be drawn in four circumstances, namely: 1) where the accused withholds a fact from the police 'during

[78] NSWLRC: The Right to Silence, n5, para 4.37. in Griffith, G. (2000) Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000. p15.
[79] South African Law Commission. (2002) Project 73, Fifth interim report on simplification of criminal procedure, A more inquisitorial approach to criminal procedure - police questioning, pre-trial defence disclosure, the rule of judicial officers and judicial management of trials.pdf as published on www.isrcl.org/Papers/Schwikkard.pdf. p30, para 4.17 and para 4.18.
[80] Van Dijkhorst, K. (2000) 'The right to silence.' Supra, p10.

investigation which is relied upon at trial;' 2) where the accused fails to answer police questions relating to 'suspicious things found in his possession or at the place of his arrests or about remarks he made at such time;' 3) where the accused fails to explain his presence at the crime scene at the relevant time and 4) where the accused fails to 'testify where it would have been appropriate for an innocent person to do so.'

Therefore, if the accused fails to disclose in terms of section 5 of CPIA 1996, then in terms of sections 34-37 of the English Criminal Justice and Public Order Act 1994 inferences may be drawn. In addition, Griffith[81] added that even where an accused person:

> '…departs from the nature of his/her disclosed defence…the trial judge/prosecution (with the leave of the judge) may refer to this and invite the jury to draw appropriate inferences.'

However, in the last instance, what criterion is used in determining what would have been appropriate for an innocent person to testify on? The presumption of innocence denotes that all accused persons are to be presumed innocent until proven guilty, therefore, based on the aforesaid there can be no such thing as inferences to be drawn from questions which would have been 'appropriate' for an innocent person to testify on. The author also noted that incentives for compliance may also be introduced, resulting in:

> 'reduced penalties where offender has assisted the law enforcement authorities.'

However, the mere fact that an accused person opts to remain silent does not mean that the accused is guilty. The drawing of such an inference would lead to a great miscarriage of justice, especially since it is a right upheld and protected by the law. There can be no bargaining of rights to fair trial in exchange for Crown incentives.

Conversely, why is this not the case when the Crown fails to disclose? Even though the Court can compel the Crown to disclose the material, provided it is made aware of it, the Court and the jury should accordingly also draw inferences from the failure or refusal of the Crown to have disclosed same voluntarily to the defence. This is a lesson to be learnt for Namibia as well as provision to be incorporated in both CPIA 1996 and the Criminal Procedure Act.

[81] Griffith NSW Attorney General's Department, Discussion Paper on Reforms to the Criminal Justice System, May 1989, p 56. in Griffith, G. (2000) 'Pre-Trial defence disclosure.' Supra, p27.

4.6. Summary on UK provision

The United Kingdom introduced pre-trial defence disclosure into their system through the Criminal Justice Act of 2004, in terms of which all accused persons are required to make full disclose in terms of a) the nature of the defence b) the defence to be relied on and c) issues. The Act further provides for inferences to be drawn by the Court for the accused person's failure to mention certain facts. However, as the author has highlighted above, these inferences should also be drawn in instances where the State fails to or refuses to voluntarily disclose to the defence.

In addition, another flaw with the inferences permissible in terms of sections 34-37 of the English Criminal Justice and Public Order Act 1994 is that the said Act fails to define what 'appropriate inferences' can be drawn by the Court and the jury.

On the other hand, in pursuance of ensure fair trial, the English Attorney-General issued directives for State disclosure of 'unused material.' However, the greatest downfall of the guidelines of the Attorney-General was that it failed to concisely define the scope of 'unused material' and left it for the interpretation of the Courts.

It is for the aforementioned arguments that the reciprocal disclosure advocated for in the United Kingdom should have no place of reference in Namibia as they do not hold any water.

4.7. South Africa

4.7.1. Criminal procedure

In South Africa criminal proceedings begin with the State reading out the charge sheet, the accused pleading thereto in terms of section 112 or section 115, the State leading evidence to prove its case against the accused and then the accused presenting evidence, if a *prima facie* case has been established failing which an accused person can then apply for a section 174 discharge in terms of the Criminal Procedure Act of 1977. These in short, are the procedures applied in criminal proceedings in South Africa.

4.7.2. South African Law Commission

In August 2002 and in pursuance of section 7(1) of the South African Law Commission Act[82] the Chairperson of the South African Law Commission published Project 73: A fifth interim report on simplification of criminal

[82] No. 19 of 1973.

procedure. In this report the Commission considered the possibility of South Africa adopting a more inquisitorial approach to criminal procedure *inter alia* police questioning, pre-trial defence disclosure, the role of judicial officers and judicial management of trials.

The Commission considered proposals that pre-trial defence disclosure take place pre-trial '…by the time the accused has been indicted it must be assumed that the investigation is complete, and accordingly the only real purpose that is served by requiring pre-trial defence disclosure at that stage is to curtail the trial.[83]'

Moreover, in the Commission's opinion, the proposed provisions on pre-trial defence disclosure 'were not clearly unconstitutional and recommended to the Minister of Justice that the Criminal Procedure Act 1977 be amended to include provisions that bear a striking resemblance to those contained in ss 34, 35, 36 and 37 of the English Criminal Justice and Public Order Act 1994.[84]'

Consequently, pre-trial defence disclosure was introduced in South Africa as a potential provision in criminal trials but currently the Act[85] has not yet been amended and the position still remains the same as before in that only the State is required to disclose to the defence.

Relying on South African jurisprudence as advanced by Schwikkard in her article entitled '*Does the merging of inquisitorial and adversarial procedures impact on fair trial rights?'* it is argued that 'the introduction of more inquisitorial elements into South African criminal procedure is not a radical proposal as there are already a number of significant departures from the classic adversarial model.[86]'

4.7.3. Adversarial system – the burden of proof

Schwikkard maintains that 'the adversarial system is party-driven…The prosecutor must provide, independent of the accused, proof of any accusation made. The parties may determine the area of contest through pleadings and agreements over guilt. The key element of the trial is the emphasis on the spoken word - evidence is produced orally - and written statements of witnesses

[83] Schwikkard (ibid.: xxvi, para 12).
[84] (ibid.: 3 – 4).
[85] Criminal Procedure Act No. 51 of 1977.
[86] Schwikkard (ibid.: 3 – 4).

have little value…The basic assumption of the adversarial system is scepticism about trusting the State to produce the truth and protect the interests of the accused.[87]' It is clear to see that in South Africa, the onus of proving the State's case beyond a reasonable doubt is placed squarely on the shoulders of the State.

4.7.4. Negative inferences

Chapter 23A of the South African Criminal Procedure Act[88] provides for the Court to draw inferences from the accused person's silence and/or if the accused person omits to mention certain facts when questioned.

One might argue that the drawing of inferences does not adversely affect the case of the accused person, however, it is to be noted the drawing of inferences in most instances is to the detriment of the accused person as silence is often observed as guilt.

4.7.5. Summary on SA provision

The South African judiciary is contemplating on incorporating pre-trial defence disclosure, which of inquisitorial descent, into its adversarial criminal justice system. The South African Law Commission advised the Ministry of Justice to introduce provisions that resemble that of the UK. In the absence of disclosure by the defence, the Court is given discretion to draw inferences from the accused person's silence or omission of certain facts under questioning. At present, South Africa's Criminal Procedure Act has not been amended to include these provisions but it is suggested by Schwikkard that this 'is not a radical proposal as there are already a number of significant departures from the classic adversarial model.[89]'

4.8. Conclusion

It can be seen from above that both the South African criminal justice system and the English criminal justice system have both their advantages and disadvantages. Dijkhorst[90] opines that it is common for an adversarial system to place a lot of emphasis on the rights of accused persons to remain silent,

[87] South African Law Commission. (2002) Project 73, Fifth interim report on simplification of criminal procedure, A more inquisitorial approach to criminal procedure - police questioning, pre-trial defence disclosure, the rule of judicial officers *and judicial management of trials*. (2002) pdf as published on www.isrcl.org/Papers/Schwikkard.pdf, p10, para 2.11.
[88] No. 51 of 1977.
[89] Schwikkard (ibid.: 3 – 4).
[90] Dijkhorst, K. (2000) *The Right to silence*. Supra, p8.

whereas, under inquisitorial systems of criminal justice, accused persons are encouraged to ‘speak their innocence.’

Chapter 5: Conclusion & Recommendations

5.1. Introduction

This Chapter seeks to succinctly summarise the arguments set forth in this dissertation. The *modus operandi* in this chapter will be that of introducing each research questions, the conclusions on the debate relating to the research question, followed by a recommendation by the writer hereof.

5.2. Are sections 114 and 115 of the Criminal Procedure Act constitutionally sound?

Firstly, as Chapter 3 hereof has conclusively proven, section 114 and 115 of the Criminal Procedure Act are not constitutionally sound as they do not promote the right to fair trial.

To this end, it is the recommendation that the Supreme Court declare this provision as unconstitutional by virtue of Article 79(2) of the Constitution. On the issue of constitutionality, Parliament is also advised to make express provision in the Constitution for the right to remain silent and the protection against self-incrimination in criminal trials (not only spousal protection but a general protection) in Chapter 3 of the Bill of Rights of the Namibian Constitution as is the case in South Africa[91].

5.3. Effects of pre-trial defence disclosure on the rights to fair trial

Secondly, on the issue of the effects of pre-trial defence disclosure on the rights to fair trial, it has been irrefutably proven by the writer of this paper that the effects on fair trial are severe adverse. Pre-trial defence disclosure violates an accused person's right to fair trial and to be presumed innocent until proven guilty. Furthermore, as Chapter 3 has shown, pre-trial defence disclosure tends to result in the accused person assisting the State in proving its case against the accused person.

For this reason, it is recommended that section 114 be declared null and void and be repealed by Parliament with immediate effect as it places the rights to fair trial in jeopardy.

[91] South Africa includes these two rights in section 35 of the 1994 Constitution.

5.4. Legal ramifications of non-compliance with section 114(1)

Thirdly, the legal ramifications for non-compliance as found in section 115(2) of the Criminal Procedure Act found that inferences are to be drawn by the Court from the refusal of the accused person to disclose or from a defect in the defence statement. The arguments advanced by the writer hereof show that there is no justification for adverse inferences to be drawn.

Consequently, it is the recommendation on the writer hereof that a section be incorporated into the Criminal Procedure Act that provides for appropriate inferences to be drawn in the event that the State fails to or refuses to comply with section 113 of the Criminal Procedure Act.

5.5. Comparative study

Fourthly, the comparative study showed that even though English law has incorporated the provisions in CPIA 1996, they have failed to promote the right to fair trial as CPIA 1996 demands the accused person to waive their right to silence and 'co-operate' with the administrative officials. The CPIA 1996 only provides for the drawing of 'appropriate inferences' in the event that the defence fails to or refuses to comply with section 5 of the CPIA.

Schwikkard[92] noted that the South African Law Commission found that the proposed provisions on disclose:

> 'were not clearly unconstitutional.'

But how can this argument hold any water, when pre-trial defence disclosure violates the right to silence, the protection against self-incrimination and the right to be presumed innocent until proven guilty? The Legislature failed to constitutionally justify themselves in the rationale behind pre-trial defence disclosure and that sections 113, 114 and 115 should be accordingly repealed and struck as unconstitutional.

In addition, Namibia is a signatory to the European Convention on Freedoms and Rights, which promotes and guarantees the right to fair trial through Article 6. This is a Convention is a binding international agreement under Article 144 of the Namibian Constitution, which Parliament assented to.

[92] South African Law Commission. (2002) Project 73, Fifth interim report on simplification of criminal procedure, A more inquisitorial approach to criminal procedure - police questioning, pre-trial defence disclosure, the rule of judicial officers and judicial management of trials. (2002) pdf as published on www.isrcl.org/Papers/Schwikkard.pdf, p3-4.

Therefore, the implementation of sections 113-115 of the Criminal Procedure Act of 2004 will not only contravene the Namibian Constitution but in the same vein, it will also violate the international agreement i.e. the European Convention on Freedoms and Rights.

5.6. Conclusion

Pre-trial defence disclosure in Namibia is a relatively new and un-established concept in terms of our criminal justice system. Our criminal justice system is premised on the adversarial approach to criminal trials, of which no provision is made for pre-trial defence disclosure.

Given the above-mentioned, it is clear that the effect of non-disclosure by the State is that the accused person is denied his/her constitutional right in terms of Article 12(1)(d) to cross-examine witnesses called against him/her and to essentially test the evidence adduced by the State. The denial of this constitutional right by the provisions of the Criminal Procedure Act of 2004 cannot be derogated from or suspended, as it forms part of the rights encompassed in Article 23(3) of the Constitution, which cannot be derogated from.

Horn postulates that 'this kind of disclosure is unknown in other countries where pre-trial defence disclosure forms part of their criminal procedure. It goes against both the common law and the constitutional protection of the right to remain silent.[93]' 'The accused is not only protected by the Constitution. Her right to remain silent and her right not to disclose her defence, are both common law rights.[94]' Accordingly 'it goes against both the common law and the constitutional protection of the right to remain silent.[95]'

In conclusion, 's114 contradicts old principles of fairness and justice…s114 puts pressure on the accused to reveal not only its defence but also significant facts of the case of the State.[96]' As already stated above, the onus of proving the case against the accused person rests squarely on the shoulders of the State,

[93] Horn, N. (2008) *Art. 81 of the Namibian Constitution and the New Criminal Procedure Act, 25 of 2004. Supra.* p53.

[94] (ibid.: 52).
[95] (ibid.: 53).

[96] (ibid. 54).

for this reason the accused person should not be employed to help alleviate the State of its task.

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