

**The Impact of Courtroom Demeanour and Non-verbal Communication on the
Verdict**

By

Kanagie Naidoo

Student number: 200906150

Submitted in accordance with the requirements for the

Doctor of Laws (LLD)

In the Department of Law

Faculty of Commerce, Administration and Law

University of Zululand

Supervisor: Prof D Iyer

January 2018

ACKNOWLEDGMENTS

My heartfelt gratitude and appreciation goes to the following:

My creator for giving me the strength to complete the research.

My parents who made sacrifices to give me the opportunities to get a good education.

My loving husband, Nelen, and my daughter Kerishva, for their committed support, understanding and sacrifice.

My supervisor, Prof D Iyer, for his guidance, patience and support.

My peers, and my friends, Tholaine Matadi and Lizel Calvino, who motivated me to complete my research despite challenges along the way.

DEDICATION

This thesis is dedicated to my loving parents, who, by their mere presence made me believe that I can succeed at anything I tried.

To my late Mother, Thank you Ma for giving me the courage to be the best I can be.

DECLARATION

I, KANAGIE NAIDOO, declare that the work presented in this thesis has not been submitted before any degree or examination and that the sources I have used or quoted have been acknowledged as complete references. It is in this regard that I declare that this work is originally mine.

It is hereby presented as the complete fulfilment of the requirements for the award of the Doctor in Laws Degree.

Signature: _____

Date: _____

Contents

ACKNOWLEDGMENTS and DEDICATION	1
DECLARATION	2
SUMMARY	7
OPSOMMING	9
1. CHAPTER 1- BACKGROUND AND RESEARCH PROBLEM	11
1.1 Introduction	11
1.2 Background	12
1.3 Problem Statement and Research Questions	15
1.4 Aims of the Study	16
1.5 Rationale of the Study	16
1.6 Significance of the Study	18
1.7 Research Methodology	18
1.7.1 The Qualitative Research Methodology	20
1.7.2 Quantitative Research Methodology	25
1.7.3 Mixed Methods Research	27
1.7.4 Reliability and Validity	29
1.7.5 Qualitative Data Collection	30
1.8 Conclusion	31
1.9 Definitions of Terms and Key Words	32
2. CHAPTER 2 - THEORETICAL BACKGROUND	36
2.1 Introduction	36
2.2 Legal Realism	41
2.3 The Foundations and Tenets of Legal Realism	43
2.4 The Courtroom Interaction	52
2.5 Conclusion	58
3. CHAPTER 3 – NON-VERBAL COMMUNICATION	60
3.1 Introduction	60
3.2 Categories of Non-verbal Communication	64
3.2.1 Kinesics	65
3.2.2 Paralinguistic Communication	68
3.2.3 Gaze and Eye Contact	69
3.2.4 Proxemics	70
3.3 Approaches to Non-verbal Communication	71
3.3.1 The Functional Approach	71

3.3.2	The Ethological Approach	72
3.3.3	The Body Language Approach	72
3.4	The Importance of Non-verbal Communication in the Courtroom	73
3.4.2	The Impact of the non-verbal behaviour of the attorney on the outcome of the trial	82
3.4.3	The impact of the non-verbal behaviour of the witness on the outcome	88
3.4.4	The impact of the non-verbal behaviour of the presiding officer on the outcome	91
4.	CHAPTER 4 – Demeanour in the Courtroom	96
4.1	Introduction	96
4.2	The Relevance of Demeanour in the Trial Process	99
4.3	Demeanour and its Impact on the Credibility of the Witness	102
4.4	The Impact of the Accused's /Accused's Demeanour	105
4.4.1	Cases Involving Jurors	106
4.4.2	South African Cases	111
4.4.3	Cases Relating to the Demeanour of the Presiding Officer	126
4.5	Conclusion	129
5.	CHAPTER 5 – RESEARCH METHODOLOGY	132
5.1	Introduction	132
5.2	Research Methodology	132
5.2.1	Qualitative Methodology	133
5.2.2	Quantitative Methodology	135
5.3	Research Paradigm	136
5.3.1	Positivism	137
5.3.2	Post-positivism	141
5.3.3	Interpretivism	143
5.3.4	Realism	149
5.4	Research Design	151
5.4.1	Case Study Research	151
5.4.2	Ethnography	152
5.4.3	Narrative Biography	152
5.4.4	Phenomenology	152
5.4.5	Grounded Theory	153
5.5	Research Process	155
5.6	The Literature Review	156
5.7	Non-empirical Research	156

5.8	Specific Design of Mixed-Methods Research	157
5.9	Reliability and Validity	158
5.9.1	Reliability	159
5.9.2	Validity	160
5.10	Selection of Participants	161
5.11	Interviews	164
5.11.1	Advantages of In-depth Interviews	167
5.12	Data Analysis	169
5.12.1	Analysis of the Qualitative Data	170
5.12.2	Analysis of Quantitative Data	171
5.13	Ethical Considerations	172
5.14	Conclusion	173
6.	CHAPTER 6 - DATA ANALYSIS, FINDINGS AND EVALUATION	175
6.1	Introduction	175
6.2	A Brief Description of the Participants	176
6.3	Common Themes	179
6.3.1	Credibility	179
6.3.2	Reliability	179
6.3.3	Trustworthiness	179
6.3.4	Honesty	179
6.3.5	Demeanour	179
6.3.6	Totality of Evidence	179
6.3.7	Cultural Differences	179
6.3.8	Non-verbal Communication	179
6.3.9	Training Required	179
6.4	Results and Findings	180
6.5	Findings from the Interview Stage	181
6.6	Analysis of the Participants' Interviews	183
6.7	Evaluation of Participants' Responses Arising Out of the Interview Process	185
6.7.1	Credibility	185
6.7.2	Demeanour	186
6.7.3	Totality of Evidence	187
6.7.4	Cultural Differences	187
6.7.5	Non-verbal Testimony/Communication	188
6.7.6	Training Required	190
6.9	Reliability of the Coding Process	191

6.10	Findings from the Literature Review	191
6.11	Concluding Remarks In Respect of the Literature Review and the Qualitative Data Analysis	193
6.12	Evaluation of the Study	195
6.12.1	Strengths of the Study	195
6.12.2	Limitations of the study	197
6.12.3	Suggestions for Future Research	198
6.12.4	Conclusion	198
7.	CHAPTER 7 – CONCLUSIONS AND RECOMMENDATIONS	199
7.1	Introduction	199
7.2	The Research Questions	199
7.3	Recommendations	203
7.4	Final Conclusion	206
	REFERENCES	207

Table of Figures

Figure A:	shows the themes that were identified during the analysis of the responses as contained in the transcripts.	180
Figure B:	shows the outcome of the participants' interviews and their views on what should be given priority in a trial	184
Figure C:	shows factors that determine the credibility of a witness	185
Figure D:	This pie graph shows the percentage of agreement amongst the participants as factors that were conducive to a proper and fair trial.	190

Table of Annexures

ANNEXURE A	229
ANNEXURE B	230
ANNEXURE C	234
ANNEXURE D	236
ANNEXURE E	237
ANNEXURE F	289

SUMMARY

Over the years concern has been growing about justice being done in South Africa. Society's faith in the justice system is not as strong as it was before and matters are being taken on appeal all too frequently. In addition to this, the professional body for legal practitioners¹ (The Law Society of South Africa or LSSA) is concerned that law graduates do not have all the attributes necessary for the profession. The LSSA is also concerned that the legal qualification (Bachelor of Laws or LLB) at most institutions focuses only on the "knowledge of the law" and not on the development of skills or abilities that will help graduates cope in the working world of the profession.

The law profession in South Africa has evolved to the point that it is no longer simply about the implementation of law. The Constitution² has brought with it the requirement of due process, the right to a fair trial and the right to confront an accuser. These developments in the law call for further development in the skills of those who practice the law. Changes in the judiciary and the legal profession in general have brought with them the need for a review of how litigation and adjudication take place.

This study focuses on key areas of communication in the trial process, namely demeanour and non-verbal communication. Neither of these areas have enjoyed the benefit of substantial theory building by scholars. The ability to correctly deal with evidence is a core competency for any presiding officer and legal practitioner as it impacts on the right to a fair trial. The Constitution has also emphasised the requirement that "justice must be seen to be done" and there appears to be a weakness in the system in this regard.

This study focuses on evidence of demeanour and non-verbal behaviour/communication in the courtroom and how they impact on the outcome of trial. In as much as these concepts feature rather often in judgements there is a limited amount of literature to refer to for guidance on how to deal with demeanour and non-verbal behaviour during a trial. The aim of this study is to accentuate the fact that demeanour and non-verbal behaviour/communication do indeed impact on the outcome of the trial and that presiding

¹ Law Society of South Africa (LSSA) Press Release on the findings of the LLB Curriculum Research as presented by the Council on Higher Education (CHE) at a colloquium on 11 November 2010.

² Constitution of the Republic of South Africa, Act 108 of 1996.

officers, to some extent, lack adequate training and skill to effectively evaluate this type of evidence. The proper evaluation of evidence is central to a fair trial and justice.

This study sets out the various approaches to: non-verbal communication within the social context of the courtroom, how the non-verbal behaviour of role players in a trial is dealt with, and how evidence of demeanour is dealt with when evaluating evidence. The gradual, but slow, growing body of knowledge in this regard illustrates what an integral part of the communication process of non-verbal communication really is.

The qualitative approach adopted by this study (where presiding officers were interviewed) expanded the researcher's understanding of how presiding officers deal with non-verbal communication/behaviour and demeanour when evaluating evidence. The responses from the in-depth interviews were mechanically recorded and this afforded the researcher the opportunity to gain insight into the perspectives of the presiding officers. The analysis of the responses led to the emergence of themes that were then formulated in a theoretical experience.

When questioned about whether they had received sufficient training in how to deal with evidence of demeanour and non-verbal communication/behaviour all the participants in this study expressed a need for training in this regard.

The study revealed that legal realism coupled with a functional approach to dealing with non-verbal communication and demeanour in the courtroom will improve the quality of judgements and add value to the work of presiding officers. The formulation of guidelines on how to better deal with evidence of demeanour and non-verbal communication/behaviour will take the judiciary and the legal profession closer to ensuring that "justice is seen to be done".

OPSOMMING

Oor die jare is daar groeiende bekommernis oor die vlak van geregtigheid in Suid-Afrika. Die samelewing se vertroue in die regstelsel het verswak en op meer gereelde grondslag word daar geappelleer teen hofuitsprake. Boonop is die professionele raad vir regspraktisyns (The Law Society of South Africa of LSSA), besorg dat graduandi in regte nie oor al die eienskappe van kwaliteit, vaardigheid en kennis beskik soos vereis vir die regsberoep nie. Daar bestaan kommer dat voorbereiding vir regskwalifikasies (LLB), by die meeste instellings, slegs op die "kennis van die wet " steun en nie die vaardighede en vermoëns, soos vereis deur die professie aanspreek en ontwikkel nie.

Die regsprofessie in Suid-Afrika is tans sodanig ontwikkel dat dit nie meer eenvoudig gaan oor die toepassing van die "Wet" nie. In die Grondwet is die vereistes van behoorlike proses; die reg op 'n regverdige verhoor; en die reg om die aanklaer te konfronteer, ingesluit. Hierdie ontwikkelinge in die reg noodsaak meer vaardighede van regstoepassers. Die veranderinge in die regbank en die regsprofessie in die algemeen, het die behoefte gebring vir die hersiening van die proses van litigasie en beoordeling.

Die primêre fokus van hierdie studie is op kommunikasie tydens die regsproses, en meer spesifiek op 'n analise van die impak van gedrag en nie-verbale kommunikasie. Gedrag en nie-verbale kommunikasie is 'n nuwe studieveld en baie min wetenskaplike analise, en daarom ook baie min teoretiese onderbou, bestaan oor die belangrike veranderlikes. Die vermoë om bewyse korrek te hanteer is 'n kernnoodsaaklikheid van enige voorsittende beampte en regspraktisyn, aangesien dit die reg op 'n regverdige verhoor beïnvloed. Die Grondwet het ook die vereiste beklemtoon dat "geregtigheid gedoen moet word", alhoewel daar blyk 'n swaakteit in dié verband te wees.

Hierdie studie fokus op 'n analise van gedrag en nie-verbale gedrag / kommunikasie in die hofsaal en hoe dit die uitslag van die verhoor beïnvloed. Alhoewel die begrippe gedrag en nie-verbale kommunikasie gereeld in beoordelings geïdentifiseer word, is daar 'n uiters beperkte hoeveelheid literatuur oor die onderwerpe en geen riglyne oor die bestuur van gedrag en nie-verbale kommunikasie tydens 'n verhoor nie.

Die doel van hierdie studie is om te bewys en te beklemtoon dat gedrag en nie-verbale gedrag / kommunikasie inderdaad 'n uitwerking uitoefen op die uitslag van die verhoor en dat voorsittende beamptes, tot 'n sekere mate, nie genoegsame opleiding ontvang en nie oor die vaardighede beskik om hierdie tipe bewyse effektief te evalueer nie. Die behoorlike evaluering van bewyse is egter per definisie sentraal tot 'n regverdige verhoor en geregtigheid.

Hierdie studie ontleed verskeie benaderings tot die impak van kommunikasie: nie-verbale kommunikasie in die sosiale konteks van die hofsaal; die hantering van nie-verbale gedrag van die rolspelers gedurende die hofsaak; en ook hoe gedrag analiseer word tydens die evaluering van bewyse. Die stadig groeiende kennis oor die studieveld illustreer dat nie-verbale kommunikasie en gedrag 'n integrale deel is van die kommunikasieproses in die hofsaal.

Die kwalitatiewe benadering toegepas in hierdie studie (deur onderhoude met voorsittende beamptes) het die navorser se begrip van hoe die voorsittende beamptes met nie-verbale kommunikasie en gedrag omgaan tydens evaluering van bewyse, verbreed. Die antwoorde van die indiepte onderhoude is elektronies opgeneem en dit het die geleentheid gebied om insig te verkry in die perspektiewe van die voorsittende beamptes. Wanneer daar byvoorbeeld gevra is oor opleiding en oor die hantering van bewyse van gedrag en nie-verbale kommunikasie, het al die respondente 'n behoefte aan opleiding aangedui. Die ontleding van die antwoorde het gelei tot die ontwikkeling van temas, wat uiteindelik verwerk en verfyn is in verskillende teoretiese ervarings.

Die studie bevind dat regsrealisme gekombineer met 'n funksionele benadering tot die hantering van nie-verbale kommunikasie en gedrag in die hofsaal, die gehalte van oordele sal verbeter en waarde sal toevoeg. Die formulering van riglyne oor die hantering van bewyse van gedrag en nie-verbale kommunikasie, sal die regbank en die regsberoep ondersteun in die strewe dat "geregtigheid gedoen moet word".

CHAPTER 1- BACKGROUND AND RESEARCH PROBLEM

1.1 Introduction

“All the world’s a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts,
His acts being seven ages.”³

South Africa is often referred to as the “rainbow nation” because of the cultural, linguistic, religious, and ethnic diversity of its people. Like other modern societies, South Africa also experiences miscommunication problems which can occur amongst individuals on various levels, such as linguistic and non-verbal behaviour.

Ellis and Beattie⁴ state that “The same message may be communicated in more than one way. Humans have undoubtedly developed the art of communication further than any other species if only in the number of different channels of communication employed. Facial expressions, gestures, eye contact, clothing, speech and non-verbal sounds like laughter and sighs are just some of the channels which can communicate information between people.”

The South African courts also experience the same challenges as general society does, especially given the diversity in culture, ethnicity, language preference, socio-economic status, and dialect of the individuals who participate in court proceedings. The Constitution⁵ places a duty on the courts to acknowledge and respect the diversity of the people of South Africa, especially in relation to religion, culture, socio-economic status, and language. The Bill of Rights, as entrenched in the Constitution,⁶ guarantees all citizens certain rights, and the rights to equality⁷ and a fair trial⁸ are particularly important. The existence of these rights means that it is important for courts to accept and

³ Shakespeare W. 1963. As you like it, in *The Hagerstrom of William Shakespeare Gathered into One Volume* 611, 622 (Sir Paul Harvey ed., Oxford university Press 1938).

⁴ Ellis, A and Beattie, G, 1986. *The Psychology of Language and Communication*. London: Weidenfield and Nicolsen. 6.

⁵ Constitution of the Republic of South Africa, Act 108 of 1996.

⁶ Act 108 of 1996

⁷ Section 9 of Act 108 of 1996. This section also states that no one should be discriminated against on the grounds of race, colour, ethnic or social origin, sex, religion or language.

⁸ Section 35(3) of Act 108 of 1996.

understand the different ways in which parties to proceedings communicate, both verbally and non-verbally, during proceedings. Principles relating to non-verbal communication can be different amongst different social groups.

One of the primary objectives of this study is to explore the impact of the non-verbal communication and demeanour of different role players on the outcome of court proceedings in South African courts. Another primary objective of this study is to explore whether the different role players are equipped with the necessary skills to deal with the non-verbal communication and demeanour aspects of evidence whilst ensuring that justice is seen to be done.

1.2 Background

Over the years South Africa has developed an elaborate system of courtroom procedures and evidentiary rules. A criminal trial is much more than a collective process of evidentiary parts. The trial entails the evaluation of the evidence that is deliberately presented during the trial as well as the evidence that emanates from the manner in which the witness testifies. The latter can be in the form of non-testimonial/non-verbal evidence as well as the demeanour of the witness while testifying. Demeanour is defined as the witness's behaviour, manner of testifying, personality and the general impression that the witness creates during his/her testimony.⁹ The fundamental question facing our criminal justice system today is what we want a criminal courtroom to be.

The courtroom has been described as a theatre in which various courtroom actors play out the guilt or innocence of an accused person/accused for the trier/arbitrator of the fact to assess.¹⁰

In the South African courtroom and criminal justice system the key role players or actors in a trial are the presiding officers, the prosecutor, and the accused person/accused, the legal representative of the accused person, the witnesses and to a certain extent the

⁹ Bellengere A., Palmer R., Theophilopoulos C., Whithcher B., Roberts L., Melville N., Picarra E., Illsley T., Nkutha M., Naude' B., Van der Merwe A & Reddy S. 2014. The law of evidence in South Africa: basic principles. Oxford University Press, Cape Town, Southern Africa. Ch 5. p. 29. Concept will be dealt with in greater detail in Chapter 4 of this thesis.

¹⁰ Murphy P.W. 2002. "There's No Business Like...?" *Some Thoughts on the Ethics of Acting in the Courtroom*, 44 S. Texas Law. Rev. 111.

interpreter/language facilitator.¹¹ In the American courtroom, on the other hand, there are also the jurors who are key role players in the trial.

In the well-publicised criminal trial of 1995, *People v Simpson*,¹² the famous sportsman, O. J. Simpson was tried for murder by the Supreme Court in the Los Angeles County of California. This case received widespread publicity due to the manner in which the role players carried themselves during the trial. Fiedler, in his article “Acting Effectively in court: Using Dramatic Techniques”¹³, remarked that jurors often view the courtroom as theatre. Fiedler quoted one of the jurors in the O. J. Simpson trial as saying

“The whole thing with those closing argument was I felt it was all a script. I hated it because at that point you’re supposed to be tying in all the evidence and tying in everything. So you’re sitting there and trying to just focus on the issues and here they are, Marcia Clark, the woe-is-me...trying to get the tear thing. And Jonnie Cochran is going on about proverbs and this, that, and the other, and the hat routine and “if it doesn’t fit, you must acquit”.”

Bennett and Feldman¹⁴ maintain that formal court rules are rituals that facilitate the presentation of a case but do not dictate its interpretation. While the formal procedures limit the information perceived as relevant to a story, within the range of admissible information, the actual presentation and the interpretation of the cases depends primarily on the storytelling and story hearing abilities of the courtroom actors (judge, jurors, defence, prosecutor and witnesses).

In contrast with the views that the courtroom is a theatre is the view that the courtroom is a controlled laboratory in which the science of law is performed, whereby the parties present evidence, the judge supervises for quality control and, as it happens in an American trial, the jurors give the results of the experiment. The trial is simply a sum of the parties’ formal evidence in which neither the utterances of the representatives nor the mannerisms of the accused or the witnesses called by either party affect the outcome of the case. In reality however, this laboratory scenario does not exist because the outcome

¹¹ Ritchie K. 2006. *Reporting the Courts: A Handbook for South African Journalists*. Pinetown Publishers (Pty) Ltd.

¹² *The People of the State of California v Orenthal James Simpson* [1995] BA097211 78, p.12395.

¹³ Fiedler D. 2001. *Acting Effectively in Court: Using Dramatic Techniques*. B25 *Champion Magazine*. 18 (July 2001)

¹⁴ Bennet W.L., and Feldman M.S. 1981. *Reconstructing Reality in the Courtroom – Justice and Judgment in American Culture*. Rutgers University Press – USA.

of the trial is inevitably influenced by many factors, such as the appearance and reaction of the accused person as well as the witnesses in the courtroom, which technically do not amount to evidence.

Quite often presiding officers find themselves in a position where they have to decode and analyse the non-verbal communication of the accused person and the witnesses. In order to do this and still deliver justice the courts have to understand and accept that we communicate even before we make any audible utterances. This is done through body movements, facial expressions, the style and colour of attire, posture, tone of voice and manner of speech, the form of eyewitness testimony, exhibits and stipulations.

A correct interpretation of these non-verbal communications is essential for the court to reach a finding that is legally and factually correct. While an accused sits in court exercising his/her right to be present during the trial and to confront the witnesses who testify against him, the accused is on display for the court and the assessors. Assessors sometimes assist the presiding officers in the Regional Court and High Court (especially in high profile matters), where appropriate in South African courts, and the jury in American trials.¹⁵

Traditionally, it is thought that the decision arrived at by the court is based on the actual evidence physically presented in court either by way of *viva voce* evidence, documentary evidence, real evidence, pleadings and arguments presented by the parties. During opening statements and closing arguments the parties generally impress upon the presiding officers to focus on the evidence that has been presented during the trial. In effect, the court is being asked to base its findings on what it hears during the *viva voce* evidence and what it reads in the documentary/written evidence. However, it cannot be disputed that courtroom demeanour has an impact on the decision of the presiding officer and the jury.

The development and formalisation of guidelines and the nexus between demeanour, non-verbal communication and verbal communication and its impact on the verdict have been ignored and neglected amongst lawyers and law makers. The literature relating to the impact of non-verbal communication and demeanour as evidence in the South African context is very limited. There are very few reported studies revolving around the

¹⁵ Thornton H. 1995. Hung Jury: The Diary of the Menendez Juror. 47.

probative effect/impact of non-verbal communication and demeanour on the verdict in South African courts. As will become apparent in the chapter that follows, in the United States there is quite a bit of literature on non-verbal communication and demeanour in the courtroom.

1.3 Problem Statement and Research Questions

The study was initiated by the researcher's interest in the evaluation of evidence, especially non-testimonial evidence in the form of non-verbal behaviour and the demeanour of those who testify and role players in trial proceedings. Neither tertiary institutions nor training facilities for presiding officers, prosecutors and attorneys in South Africa offer any kind of formal training on demeanour and non-verbal communication to be taken into account as factors when arriving at a verdict or as a component in the communication process. Nor have these institutions undertaken any kind of study of the effects of these factors. The lack of education and research makes the interpretation of non-verbal communication a very subjective and uncontrolled exercise.¹⁶

The lack of formal training has given rise to a lack of knowledge and ability to properly understand and appreciate the impact of non-verbal communication/non-testimonial evidence on the verdict. It also means that the evaluation of non-verbal behaviour and demeanour as evidence is inconsistent. What the criminal justice system needs now is a sincere look at the dynamics of criminal trials so that the courts can make a conscious decision as to how much extra judicial information triers/adjudicators of fact should be allowed to take into account.

During the course of this study the researcher will endeavour to answer the following questions:

- Do presiding officers consciously or unconsciously consider the non-verbal communication/behaviour and demeanour of witnesses when deciding on a verdict?

Once the answer to the above question is established the following will also be considered:

¹⁶ Practical Guide to Court and Case Flow Management for Regional and District Courts – Department of Justice. 2010. Available at www.justice.gov.za/juscol/docs. Also see Appendix 1: 3 Judicial Ethics in South Africa- Vula. Available at <https://vula.uct.ac.za/CodesofConduct>.

- Do role players in a trial have the requisite training to equip them with the skill to adequately evaluate the evidential value of demeanour and non-verbal behaviour?
- How would the proper skill to perceive, read and analyse the non-verbal behaviour and demeanour evidence enhance the substantive correctness of the verdict and the legal fraternity in general?

1.4 Aims of the Study

There has been little study of the impact of demeanour and non-verbal or non-testimonial evidence and communication on the verdict in a trial. This study has a dual purpose to, on the one hand, show that the impact and relevance of non-verbal or non-testimonial evidence is often ignored and/or underestimated and, on the other hand, to highlight some common interpretations of certain types of non-verbal communication/evidence. Once this has been done, the aim will then be to formulate guidelines on how to interpret this non-verbal evidence. To ensure the substantial correctness of the study we will need to delve into the principles of legal realism and its impact on jurisprudence.

1.5 Rationale of the Study

It is anticipated that the outcomes achieved during this investigation will result in the formulation of guidelines as to how demeanour and non-verbal communication/non-verbal testimony should be interpreted. It will also result in a conclusion on whether there is likelihood that these factors influence the court in its decision-making process. This study has the potential to greatly improve the practical legal skills of young presiding officers, prosecutors, and attorneys; enhance and strengthen the reputation of the judiciary and the criminal justice system in South Africa; and perhaps establish some guidelines on the interpretation or analysis of non-verbal evidence/testimony.

Furthermore, this research project/study should invoke interest in the minds of academics, lawyers, aspirant practitioners and members of the judiciary who accept that communication skills and the skill of interpreting evidence, verbal or non-verbal, are vital for success in their profession.

For this research to be clearly understood, and for it to be analysed with the correct mind-set and background, the study below should be considered against the canvas of non-

verbal communication. To a certain extent, the social context of the law and appropriate jurisprudential theories should also be considered.

The theories of jurisprudence include Positivism, Natural Law and Legal Realism. Legal realism is the third theory of jurisprudence and purports that the real-world practice of law is what determines what law is: the law has the force that it does because of what legislators, judges and executives do with it.¹⁷

In order to properly understand non-verbal communication we need to have the ability to analyse and understand the behaviour and demeanour that constitute non-verbal communication. We also need to understand the models and approaches to non-verbal communication used for this purpose.¹⁸

When humans communicate, the act of communication comprises different components that occur simultaneously and at times without deliberate action on the part of the communicator/sender. In order to arrive at the meaning of what is being communicated the message should be interpreted in its entirety and within the context in which it is communicated. The interpretation process can lead to miscommunication and misinterpretation. To eliminate or limit the likelihood of misinterpretation one can take into consideration the social context, the communicator/sender's intention, the physical aspect, the relationship between the communicator and the recipient, the structure, meaning and properties of the message in question. Understanding and interpreting non-verbal communication can be made easier by first establishing the meaning of the message. A full understanding of the models and approaches to non-verbal communication will invariably assist lawyers at all levels of the practice of law to enhance the delivery of justice.

With the above preface the following should be considered:

1. Non-verbal signs serve many functions necessary for effective human interaction and, in spite of the general importance of non-verbal behaviour in a communicative context, little has been done to synthesise what we know about the courtroom environment;

¹⁷ Van Blerk A.E. 1996. *Jurisprudence - An Introduction*. Butterworths, Durban: South Africa. Also see Freeman M.D.A. 1994 *Lloyd's Introduction to Jurisprudence* 6th ed.

¹⁸ Van Blerk A.E. 1996. *Jurisprudence - An Introduction*. Butterworths, Durban: South Africa. Also see Freeman M.D.A. 1994 *Lloyd's Introduction to Jurisprudence* 6th ed.

2. People generally have more conscious control over spoken words than non-verbal signals, such as facial expressions, voice changes and body movements, especially when the signals are inconsistent with what is said;
3. During a trial the role players give testimony, which consists of verbal and non-verbal components, and a lack of or limited understanding of the numerous sign systems may lead to failures or deficiencies in communication;
4. Studying non-verbal signals within the context of models of non-verbal communication can facilitate the study of dialectics within non-verbal behaviour and help in understanding how the inter-relationship between verbal and non-verbal communication balances out in the communication process;
5. A verdict is not a conclusion based simply and exclusively on the verbal/testimonial evidence presented but is influenced by the verbal and non-verbal (testimonial and non-testimonial) performance, and a frivolous, chalice and unsubstantiated interpretation of non-verbal evidence can lead to great injustice, both to the accused and society.
6. The focus of this study shall be on the approaches to non-verbal communication and demeanour.

1.6 Significance of the Study

The significance of this pilot study is that it could possibly reveal that demeanour and non-verbal behaviour/communication do indeed have an impact on the verdict. Judicial officers will therefore need to deal with this type of evidence with caution and consistency so that justice is seen to be done, the right to equality is not violated, and the probative value that is attached to this evidence is justifiable. The researcher is also hopeful that the literature reviewed and the outcomes of the interviews will reveal a need for the manner in which this type of evidence (demeanour and non-verbal behaviour/communication) is dealt with to be more consistent and controlled.

1.7 Research Methodology

For any study to be successful and reliable there must be a framework that will map out the method, steps and procedures that will be followed in order to answer the questions

that need to be answered and to solve the respective problems. Methodology relates to the general theoretical perspective of the research, the nature of the research activity and the perspective the researcher wishes to take on the question being asked.

This research project, in the field of social science, adopted a mixed-methods approach combining both qualitative and quantitative information to add depth and detail to the findings of this research. The mixed-methods approach comprised the following components:

- The qualitative component of the research dealt with published literature; fundamental theories; legislation; case law in the area of study; articles; reports within the South African and American legal systems; and semi-structured interviews with a small sample of role players (presiding officers) of different ethnic groups, in courts of different levels in the Lower Umfolozi, Mthunzini and Hlabisa Districts. The interviews entailed the use of open-ended questions being put to the participants. Open-ended questions were used to encourage intellectual honesty and to avoid getting the interviewee to lean towards an obvious response. The aim of the questions asked during the interview were to establish the role players' view of the impact, if any, of demeanour and non-verbal/non-testimonial evidence on the verdict and the findings. The questions revolved around the demeanour of the role players in the courtroom and called for comment from the interviewees as to if, and to what extent the demeanour and non-verbal behaviour impact on the outcome of trial.
- The second component is the quantitative research which comprises the analysis of the data collected during the semi-structured interviews with a small sample of role players. As part of the quantitative aspect of the research the following steps were taken:
 - a content-analysis of the data gathered through the interviews;
 - a corresponding analysis and summary of the outcomes of the interviews; and
 - a statement of conclusions and recommendations based on the summary of the results/outcomes.

1.7.1 The Qualitative Research Methodology

Qualitative research can be described as a form of social science research where the researcher collects and works with non-numerical data and attempts to interpret the data and extract meaning from this data, which helps to understand social life through the study of targeted phenomena, populations or places.¹⁹ Observation and immersion, interviews, open-ended surveys, focus groups, content analysis of visual and textual materials, and oral history are some of the methods of qualitative research.²⁰ Qualitative research has been used in the field of sociology for a long time since it affords the researcher the opportunity to investigate the meanings that people attribute to their behaviour, actions, and interactions with others. It is interpretative, and ethnographic in nature.²¹

The design of qualitative research enables it to reveal the “meaning that informs the action”²² or the outcomes that are typically measured by quantitative research. So, when doing qualitative research one investigates meanings, interpretations, symbols, and the processes and relations of social life, thereby producing descriptive data which must be interpreted by the researcher by means of strict and systematic methods of transcribing, coding, and analysis of trends and themes.²³ The focus of qualitative research is often daily life and people’s experiences thereby creating the possibility of developing new theories using the inductive method, which can be tested through further research.²⁴

Table 1.1 – Characteristics of Qualitative Research

¹⁹ Crossman A. 2017. Qualitative Research; Definitions and Methods. Available at <https://www.thoughtco.com>...>Social Sciences>Sociology>Research and Statistics>. Accessed on 07 December 2017.

²⁰ Crossman A. 2017. Qualitative Research; Definitions and Methods. Available at <https://www.thoughtco.com>...>Social Sciences>Sociology>Research and Statistics>. Accessed on 07 December 2017. 2.

²¹ Atieno, O.P., 2009. An Analysis Of The Strengths And Limitation Of Qualitative And Quantitative Research Paradigms. Problems of Education in the 21st Century, 13(1), pp.13-38. 13.

²² Crossman A. 2017. Qualitative Research; Definitions and Methods. Available at <https://thoughtco.com/symbolic-interaction-theory-3026633>. Accessed on 07 December 2017.

²³ Crossman A. 2017. Qualitative Research; Definitions and Methods. Available at <https://www.thoughtco.com>...>Social Sciences>Sociology>Research and Statistics>. Accessed on 07 December 2017.

²⁴ De Vos A.S., Strydom H., and Delport C.S.L. 2017. Research at Grassroots. Van Schaik Publishers. 66.

Characteristics	Descriptions
Concern for content	<ul style="list-style-type: none"> • Human experience takes its meaning from social, historical, political and cultural influences • Reality is socially constructed and constantly changing
Purpose	<ul style="list-style-type: none"> • To understand social phenomena of multiple realities from respondents' perspectives
Rich narrative description	<ul style="list-style-type: none"> • Data are in the form of words • Subjects' experiences and perspectives • Detailed, context-bound generalisations • Rich, detailed description • In-depth
Sample	<ul style="list-style-type: none"> • Small, non-random and purposeful
Method	<ul style="list-style-type: none"> • Interviews
Natural setting	<ul style="list-style-type: none"> • Takes place in natural setting • No attempt to manipulate behaviour • No artificial constraints or controls
Human instrument	<ul style="list-style-type: none"> • Researcher is the primary agent for the gathering and analysis of data • Studies human experiences and situations, requires an instrument to capture • Complexity of the human experience • Becomes immersed in social situation • Relies on fieldwork methods
Emergent design	<ul style="list-style-type: none"> • Design emerges as the study proceeds • Self-questioning throughout research in order to think critically – reflexive acts • Flexible and evolving

	<ul style="list-style-type: none"> • Interactive and developmental
Inductive analysis	<ul style="list-style-type: none"> • Data collection and data analysis take place simultaneously • Holistic form of analysis • Identification of recurring patterns • Proceeds from data to hypothesis to theory

Table 1.1 Adapted from Ary, Jacobs and Razavieh²⁵; McMillan and Schumacher²⁶; McMillan and Wergin²⁷; Merriam²⁸; Ritchie and Lewis²⁹.

1.7.1.1 Methods of Qualitative Research

When carrying out qualitative research the researcher often made use of his/her own ears, eyes, and intellect to collect in-depth perception and descriptions of targeted events, phenomena, places, groups, and populations. The information or data was collected through a variety of methods and often the researcher would use at least two methods while conducting the qualitative study. Below is a brief discussion of some of the methods:³⁰

- Direct Observation

When using this method the researcher studies people as they go about their daily lives in their natural environment without participating or interfering in the activities of the participants. During this type of research those being observed are often unaware that they are under study, therefore this type of research needs to be conducted in public settings where people do not have a reasonable expectation of privacy. An example of

²⁵ Ary, D., Jacobs, L. C., & Razavieh, A. 2002. Introduction to Research in Education (6th ed.). Belmont: Wadsworth.

²⁶ McMillan, J. H., & Schumacher, S. 2001. Research in Education. A Conceptual Introduction (5th ed.). New York: Longman.

²⁷ McMillan, J. H., & Wergin, J. F. 2002. Understanding and Evaluating Educational Research (2nd ed.). New Jersey: Merrill Prentice Hall.

²⁸ Merriam, S. B. 1998. Qualitative Research and Case Study Applications in Education. San Francisco: Jossey-Bass Inc.

²⁹ Ritchie, J., & Lewis, J. 2003. Qualitative research practice. A guide for Social Science Students and Researchers. London: Sage Publications.

³⁰ Creswell J.W., Ebersohn L., Eloff R., et al. 2012. First Steps in Research. Van Schaik Publishers. 71. Also see Henning E. 2011. Finding Your Way in Qualitative Research. Van Schaik Publishers.

this could be when a researcher observes how strangers interact with each other as they gather to watch a soccer match in a stadium.

- Open-ended Surveys

In this type of research the researcher generates qualitative data through the use of open-ended questions where the participants are able to explain their answers in their own words. An example of this would be where a survey is carried out to investigate not just what the speed limit should be in a residential area, but why and why it should be that speed.

- Focus Group

When this type of research is embarked on the researcher will engage a small group of participants in a conversation that is designed to illicit responses that will form the data relevant to the research question. This small group makes up the focus group and is generally made up of five to fifteen participants. This method is often used by social scientists who investigate events or trends that are taking place in certain contexts.

- In-depth Interviews

When using this method the researcher conducts in-depth interviews by speaking to participants on a one-to-one basis. The researcher often goes into the interview with a schedule of pre-determined questions or topics for discussion. The questions are generally open-ended allowing the conversation to evolve according to the responses received from the participant.

- Oral history

This method of research is used when the researcher wants to create a historical account of an event, group, or community. This type of research generally involves a series of in-depth interviews conducted with one or multiple participants over an extended period of time.

- Participant Observation

When using this method the researcher participates in the action or event that is being observed so that he/she can observe others and gain first-hand experience in the setting.

- Ethnographic observation

This method of research is the most intensive and in-depth observational method. It has its origins in anthropology. When using this method, the researcher becomes fully immersed in the research setting and lives among the participants as one of them for the full period over which the observation is to take place. Doing this allows the researcher the opportunity to observe the events and have experiences from the viewpoints of the subjects of the study. This will allow the researcher to formulate an in-depth and long-term account of the community, events or trends under observation.

- Content analysis

Sociologists generally use this method to analyse social life by interpreting words and images from documents, film, art, music, and other cultural products and media. The researcher takes the content (words and images) used in the documents, films, art, music, and other cultural products and media, contextualises it and draws inferences about the underlying culture. Over the past decade this method has been popular when analysing the content of digital material generated by social media users.

The data generated during qualitative research is generally manually coded and analysed by the researcher.

1.7.1.2 The Advantages and Disadvantages of Qualitative Research³¹

Qualitative research is often used in social science research but it has advantages and disadvantages. These will be discussed below.

1.7.1.2.1 Advantages of the Qualitative Research Methodology:

³¹ Crossman A. 2017. Qualitative Research; Definitions and Methods. Available at <https://www.thoughtco.com>...>Social> Sciences>Sociology>Research and Statistics. Accessed on 07 December 2017.

- Qualitative research provides an in-depth understanding and appreciation of the attitudes, interactions, events, behaviours, and social processes that occur in the course of daily life.
- Qualitative research assists social scientists in understanding how societal factors like social structure, social order, and other social factors impact on everyday life.
- Qualitative research has an element of flexibility and is easily adaptable according to the changes in the research environment.
- Qualitative research can be conducted with the minimum costs being incurred.

1.7.1.2.2 Disadvantages of the Qualitative Research Methodology

- The scope of qualitative research is rather limited, making it difficult to generate findings that are generally applicable.
- Researchers have to exercise great caution to ensure that they themselves do not influence the data significantly.
- The researcher also has to exercise great caution so as not to bring their own personal bias into the interpretation of the data and findings.

1.7.2 Quantitative Research Methodology

Quantitative research has been described as a process that is systematic and objective, and uses numerical data from a selected subgroup of a population in order to generalise the findings to the population being studied.³² Quantitative research methodology is empirical in nature and is also known as the scientific research paradigm.³³ This methodology ensures validity through the process of rigorous clarification, definition, and in some instances, the use of pilot experiments.³⁴

Leedy and Ormrod³⁵ submit that "There are three broad classifications of quantitative research: descriptive, experimental and causal comparative". Descriptive research is said to involve the identification of attributes of a particular phenomenon, whereas the

³² Maree K., and Pietersen J., in Creswell J.W., Ebersohn L., Elof I., Ferreira R., Ivankova N.V., Plano Clark V.L. & Van der westhuizen C. 2012. *First Steps in Research*. Van Schaik Publishers. 145.

³³ Atieno, O.P., 2009. An Analysis Of The Strengths And Limitation Of Qualitative And Quantitative Research Paradigms. *Problems of Education in the 21st Century*, 13(1), pp.13-38. 13.

³⁴ Atieno, O.P., 2009. An Analysis Of The Strengths And Limitation Of Qualitative And Quantitative Research Paradigms. *Problems of Education in the 21st Century*, 13(1), pp.13-38. 13.

³⁵ Leedy P.D. and Ormrod J.E. 2001. *Practical Research: Planning and Design*. 7th ed. Ohio: Prentice Hall.

experimental approach is said to investigate the treatment of an intervention into the study group and then measures the outcomes of the treatment. The comparative approach is where the researcher examines the relationships between the variables.³⁶

1.7.2.1 Advantages of Quantitative Research

Quantitative research has the following advantages:³⁷

- Quantitative research is objective and can be measured so that comparisons can be made.
- If the methods used are explained with sufficient detail, the research is generally very easy to replicate and ascertain reliability.
- The results of the research, when analysed, can be reduced to a few numerical statistics and the data can be interpreted using a few short statements.
- When using quantitative instruments one will be able to verify observations collected during informal field observations.
- When one uses a survey instrument to collect data from all program stakeholders in the study this can, to a certain extent, correct the qualitative research problem of collecting data only from a selected group within the system being studied.

1.7.2.2 Disadvantages of Quantitative Research

Quantitative research has the following disadvantages:³⁸

- The findings can be biased in favour of the researchers' perspective. This makes it necessary for the researcher to try extra hard to maintain a safe 'distance' from the subjects of the study, and should not attempt to acquaint himself/herself with subjects, except to collect data.

³⁶ Leedy P.D. and Ormrod J.E. 2001. Practical Research: Planning and Design. 7th ed. Ohio: Prentice Hall.

³⁷ UK Essays. November 2013. Advantages And Disadvantages Of Quantitative Research Psychology Essay. [online]. Available from: <https://www.ukessays.com/essays/psychology/advantages-and-disadvantages-of-quantitative-research-psychology-essay.php?cref=1> [Accessed 12 December 2017].

³⁸ UK Essays. November 2013. Advantages and Disadvantages of Quantitative Research Psychology Essay. [online]. Available from: <https://www.ukessays.com/essays/psychology/advantages-and-disadvantages-of-quantitative-research-psychology-essay.php?cref=1> [Accessed 12 December 2017].

- Quantitative research often takes place in an unnatural setting making it difficult to control all the relevant variables.
- Quantitative research makes use of a static and rigid approach making the process inflexible.

For the purpose of this study the mixed method was used and the researcher adopted the qualitative approach by carrying out a review of literature (cf. Ch. 2) and in-depth interviews that were semi-structured. Thereafter the quantitative methodology was used to analyse the data collected through in-depth interviews (cf. Ch. 6).

1.7.3 Mixed Methods Research

Mixed methods research can be described as the kind of research in which the researcher combines both qualitative and quantitative techniques, methods and concepts. This combination of techniques is used while carrying out a single study or a series of related studies within a pragmatic philosophical worldview (paradigm) and the study is seen through theoretical lenses. It is this combined view that directs the process to be followed when conducting the study.³⁹

The aim of mixed method research should in no way be viewed as a means to replace either the qualitative research methodology or the quantitative research methodology; instead it is aimed at utilizing the strengths of both methodologies and minimizing the weaknesses.⁴⁰ Nau⁴¹ recommends that “*blending qualitative and quantitative methods in research can produce a final product which can highlight the significant contributions of both.*”

Saunders, Lewis and Thornhill⁴² recognize two major advantages of adopting mixed methods in the same study. The first advantage is that different methods can be used for different purposes in the study, giving the researcher confidence that the most important

³⁹ Creswell J.W., and Plano Clark V.L. 2011. *Designing and Conducting Mixed Methods Research*. (2nd ed.) Sage Publications. 5. Also see Johnson R.B., and Onwuegbuzie A.J. 2004. Mixed Methods Research: A Research Paradigm whose time has come. *Educational Researcher*, 33(7). 14-26. 17.

⁴⁰ Johnson R.B. and Onwuegbuzie A.J. 2004. Mixed Methods Research: A Research Paradigm whose time has come. *Educational Researcher*, 33(7). 14-26. 14.

⁴¹ Nau, D. S. (1995). Mixing Methodologies: Can Bimodal Research be a Viable Post-Positivist Tool? *The Qualitative Report*, 2(3), 1-6. p.1. Retrieved from <http://nsuHagerstrom.nova.edu/tqr/vol2/iss3/3>. [accessed on 12 December 2017]

⁴² Saunders M., Lewis P., and Thornhill A. 2009. *Research Methods for Business Students*. (5th ed.) Pearsons. 153.

issues have been addressed. Secondly, the combined usage of quantitative and qualitative research methods allows triangulation of the data to take place, thereby offering the advantage of the respective qualities of both approaches.⁴³

1.7.3.1 Rationale for Choosing Mixed-Methods Research Design for this Study

This study aimed to find ways of revising the manner in which evidence of demeanour and non-verbal communication/behaviour is dealt with by the courts. For this study to have validity the researcher decided to combine the different methods of research. A mixed-methods research design was adopted for the following reasons:

- to get a more complete and richer picture;
- to prompt more in-depth and broader insights;
- to amplify and intensify the significance of interpretation; and
- To explain the approaches, opinions, and practices of the different participants.

1.7.3.2 The Advantages of Adopting the Mixed-Method Research Design

The following can be highlighted as the advantages of employing the mixed-methods design:⁴⁴

- An alleged disadvantage of quantitative research is that it is sometimes viewed as lacking strength and adequacy with regards to understanding the context in which people talk. The voices of the participants are not heard directly. On the other hand, qualitative research is perceived to be deficient because of the researcher's personal involvement and personal interpretation which can lead to bias on the part of the researcher. The mixed-methods design is able to deal with the aforementioned disadvantages of the two research methods.
- The evidence provided by mixed-method research for studying a research problem is more comprehensive than the evidence provided by qualitative or quantitative research on its own.

⁴³ Shank G., and Brown L. 2007. *Exploring Educational Research Literacy*. (1st ed.) Routledge. 190.

⁴⁴ Creswell J.W., and Plano Clark V.L. 2011. *Designing and Conducting Mixed Methods Research*. (2nd ed.) Sage Publications. 12-13.

- During mixed-method research the researcher is at liberty to use appropriate methods, skills, and thinking to deal with a research problem. This makes it practical.
- Mixed-method research allows for the use of a multi-faceted paradigm, such as pragmatism.

1.7.4 Reliability and Validity

Powell and Conway⁴⁵ maintain that, as one develops and conducts a research study, one should always be mindful of its validity and reliability. The reliability of a study is synonymous with the research being *dependable, consistent, stable, trustworthy, predictable, and faithful*.⁴⁶ With regards to validity, it is suggested that one look at terms such as *credibility, dependability, confirmability, trustworthiness, verification, and transferability*. Tobin and Begley⁴⁷ suggest the use of *rigour* to ensure reliability. Rigour is said to refer to the display of integrity and competence in qualitative research which can be accomplished by adhering to detail and accuracy to ensure that the research process is authentic and trustworthy.⁴⁸

In order to fortify the authenticity and trustworthiness of the research the following criteria should be met:⁴⁹

- **Dependability:** According to Riege⁵⁰ dependability is equivalent to the notion of reliability in quantitative research. This criterion is used to show stability and consistency in the process.
- **Credibility:** To ensure credibility, one needs to look at the links between data (recordings, notes, and transcripts) and the interpretation of data.
- **Authenticity:** This entails looking at whether the research questions have a substantial theoretical basis.

⁴⁵ Powell R.R. and Connaway L.S. 2004. Basic Research Methods for Librarians. Libraries Unlimited. 43.

⁴⁶ Salkind N.J. 2006. *Exploring Research*. (6th ed.) New Jersey: Pearson Education. 106.

⁴⁷ Tobin G.A. & Begley C.M. (2004). Methodological Rigour within a framework. Journal of Advanced Nursing 48(4), 388– 396. 389-390.

⁴⁸ Tobin G.A. & Begley C.M. (2004). Methodological Rigour within a framework Journal of Advanced Nursing 48(4), 388– 396. 389-390.

⁴⁹ Tobin G.A. & Begley C.M. (2004). Methodological Rigour within a framework. Journal of Advanced Nursing 48(4), 388–396. 390-392.

⁵⁰ Riege A.M. 2003 "Validity and reliability tests in case study research: a literature review with "hands-on" applications for each research phase", Qualitative Market Research: An International Journal, Vol. 6 Issue: 2, pp.75-86, <https://doi.org/10.1108/13522750310470055>.

- **Confirmation:** Here, one looks at what audit process has been adopted to ensure that the data and interpretation of the data is sound.

1.7.5 Qualitative Data Collection

In collecting data for the qualitative investigation of this study the researcher made use of interviews.

Interviews can be in the form of standardised open-ended interviews, semi-structured interviews or structured interviews.⁵¹ Open-ended interviews are unstructured and the interview is conducted in the form of a friendly conversation, with no pre-determined order or wording of the questions.⁵² Structured interviews are made up of pre-set standardised questions that are normally closed-ended, and asked in sequence.⁵³ This type of interview can be done through the use of questionnaires. Semi-structured interviews are described as concentrated, open-ended, and focused, with an overall topic, general themes, targeted issues, and specific questions that are flexible.⁵⁴

When using the interview method of qualitative research the researcher asked open-ended questions orally and recorded the participants' responses either by hand, or with the use of a digital recording device, or both. The interview method of research is useful when collecting data that reveals perspectives, values and experiences of the population or participant pool under study. The interview method is often paired with other research methods such as survey research, ethnographic observation and focus groups.⁵⁵ Interviews are generally done face-to-face, but can also be done telephonically or through video chat.

⁵¹ Scott D., and Usher R. 2011. *Researching Education: Data Methods and Theory in Education Enquiry*. Bloomsbury Academic. 116-117.

⁵² Tharenou P., Saks A.M., and Moore C. 2007. A Review and Critique of Research on Training and Organisational-level Outcomes. *Human Resource Management Review*, 17. 251-273.

⁵³ Tharenou P., Saks A.M., and Moore C. 2007. A Review and Critique of Research on Training and Organisational-level Outcomes. *Human Resource Management Review*, 17.

⁵⁴ Crabtree, B.F. and W. L. Miller. 1992. A template approach to text analysis: Developing and using codebooks. *Doing Qualitative Research*. Newbury Park, CA, Sage Publications: 93-109.

⁵⁵ Cooper, D. R. & Schindler, P. S. (2011). *Business research methods* (11th ed.). New York: McGraw-Hill/Irwin. 183.

Survey interviews⁵⁶ are generally done with the use of questionnaires and are usually rigidly structured. The questions have to be asked in the same order, in the same manner, and only pre-defined answer choices can be given.

On the contrary, in-depth qualitative interviews⁵⁷ are flexible and continuous. When using in-depth interviews, the interviewer will have a general plan of inquiry, and perhaps a specific set of questions that will not necessarily be asked in the same order. During in-depth interviews the participant does most of the talking while the interviewer listens, takes notes, and steers the conversation in the direction that it needs to go. The participant's answers to initial questions generally shape the subsequent questions. The interviewer is expected to think, talk, and listen at the same time.

1.8 Conclusion

This study involved the use of a mixed method of research. The qualitative research methodology consists of a literature review and interviews. The literature review entailed reading, analysing, evaluating, and summarizing scholarly and other materials about a specific topic. The interviews took the form of in-depth interviews comprising semi-structured questions. The participants of the interviews were ten presiding officers from different race groups and of different genders, presiding in the regional and district courts in the Lower Umfolozi, Mthunzini and Hlabisa District. The interviews were conducted by the researcher and recorded with the use of a digital recording device as well as by hand (simply as a back-up record). The recordings were then transcribed verbatim and the data (in the form of words used for the responses) was then analysed using the quantitative research methodology (coding) and is discussed further in Chapter 6 of this study.

Prior to commencing with the interview process the researcher obtained the written permission of the Court Manager for the area so that the participants could be interviewed. The letter is annexed to the thesis marked "Annexure A".

⁵⁶ Greeff M. 2002. Information Collection: Interviewing (291-319). In De Vos A.S. (Ed.), *Research at Grassroots: For the Social Sciences and Human Services Professions*. (2nd ed.). Pretoria: Van Schaik.

⁵⁷ Greeff M. 2002. Information Collection: Interviewing (291-319). In De Vos A.S. (Ed.), *Research at Grassroots: For the Social Sciences and Human Services Professions*. (2nd ed.). Pretoria: Van Schaik.

Before commencing with each interview the participant was handed an informed consent form that they could peruse and sign, thereby granting the researcher written permission to use the information acquired during the interview. Each participant signed the informed consent form prior to the commencement of the interview. Due to the nature of the office held by the participants personal details were excluded from the transcripts and the thesis. A copy of the informed consent form is annexed to the thesis marked “Annexure B”. Prior to the interview process commencing and as part of the planning the researcher compiled an interview schedule setting out of the pre-determined questions and these questions were asked during the interview.

1.9 Definitions of Terms and Key Words

- *Presiding officer* means the person who adjudicates over the matter and renders the verdict, and includes judges in the High Court and magistrates of the District and Regional Courts.
- *Demeanour* means the facial expressions, conduct, body language, and expressions of language and reactions.
- *Verdict* means the finding of the presiding officer as to the guilt or innocence of an accused.
- *Accused* means the individual who is standing trial
- *Witness* means any person who comes to court and gives evidence in court.
- *Prosecutor* means the person presenting the case on behalf of the State against the Accused.
- *Juror* means a Layperson who sits in and observes the proceedings of the trial and submits a finding as to whether the Accused should be convicted or acquitted.
- *Layperson* means a person who has no formal training or expertise in the field of law.
- *Assessor* means a Layperson who sits in and observes the proceedings of the trial to ensure that the proceedings are carried out fairly
- *Communicators* mean the individuals involved or engaged in the communication process.
- *Sender of communications* means the person exhibiting the gestures or non-verbal communication.

- *Receivers of communication* mean the person observing or being subjected to the non-verbal communication.
- *Participant pools* means the individuals who participate in the empirical quantitative research
- *Gestures* mean movements of the body, face or head to show a particular meaning, feeling or intention.
- *Kinesics* is the study of body movement, gestures and posture.
- *Proxemics* refers to personal space and distance between participants in the communication process.
- *Paralanguage* refers to the vocal cues that accompany speech and these cues can enhance the effect of the speech and reveal a speaker's emotional state.
- *Non-verbal communication* is communication that does not involve speech or the utterance of words and includes physical appearance, facial expressions, gestures, personal space, posture, eye contact, demeanour, touch, vocal cues, time, and pauses, amongst others.
- *Legal realism* is a jurisprudential theory that contends that law does not comprise exclusively of factors within the legal realm but is intrinsically associated with real-life outcomes. Legal realists believe that social factors influence the law and legal decisions and therefore law cannot be seen as independent from society.
- *Case study* means a qualitative research approach that seeks to collect detailed information about a particular participant, small group, or an organization that is observed in a real-life setting in order to understand the social phenomena the group or organization reflects.
- *Coding* is an analytical process used by researchers to categorize data in order to facilitate analysis of it.
- *Ethnography* is a qualitative research approach that focuses on a specific group or culture and its characteristics. Ethnographic research seeks to generate understanding through an "insider's point of view" during long term engagement in a specific setting.
- *Literature review* is the process of reading, analyzing, evaluating, and summarizing scholarly and other materials about a specific topic. The results of a literature review may be compiled in a research design, feature in a report, or form part of a research article, thesis, or grant proposal.

- *Qualitative data analysis* is a type of analysis that involves the researcher interpreting (rather than calculating) observations, words, and symbols in the data, which consists of written texts.
- *Qualitative research methodology* is the methodology applied when the researcher is interested in information that relates to understanding aspects of social life and generating words rather than numbers.
- *Quantitative data analysis* is a type of analysis in which the researcher converts the collected data into numerical forms so that the data can be analyzed statistically.
- *Quantitative research methodology* is the methodology applied when the researcher is interested in collecting numerical data that can be analyzed by mathematical means.
- *Questionnaire* is a document consisting of questions that is used to collect data.
- *Research design* is a plan that lays out why and how research will be conducted.
- *Research ethics* is the application of fundamental ethical principles in relation to the research.
- *Research methodology*: The overall framework and process that guides the researcher to the type of information (data) sought, and that identifies the methods needed to gather the information.
- *Research methods* are the set of procedures or “tools” used to collect qualitative or quantitative information (data).
- *Research participant* is someone who participates in the research—for example, by being interviewed or observed or by answering a questionnaire.
- *Research question* is the main question that the research sets out to answer.
- *Sampling* is the process of selecting units—for example, specific people from a broader population of interest.
- *Triangulation* is a concept used in qualitative research that refers to the data having been collected from different points (using different methods and sources) to achieve validation of data.
- *Validation of data* is achieved when data is obtained from various sources and through different methods and produces overlapping results.

- *Variables* are the characteristics of a person or thing (for example, gender or age) that differ between the persons or things that the researcher wants to collect information about. These are characteristics that can be measured.

CHAPTER 2 - THEORETICAL BACKGROUND

“A picture speaks a thousand words”.

2.1 Introduction

Law is a cultural force which serves the function of imposing norms of conduct or patterns of social behaviour on the individual will.⁵⁸ Law has also been seen as an academic discipline which claims to have its own specific methods, modes of analysis (both of which are taught at law schools and constitute an important part of legal education/socialization) and subject matter. Law provides a basis upon which a “neutral’ third party can adjudicate, arbitrate, or mediate in disputes.⁵⁹

The legal practitioner’s understanding of the law is not predicated on substantive law (black letter law) alone, or the type of legal knowledge which might be acquired through formal legal education, by learning legal rules and doctrines, mastering the various techniques of interpretation, and by developing a theoretical ability to identify the relevant sources of law.⁶⁰ The lawyer’s grasp of the law is also based on first-hand experience of legal practice, on knowing how laws are used in day-to-day life of the judicial system, a tacit form of competence which is acquired only through working within the legal system over a long period of time.⁶¹ Thus the conditions for acquiring or achieving this

⁵⁸ Timasheff N S. 1937. What is “Sociology of Law”? American Journal of Sociology, Vol 43 (2). pp 225-235.

⁵⁹ Banakar S. (2000). Reflections on the Methodological Issues of the Sociology of Law, Vol 27(2) Journal of Law and Society, p 273-295.

⁶⁰ Banakar S. (2000). Reflections on the Methodological Issues of the Sociology of Law, Vol 27(2) Journal of Law and Society, p 273-295.

⁶¹ Banakar S. (2000). Reflections on the Methodological Issues of the Sociology of Law, Vol 27(2) Journal of Law and Society, p 273-295. At p 282 Banakar uses the following example to illustrate the concept: “how a solicitor advises his or her clients or a barrister prepares a case for trial depends on ‘predicting the behaviour of the other actors in the legal system’, that is on judgments of fact and descriptive causal propositions similar to those of sociology.” See also Weber M. (1983) 14-15, It should be added, however, that the lawyer’s interest in empirical knowledge is *ad hoc*’ and task orientated and, thus, epistemologically different from the sociologist’s ultimately theoretical commitment to constructing general models of social relations. Also see Banakar R. ‘ The Identity of Crisis of a” Stepchild” (1998) 81 Retfoerd: The Nordic Journal of Law and Justice p3.

competence are embedded in empirically ascertainable features of legal procedure, which is how legal tasks are performed in actual fact.⁶²

The law's 'truth', or the essence of the law constructed internally from a legal perspective, is not based solely on the concrete body of legal rules, nor does it constitute a heterogeneous and monolithic reality moulded by a hermeneutical search for legal meaning.⁶³ Over time our intellectual skills have developed and it is now a common knowledge that we are living in a world where these intellectual skills have been enhanced and have been elevated through a deeper understanding of science, psychology and the human mind.⁶⁴ In recent times law has come to be defined by social, economic and political considerations.⁶⁵ The consideration of external factors as relevant when defining law as a concept was taken into account even in the nineteenth century and can be seen in the work of James Carter, a forerunner of historical jurisprudence, who wrote:

“Systems of law must be shaped in accordance with the actual usages of men. It is a folly to suppose that unbending rules can be made beforehand, and men be disciplined to learn them and adapt the business of life to them.”⁶⁶

⁶² Banakar S. June 2000 Vol 27(2) *Journal of Law and Society*, p 273-295 at 282. Also see Zuckerman A.A.S. 1995 (2) 'A Reform of Civil Procedure: Rationing Procedure Rather Than Access To Justice' *Journal of Law and Society*, p 155: "Delay tactics used in civil legal procedure 'to rob judgments of their practical usefulness' (p 162) are a case in point. To prevent (or employ) such tactics also need first- hand experience of the limits of legal procedure in action, which is gained from legal practice. Turning to criminal law, we find that similar importance is attached to the role of the criminal process. In *The Limits of the Criminal Sanction* (1969), H.L. Packer writes, for example, that criminal process 'can described but only partially and inadequately, by referring to the rules of law that govern apprehension, screening and trial of persons suspected of crime. It consists at least as importantly of patterns of official activity that correspond in the roughest kind of way to the prescriptions of law of procedural rules' (p 149). Ibid 2.

⁶³ Banakar S. June 2000 Vol 27(2) *Journal of Law and Society*, p 273-295.

⁶⁴ Kessler M. 1995 (29). *Lawyers and Social Change in the Postmodern World* *Law and Society Review* 769 p. 1346.

⁶⁵ Ibid. Kessler, the learned author maintained that, "this confusion has been inherited from a time when we were living in a completely different world, a world of completely different interdependencies, and when attitudes toward the proper role and function of law in communities were very different."

⁶⁶ Carter J.C. "The Provinces of the Written and Unwritten Law" 1890(24) *AM Law Review*(1890) p. 15 as discussed in Twining W. *Karl Llewellyn and the Realist Movement* (Wilmer Brothers Limited Birkenhead Great Britain 1973) p. 310.

Carter was of the view that justice and the law ought to be “adapted to human affairs” in order to make sure that those tasked with applying the law do not sacrifice justice for the sake of uniformity.⁶⁷ The aforementioned forward-thinking view of law was perceived to be a direct threat to the traditional or formalistic approach, but despite the modest approach adopted by many legal scholars towards the new order, the realistic view of the law continues to gain credibility even to the present day.⁶⁸

Law does not consist of one ‘language game’, but multiple language games; it does not have one meaning but many legal contexts.⁶⁹ Consequently, the law does not comprise of one but many forms of communication.⁷⁰ Law’s unity and identity, that is those qualities which endow the fragmented body of the law with a unified image, are not the principal elements of the language games of adjudication, or the black-letter lawyers’ and legal scholars’ relentless search for legal meaning or coherence.⁷¹ For a lawyer to develop a “refined set of tools” that can be used to decipher and deal with legal issues in the “real” world, the lawyer must have an understanding of the law in the current context.⁷² This makes it imperative for the modern day lawyer to combine sharp-witted legal analysis with cognizance of social conditions and the context within which he is practising. Sociology can provide law with a systematic empirical knowledge of the limits of institutional action, while simultaneously learning from the law about society, and its paradigmatic limitations.⁷³

⁶⁷ Ibid. See discussion on Carter in Twining W. *Karl Llewellyn and the Realist Movement* (Wilmer Brothers Limited Birkenhead Great Britain 1973) at p. 310.

⁶⁸ Jackson B.S. 1968(16) *Evolution and Foreign Influence in Ancient Law The American Journal of Comparative Law* p. 372. According to Jackson, modern scholarship has evolved to such a degree that the settled manner of dealing with legal problems has to be reconsidered.

⁶⁹ Nelken D 1993, ‘The Truth About Law’s Truth’ *European Yearbook of the Sociology of Law* p 93.

⁷⁰ Ibid.

⁷¹ Cotterrell R. 1998 (25) *Why Must Legal Ideas be Interpreted Sociologically?* *Journal of Law and Society* p 172.

⁷² De Groot M. and Vrielink M.O. *Legal Theory and Sociological Facts* 1998 17 (3). *Law and Philosophy* p. 252.

⁷³ Cotterrell R. 1986 (13) *Law and Society: Notes on the Constitutions and Confrontations of Disciplines*, *Journal of Law and Society*. p 9. As Cotterrell argued (p189) the reflexive ability of sociology allows it to develop both itself and the law, thus placing it in a privileged position in relation to law. However as pointed by Nelken (Nelken D 1993, ‘The Truth About Law’s Truth’ *European Yearbook of the Sociology of Law*. 124), to enhance its reflexive

For centuries law has been the object of a science called “jurisprudence” with its many branches called criminal law, civil law, constitutional law and so forth. It is the purpose of jurisprudence to study the norms that the law imposes.⁷⁴ The study of law and law-related phenomena, whereby law is typically conceived as the whole of legal norms in society as well as the practices and institutions that are associated with these norms, is a sociological study referred to as the sociology of law.⁷⁵ The sociology of law studies human behaviour in society in so far as it is determined by commonly recognised ethico-legal norms, and in so far as it influences them.

Max Weber explains that the sociology of law has the task of studying and explaining human conduct from the causal point of view; conduct is for him human behaviour if and in so far as the actors endow it with subjective meaning.⁷⁶ In 2015 the South African Council for Higher Education (CHE) took an in-depth look at the Law Degree (LLB) and formulated standards for the award of the LLB qualification.⁷⁷ The graduate should have “comprehensive and sound knowledge and understanding of the Constitution and basic areas or fields of law” as it relates to “the body of South African law and the South African legal system, its values and historical background”.⁷⁸ It was said that the “basic areas” should include:

- aspects of private, public, mercantile and formal law;
- international and comparative law, perspectives on law and the legal profession; and
- the dynamic nature of law and its relationship with relevant contexts such as political, economic, commercial, social and cultural contexts.⁷⁹

ability, sociology needs to recognise the possible differences between legal and sociological communications.

⁷⁴ Cotterrell R. 1986 (13) Law and Society: Notes on the Constitutions and Confrontations of Disciplines, *Journal of Law and Society* .1.

⁷⁵ Deflem M. 2008 *Sociology of Law: Visions of a scholarly tradition*. Cambridge University Press.

⁷⁶ Weber M. 2012 *Sociology of Law*, *Sociologia* 44(5) 621-637.

⁷⁷ Council on Higher Education. 2015. *Higher Education Qualifications Sub-Framework: Qualification Standard for Bachelor of Laws (LLB)*. p. 29-32.

⁷⁸ Ibid.

⁷⁹ Ibid p. 30.

The approach adopted by Weber was also advocated for in the White Paper on Corrections in South Africa⁸⁰ where it was stated that it is important to look at offenders holistically and to be mindful that even though they have committed offences, they are still humans, and humans have a need to communicate their inner feelings improve themselves, or be rehabilitated. The White Paper⁸¹ defines rehabilitation as the outcome of a process that integrates the rectification of offending behaviour, human development and the furtherance of social responsibility and values.

From the aforesaid it is clear that we have to move beyond the “black letter approach” and look at applying the law within the sociological context in which it exists.

Jurisprudence, on the other hand, studies the norms as such, from three main points of view, positive, historical and theoretical.⁸² The primary schools of thought in general jurisprudence are natural law, legal positivism and legal realism.⁸³

According to natural law there are rational objective limits to the power of the legislative rulers and the foundations of law are accessible through reason. It is from these laws of nature that human-created laws gain whatever force they have.⁸⁴

Legal positivism, on the other hand maintains that there is not necessarily a connection between law and morality and that the force of law comes from some basic social facts.⁸⁵

Legal realism is a third theory of jurisprudence which argues that the real world practice of law is what determines what law is; the law has the force that it does because of what legislators, lawyers and judges do with it.⁸⁶ During the early parts of the twentieth century legal realists challenged the natural law order that

⁸⁰ White Paper on Corrections in South Africa. 2005. RSA: Correctional Services. p. 67-71. At p. 68

⁸¹ Ibid p. 71.

⁸² Weber M. 2012 Sociology of Law, *Sociologia* 44(5) 621-637.

⁸³ Shiner, “Philosophy of Law” Cambridge Dictionary of Philosophy.

⁸⁴ Ibid.

⁸⁵ Ibid p.15.

⁸⁶ Ibid p.15.

focused primarily on the principles found in nature.⁸⁷ Legal realism will be the focus of this research, because my research seeks to challenge legal certainty within an era of social change and this study proceeds from the basis that lawyering is more than just an adherence to legal rules.

2.2 Legal Realism

The law and the legal system are viewed differently by different scholars. Christopher Columbus Langdell was the first scholar to submit the view that law is an independent and holistic system in which abstract principles derived from case law determine the outcomes of legal disputes.⁸⁸ Langdell's view was rejected by legal realists who maintained that this approach was too traditionalistic and not scientific enough.⁸⁹ Legal realists argued that social and economic factors have to be given due regard when legal issues and disputes are decided upon and adjudicated.⁹⁰ This view is in line with the sociology of law discussed above where the move is towards incorporating the social context into the application and interpretation of the law. Browning maintains, with regards to offenders, "...there must be a greater concern with the characteristics which brought the offender into a correctional system as well as the relationship between those characteristics and what will be required to get him/her out of the correctional system permanently".⁹¹

⁸⁷ Aristotle, who was popularly viewed as the father of natural law like, brought to the fore the importance of morality as the "thread" that determines what is right and wrong. This view was shared by Socrates and Aristotle. Aristotle believed that things have a natural purpose in life and these things move towards a natural goal. Others believed natural law to come to pass from mankind's ability to apply reason to any given situation. Roederer C. & Moellendorf D. *Jurisprudence* (Juta and Company Ltd. 2004) at 31. The realists, unlike the naturalists were of the view that judges served the important role of creating the law rather than carrying out a mechanical application.

⁸⁸ Twining W. *Karl Llewellyn and the Realist Movement* (Willmer Brothers Limited Birkenhead Great Britain 1973) at 10. Langdell, a former Dean of the Harvard Law School, adopted a formalistic approach to his methods and perceived law as a science where all the relevant materials could be found in written texts.

⁸⁹ Leiter B. 1999(99) Positivism, Formalism, Realism *Columbia Law Review* at p 1147.

⁹⁰ See Chapter 8 titled American Realism in Freeman M.D.A 1994 *Lloyd's Introduction to Jurisprudence* 6th ed. Sweet and Maxwell Ltd. London p 655.

⁹¹ Browning. P.L. 1976. Rehabilitation and the retarded offender. USA:Charles C. Thomas Publisher. p. 138.

For a long time, the court and the presiding officer were viewed as the sole instruments used to execute the function of the law.⁹² The principle forming the basis for this formalistic approach was that judicial decisions were guided only by legal rules, which rules were clearly enunciated in case precedents and legal texts.⁹³

A common view held by many was that “law was regarded as a legal doctrine only” or a “set of technical instruments”.⁹⁴ The court was perceived as the sole instrument of legal control, without imaginative consideration for community values and social issues.⁹⁵ The effect of these views was procrastination in the movement away from the inner doctrinal consistency of the formal legal order.⁹⁶

⁹² Wizner S. 1998(17) Is Learning to Think like a Lawyer Enough? *Yale Law and Policy Review* p 583.

⁹³ Wilkins D.B. 1990(4) Legal Realism for Lawyers *Harvard Law Review* p 471.

⁹⁴ McDougal M.S. “The Law School of the Future : From Legal Realism to Policy Science in the World Community” 1947(56) *The Yale Law Journal* 1438. It is important to acknowledge the contributions of Jeremy Bentham (1748-1832), John Austin (1790-1859), Hans Kelsen (1881-1973) and H.L.A. Hart (1907-1992) when touching on positivism. Bentham, one of the early theorists on positivism was also a staunch supporter of utilitarianism (a view that all human action should be judged by the “pleasure-pain” barrier and law should be created so as to generate the best consequences for as many people as possible). Bentham believed that law constituted a “command” from those in control or power (command thesis) and his views were popularized by his ardent supporter and student, John Austin who reiterated the view that law is a series of “commands” that stem from a sovereign (a group to whom the political community pays obedience). Hans Kelsen, one of foremost jurists of the twentieth century expressed the view that a hierarchy of norms rather than morality constitutes any legal system. Hart, regarded as the leading contemporary representative of British positivism firmly believed that law and morality are separate entities even though law may have been at times been influenced by morals and ethics. See Bentham J. 1945 *The Limits of Jurisprudence Defined* at 84 and Bentham J. 1988 *A Fragment on Government* at 3 in Roederer C. and Moellendorf D. *Jurisprudence* (Juta and Company Ltd 2004) at 66. See also Summers R.S. *Essays in Legal Philosophy* (Basil Blackwell Oxford 1970) at 184.

⁹⁵ McDougal M.S. “The Law School of the Future : From Legal Realism to Policy Science in the World Community” 1947(56) *The Yale Law Journal* 1438.

⁹⁶ It is important to briefly discuss the tenets of the natural law theory and positive law theory as both impacted on the emergence of legal realism. In the Middle Ages, legal philosophy was dominated by the church as Christians shared a common denominator with the universe, i.e. a “law written in (men’s) hearts, a moral sense of doing good and being good. See Bodenheimer E. *Jurisprudence: The Philosophy and Method of the Law* 2nd ed. (Harvard University Press Cambridge 1970) at 14. The Greek and Roman thought in the pre-modern society had a major influence on western legal philosophy and the three major philosophers of the time, Plato (427-347 BCE), Aristotle (384-323 BCE) and Cicero (106-43 BCE) were extremely influential in their thinking and views. See Johnson D. et al. *Jurisprudence A South African Perspective* Lexis Nexis Butterworths Durban 2001) at 5. The key tenet of natural law is that good must prevail over evil, whether that good arises from mankind’s reason or a God figure. The early nineteenth century saw the emergence of the positivist movement which to a large extent signified an insurgency against the naturalist movement. See Dias R.W.M. *Jurisprudence* 5th ed. (Butterworths London 1995) at 331. Many different meanings can be attributed to positivism but a key tenet of positivism according to Hart is that “laws are commands”. In other words written law is the sole source

Theories of law play a key role in the interpretation of focal areas and the structure of legal practice, and legal arguments are built from that concealed foundation that jurisprudence offers.⁹⁷ Legal realism which is a stream of thought in legal philosophy and jurisprudence will be discussed in this chapter. This chapter aims will focus on the tenets of legal realism which are relevant to this research, with the primary focus on non-verbal communication and demeanour during court proceedings.

2.3 The Foundations and Tenets of Legal Realism

One of the important tenets of legal realism is that all law is made by human beings and is therefore subject to human foibles, frailties and imperfections. Legal realism operates on the premise that the law is concerned with and is tied to the real-world outcomes of particular cases.⁹⁸ Roscoe Pound (1870-1964) who was a sociological-positivist⁹⁹, famous for his work on sociological jurisprudence, highlighted the importance of differentiating between “law set forth in books” and “law in action”.¹⁰⁰ Pound rejected mechanical jurisprudence

of legal authority and religion and morality (key concepts in natural law) play no role in the governance of man. See Hart H.L.A. 1958 Positivism and the Separation of Law and Morals *Harvard Law Review* p 601.

⁹⁷ Sharma S.R. *Encyclopedia of Jurisprudence* Vol. 1 (Anmol Publications New Delhi 2003) at 4. Jurisprudence is widely regarded as the theory and philosophy of law which inculcates an analysis of human thought in relation to social existence. It provides scholars with an understanding of the legal system and nature of law. *Juris Prudentia* is a Latin term which means knowledge of the law. (Oxford English Dictionary 2nd ed. 1989). The subject matter of jurisprudence is expansive as it comprises the philosophical, historical, sociological and analytical structures of legal theory. Jurisprudence has by and large focused on the relationship between the idyllic nature of justice and the flawed reality of laws operating within specific societies. See Johnson D. et al. *Jurisprudence A South African Perspective* (Lexis Nexis Butterworths Durban 2001) at 5.

⁹⁸ Johnson D.; Pete S, and Du Plessis M. 2001 *Jurisprudence: A South African Perspective* p 159, Butterworths SA.

⁹⁹ Pound R. 1921(34) Judge Holmes's Contributions to the Science of Law *Harvard Law Review* at 449-453. Pound was of the view that even though realists reject formalism, they look at in its positive form from a social perspective. Pound maintained that positivists view law as being “positive” or “posited” where law as it is laid down should be distinguished from the concept of morality. Positivism is regarded as a vital theory of knowledge that concentrates on how we acquire knowledge. See Bodenheimer E. *Jurisprudence The Philosophy and Method of the Law* 2nd ed. (Harvard University Press Cambridge 1970) at 3-70.

¹⁰⁰ Pound R. 1910 (44) Law in Books and Law in Action *American Law Review* p 12.

and argued that judicial decisions could not be isolated from their social context and stressed the influence of extra-judicial phenomena.¹⁰¹

There are two varieties of realism: American realism and Scandinavian realism, both rejecting the metaphysical approach to law propounded in natural law theories. These two varieties of realism strive to understand law as part of social reality rather than as related to natural law, reason or divine law.¹⁰² Realists have expressed differing views on what legal realism is and as such realism has been characterised as a movement, a philosophy, a school and even a revolt against legal convention.¹⁰³

Frank, Llewellyn and Holmes were amongst the scholars that contributed substantially to the exploration of legal realism to make valuable contributions to the phenomenon known as “law”.¹⁰⁴ Karl N Llewellyn and Jerome Frank viewed law as a field that stretched beyond the bounds of statutes, case law and precedents.¹⁰⁵ They maintained that external factors such as personal beliefs, private interests, political and social influences, all affect the manner in which a judge arrives at the verdict.¹⁰⁶ Llewellyn and other subsequent realists believed that traditional law could not force or predict a specific outcome or result

¹⁰¹ Pound R. 1908 (8), *Mechanical Jurisprudence*, *Columbia Law Review* 605-615. See also Pound, 1923 (36), *The Theory of Judicial Decision*, *Harvard Law Review*, 641, 955.

¹⁰² *Ibid.*

¹⁰³ Wacks R. *Understanding Jurisprudence An Introduction to Legal Theory* 1st ed. (Oxford University Press New York 2005) at 175. During the end of the 19th century, American legal education was dominated by the view that law is a complete formal science and there was no need to look for answers outside law (legal formalism). See Wilkins D.B. 1990(104) *Legal Realism for Lawyers* *Harvard Law Review* at 474. Formalism is widely regarded as a theory of adjudication by judges who decide cases solely on objective facts, rules and logic. The early 20th century saw the emergence of this revolutionary movement known as legal realism which looked at law from a controversial yet dynamic perspective. The emergence of legal realism arose against the backdrop of the industrial revolution that swept through the United States of America towards the end of the nineteenth century where courts became inundated with new regulations and copious cases. The court system in America was suddenly bombarded with an array of different cases which seemed to destabilize the basic foundation of the system of precedent. In an attempt to simplify the legal process, a realist view emerged that the existing structure failed to give due recognition to the complexities of a modern and changing world. See Duxbury N. 1991(18) *Jerome Frank and the Legacy of Legal Realism* *Journal of Law and Society* at 177.

¹⁰⁴ This theory is fully expounded by the Hagerstrom of Hagerstorm, Olivecrona and Ross. Axel Hagerstrom (1868-1939), a Scandinavian realist challenged most theories and views about the law at that time. Hagerstrom viewed law as a “psychological occurrence”. Karl Olivecrona (1897-1980) who also saw law as a psychological phenomenon exempt from the sovereign influence further developed Hagerstrom’s views..

¹⁰⁵ Cited in Tamanaha. B.Z., “Understanding Legal Realism” 2009(87) *Texas Law Review* p 749.

¹⁰⁶ *Ibid.*

because a variety of factors affect the decision of the presiding officer.¹⁰⁷ Llewellyn, who described legal realism as a “*thinking tool*” maintained that a lawyer would be unable to predict the outcome by focussing on the legal rules only.¹⁰⁸ The constantly evolving legal environment, characterised by disparities in legislation, varying social needs, cultural diversity and scientific growth have provided a suitable stage for judicial creativity.¹⁰⁹

In what became a manifesto of realism, Llewellyn and Frank listed nine “common points of departure” which distinguished the movement.¹¹⁰ The nine points were:

- (i) The conception of law in flux and of the need for judicial creativity;
- (ii) The conception of law as a means to an end and not an end in itself;
- (iii) The conception of society in flux and the need to adapt the law to new social needs;
- (iv) The temporary separation of law and morals for the purposes of study;
- (v) A distrust of legal rules as descriptions of what the courts are actually doing;
- (vi) A distrust of rules as operating as *the* weightiest factor in producing court’s decisions;

¹⁰⁷ Llewellyn K. 1930 *The Bramble Bush* at 180. See also Miles T.J and Sunstein C.R. “The New Legal Realism” *The University of Chicago Law Review*, 2008(75) 832. Llewellyn believed that rules guide decisions rather than control them.

¹⁰⁸ Llewellyn K. 1930 *The Bramble Bush* at 180. See also Miles T.J and Sunstein C.R. “The New Legal Realism” *The University of Chicago Law Review*, 2008(75) 832.

¹⁰⁹ See Samuel Summers *Instrumentalism and American Legal Theory* (Cornell University Press 1982) discussed in Decew J.W. 1985(4) Realities about Legal Realism *Law and Philosophy* at 409. See also Llewellyn K.N. *The Bramble Bush : The Classic Lectures on the Law and ITS Study* (Oxford University Press 1930). Realists therefore argue that legal rules are merely “words” which are open to different interpretations and it is usually the judge who will attach meaning to these words or rules. It is therefore the judge who makes the law and the very same judge is not only guided by precedents or statutes which are open to different interpretations but by different variables. A legal rule uniformly applied to different fact situations cannot result in the correct legal decision in all the different situations. Realists therefore argue that social factors influence law and legal decisions. As a result, law cannot be seen as autonomous from society.

¹¹⁰ Llewellyn K. 1931 (44), “Some Realism about Realism- Responding to Dean Pound”, *Harvard Law Review* 1222. See also Llewellyn *Jurisprudence* 55-57.

- (vii) The grouping of cases into narrower categories than had been the practice in the past;
- (viii) The evaluation of law in terms of its *effects*; and
- (ix) The maintenance of a programmatic attack on legal problems in the above ways.

From the above it can be inferred that realists like Llewellyn viewed law as a way of moulding behaviour and finding solutions to perceived problems.¹¹¹ Llewellyn was of the view that adopting a realistic method to change the law leads to a change in society, resulting in the improvement of the human race.¹¹²

William Twining defines the legal realist as “one who, no matter what his ideological or philosophical views, believes that it is important regularly to focus attention on the law in action at any given time and to try and describe as honestly and clearly as possible what is to be seen¹¹³. American realists are empirical sociologists of law, who are interested in day-to-day legal processes, and focus on the law in action, as it is practiced in real courts by real people¹¹⁴. Scandinavian realists on the other hand, examine law in terms of psychological

¹¹¹ Summers S. 1982. *Instrumentalism and American Legal Theory* (Cornell University Press 1982) discussed in Decew J.W. 1985(4) Realities about Legal Realism *Law and Philosophy* at 409.

¹¹² Summers S. 1982. *Instrumentalism and American Legal Theory* (Cornell University Press 1982) discussed in Decew J.W. 1985(4) Realities about Legal Realism *Law and Philosophy* at 409.

¹¹³ Twining W. 1973. Karl Llewellyn and the Realist Movement. London: Weidenfield & Nicolson. 74. See also White E.G. 1972 From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth- Century America, *Virginia Law Review* 88.6: 999-1028 “The Realists...focused on the ways in which persons in authority [like judges] performed the functions of their office through manipulation and rationalization...By stripping these artificial coverings from the engines of society, the Realists reasoned and perhaps put in better working order from the engines of society, the Realists reasoned, their internal parts would be revealed and perhaps put in better working order...”. The same assumptions made by the framers of the New Deal. The New Dealers were also demythologizers. They set out to eradicate the notions that private property was sacred and that self-help was the only way to deal with adversity... The world of the Realists and the New Dealers was one in which the traditional values had been at least temporarily abandoned in favor of concentration on the ‘realities’ of politics and government- shifting alliances, power trade-offs, the process of administration the selling of legislative programs (1024-5).

¹¹⁴ Twining W. 1973 Karl Llewellyn and the Realist Movement. London: Weidenfield & Nicolson. 74.

realities and look at how legal rules and concepts are expressed in human behaviour and in the minds of the people¹¹⁵.

The American realists do not believe that judges reach their decisions on formal grounds alone. Extra-legal factors are crucial in influencing the judge's decisions and these factors include social background, personal preferences and convictions, and political beliefs and commitments.¹¹⁶

The South African scholar, Hosten, maintains that legal realism accentuates the "security of realistic results."¹¹⁷ Scholars on realism have varying theories but a focal tenet of realism is decisions made by courts are inevitably affected and influenced by policy considerations and subjective value judgments.¹¹⁸ In as much as realists focussed on "law as it is" they still questioned the objectivity and consistency of legal rules.¹¹⁹

Singer, an American realist, amongst other realists, were of the view that law was more than just rules and rules do not necessarily and repeatedly provide the most appropriate solution for the problem.¹²⁰ Kalman (1927-1960) describes legal realism as an approach to legal reasoning which comprises two major facets.¹²¹ First, it is a form of functionalism or instrumentalism. The original realists sought to understand legal rules in terms of their social consequences.¹²² To better their understanding of how law functions in the real

¹¹⁵ Twining W. 1973 Karl Llewellyn and the Realist Movement. London: Weidenfield & Nicolson p 159.

¹¹⁶ Twining W. 1973 Karl Llewellyn and the Realist Movement. London: Weidenfield & Nicolson. p 160.

¹¹⁷ Hosten W.J. et al. 1983. Introduction to South African Law and Legal Theory (Butterworths Durban).

¹¹⁸ Decew J.W. 1985(4) Realities about Legal Realism, Law and Philosophy p 409.

¹¹⁹ Even though realists challenged the process of legal reasoning, they were still seen as positivists of a "special type because they focused on the law as is. As positivists, realists also stressed the aspect of law-in-action. See Wilkins D.B. 1990(104) Legal Realism for Lawyers *Harvard Law Review* at 474. See also Hosten W.J. et al. Introduction to South African Law and Legal Theory (Butterworth Durban 1983) at 83.

¹²⁰ Realists contended that it was possible to derive multitudinous answers to specific legal problems. They further held the view that law went beyond being just rules and rules do not always provide the best solution to the problem. See Singer 1988(76) Legal Realism Now *California Law Review* at 467.

¹²¹ Kalman L. (1927-1960). Legal Realism at Yale, Chapel Hill and London: University of North Carolina Press (1986).3.

¹²² Kalman L. (1927-1960). Legal Realism at Yale, Chapel Hill and London: University of North Carolina Press (1986) 3.

world, they attempted to unify law and social sciences.¹²³ Second, the realists proclaimed the uselessness of both legal rules and abstract concepts.¹²⁴

Rules do not decide cases, they are merely tentative classifications of decisions reached, for the most part, on other grounds and are therefore of limited use in predicting judicial decisions.¹²⁵ Singer maintains that Kalman's description of legal realism is substantially correct, but somewhat misleading.¹²⁶ Singer maintains that law must be based on human experience, policy and ethics, rather than formal logic, and that legal principles are social constructs designed by people in specific historical and social contexts for specific purposes to achieve specific ends.¹²⁷

Realists and realism have been criticised as downplaying coherent legal systems, having a tendency to collect data without justification and over emphasising the human factor. However, in spite of this criticism, realism has undoubtedly promoted and supported critical thinking and problem-solving in legal education and jurisprudential enquiry.¹²⁸ This consequently gave rise to a revision in the manner in which presiding officers analyse and interpret the law and rules.¹²⁹ The reliance on the literal approach to interpreting the rules has diminished. The interrelationship between law and many other disciplines has been welcomed and this has accentuated the "human element" in the legal system.¹³⁰

It can safely be inferred from the aforementioned that legal decisions are no longer arrived at through the mechanical application of the laws and rules.¹³¹ As

¹²³ Kalman L. (1927-1960). *Legal Realism at Yale*, Chapel Hill and London: University of North Carolina Press (1986) 17-18.

¹²⁴ Kalman L. (1927-1960). *Legal Realism at Yale*, Chapel Hill and London: University of North Carolina Press (1986)p. 3-4.

¹²⁵ Kalman L. (1927-1960). *Legal Realism at Yale*, Chapel Hill and London: University of North Carolina Press (1986)p. 5-7.

¹²⁶ Singer J.W.1988 (76) *Legal Realism Now*, California Law Review, p 469.

¹²⁷ *Ibid* p. 474.

¹²⁸ Hosten W.J. 1983, *Introduction to South African Law and Theory*, Butterworths Durban p. 85.

¹²⁹ *Ibid* 86.

¹³⁰ *Ibid*. The interaction between law and other disciplines such as economics, criminology, politics, et al. has since been acknowledged.

¹³¹ See *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 BGD at 5501, where Friedman J recognized legal realism as an important school of thought. He recognized social, economic and human factors as important components of a true legal system.

a supporter of legal realism, the researcher submits that there is a host of extraneous, non-legal variables that contribute to the outcomes and decisions in legal matters and disputes. Human factors as well as social and economic factors play a key role in deciding how and why certain decisions are arrived at.¹³² As the South African judicial and legislative landscape has developed there appears to be a shift in favour of social change and the enforcement of socio-economic rights, which seems to be similar to that which occurred in America at the time of the realists.

Judicial decisions, especially those emerging from Constitutional Court litigation, display a shift away from formalism towards realism.¹³³ In the case of *Prince v President of the Law Society of the Cape and others*¹³⁴ the Constitutional Court had to decide on the issue of freedom of religion. Prince applied to the Law Society to have his contract for articles registered. In his application, he disclosed that he had two previous convictions for possession of cannabis and that, as a Rastafarian, he would continue to use cannabis as it formed an integral part of his culture and religion. The majority court emphasised that the primary issue to be considered in these proceedings was whether the law and rules of the Law Society conflicted with the provisions of the Constitution. The majority judgement made it clear that the judges were not confident to go outside the text and in so doing adopted a positivistic approach when deciding on the verdict. However, Sachs J in his minority judgment expressed consideration for the cultural background of Prince and remarked that if Prince were to choose between his career and his culture this would

See also *Kayamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C), where the court held that the local authority had to consider the plight of the illegal squatters before evicting them. *Incasu Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), court stressed the importance of balancing the rights of the landowner against the rights of the unlawful occupier and highlighted the need for mediation to take place before granting the eviction order.

¹³² Ibid. See also *Jafta v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005(2) SA 140 (CC) where the court held that homelessness, poverty and insecurity are all cogs of one huge socio-economic problem that must be addressed together having due regard to the historical, social and economic background of those affected.

¹³³ *Government of Republic of South Africa and Others v Grootboom and Others* 2001 SA 46 (CC) where the court “placed upon the state and all other entities and persons to desist from preventing or impairing the rights of access to adequate housing”. The case illustrates a realist approach as the court emphasized that the socio-economic rights of the poor and homeless must be respected. The court also emphasized that social, political and economic factors must be taken into account.

¹³⁴ 2002 2 SA 794 (CC).

impact on what an open democracy is meant to be. Sachs' J minority judgment highlighted that under certain circumstances presiding officers might need to navigate beyond the text of the law and the facts presented in court, and should look at the issues relating to relevant policies, political circumstances, and the social context, when arriving at the verdict. The minority judgment by Sachs J clearly lends support to the realist approach calling on presiding officers to move away from the mechanical application of the law because judges in fact do "make law" when they interpret legislation while adjudicating on matters.¹³⁵

The scholarly writings on legal realism have made it abundantly clear that the traditional model cannot sustain the efficient and proper functioning of the because is the deficiency inherent in this model fails to acknowledge and take into consideration the ever-changing nature of the world that we are living in. Justice Holmes maintained that arm of the law stretches beyond a simple, abstract set of rules and this was supported by Bernard S. Jackson, when he wrote:

"..... laws may not be taken into isolation from their mother systems, but must be considered according to the functions they serve as parts of an infinitely larger total legal complex".¹³⁶

Jackson expressed the view that the endless number of variables –both inside and outside a society – that shape how the law develops, make it illogical to define the law using static theories.¹³⁷

¹³⁵ Prince v President of the Law Society of the Cape and others. 2002 2 SA 794 (CC).

¹³⁶ Jackson B.S. 1968 16 (3) Evolution and Foreign Influence in Ancient Law *The American Journal of Comparative Law* p. 372.

¹³⁷ Jackson B.S. *Semiotics and Legal Theory* (Routledge and Kegan Paul London and New York 1985) at 3-7. See also: In recent times all aspects of law have been challenged. The Critical Studies movement is more radical than legal realism in that like realism it attacked formalism but went one further to attack all aspects of the legal system including legal liberalism and legal scholarship. The movement can be credited to a group of American scholars who appeared to be disillusioned with the conventional legal scholarship. The movement gained popularity and by the 1980's resulted in the culmination of the Conference on Critical Legal Studies where members from leading American schools joined. Some of the prominent members included amongst others Duncan Kennedy, Roberto Unger, Peter Gabel, Karl Klare and Mark Tushnet. This theory of jurisprudence builds on realism in that it focuses on the "historical contingency of law" as well as the "use of political tradition" and "doctrinal techniques". See Roederer C. and Moellendorf D. 2004 *Jurisprudence* Juta and Company Ltd at 248. See

The scholarly literature on legal realism discussed in this chapter indicates that it is the legal persona and not the rules that determine the outcome of a legal matter or dispute. In order to arrive at a fair and justified finding the role players in the proceedings must possess the necessary communicative skills to be able to elicit the relevant information from the witnesses and the evidence that is presented during the proceedings.

Communication can be said to be imperative to the realists' concept of law-in-action. This concept of law-in-action is regularly over-looked as the "real factor" that establishes the true potential of a legal practitioner.¹³⁸ The impact of non-verbal communication and demeanour has been noticeably disregarded in the legal fraternity.¹³⁹ Non-verbal communication is amongst the crucial variables that impact severely on the entire communicative process.¹⁴⁰

The jurisprudential theory of legal realism has brought to the fore the need for the role players in the courtroom to acknowledge and understand these non-verbal signs and symbols as they relate to legal proceedings.¹⁴¹ The implementation of the realist method during the evaluation of evidence can only be a catalyst in the process of "growing" the communicative capabilities of the judicial officer, the prosecutor and the attorney.¹⁴²

also Meintjies-Van der Walt L. et al. 2008 Introduction to South African Law Fresh Perspectives 1st ed. Pearson
Prentice Hall Cape Town at 586.

¹³⁸ Hall E.T. and Hall 1977(3) M.R. Nonverbal Communication for Educators *Theory into Practice* at 141. The authors stress that everything communicates and to communicate effectively one needs to read and decode these messages.

¹³⁹ Ibid.

¹⁴⁰ Hall E.T. and Hall 1977(3) M.R. Nonverbal Communication for Educators *Theory into Practice* at 141.

¹⁴¹ Meisenhelder T. 1981(4) Law as a Symbolic Action: Kenneth Burke's Sociology of Law Symbolic Interaction at 45.

¹⁴² This study focuses on the practical application of the law and it is for that reason that legal realism has been selected as the theory of jurisprudence during this research. This serves as the researcher's preferred choice because of its focus on the practical application of law. Theories such as critical legal studies was found to be unsuitable for this research because it suggests that all aspects of law are indeterminate which implies that for every rule or principle there was a mirrored norm that was equally sound. Further, in the South African context the Constitution forms the basis for analysing legal order and implementing legal change. See Unger R.M. 1983(96) The Critical Legal Studies Movement *Harvard Law Review* at 564. See Freeman A.D. 1981(90) Truth and Mystification in Legal Scholarship *Yale Law Journal* at 1229.

LeVan¹⁴³ emphasized the significance of non-verbal communication/behaviour in relation to the practical application of the law when he made the following remark:

“.... non-verbal communication subtly affects the entire proceedings of a trial. It is constantly present and being asserted, yet the attorney is often unaware of its existence.”

When looking at the jurisprudential theories of naturalism, positivism and realism, Bernard Jackson viewed modern day law as being more aligned with the jurisprudential theory because legal rules include a human element.¹⁴⁴

2.4 The Courtroom Interaction

The Constitution¹⁴⁵ requires that the due process model be followed during proceedings as this is in line with the right to a fair trial. Due process requires that the presiding officer conducts the trial in a fair, orderly and impartial manner, ensuring that justice is seen to be done. Thus, the demeanour and appearance of the presiding officer should under no circumstances indicate that he believes that the accused is guilty or that the presiding officer is in any way partial to a particular outcome. Appeal courts recognise that the appearance of judicial bias or unfairness at the trial can be manifested by trial judges in explicit and subtle verbal and non-verbal ways that are not captured in the transcripts.¹⁴⁶

A magistrate's conduct and demeanour in court can create a reasonable impression of bias, as was depicted in the case of *S v Herbst*.¹⁴⁷ Here, the

¹⁴³ LeVan E.A. 1984(8) Non-verbal Communication in the Courtroom: Attorneys beware, *Law and Psychology Review* p. 83-104.

¹⁴⁴ Jackson B.S. 1968 16(3) Evolution and Foreign Influence in Ancient Law *The American Journal of Comparative Law* at 372. Positivism has been criticised for leading to the “mechanical” interpretation of the law by presiding officers. See Devenish G 1991 Teleological Evaluation: A Theory and Modus Operandi of Statutory Interpretation in South Africa *SAPL* at 67. See also Dugard J 1971 88 The Judicial Process, Positivism and Civil Liberty *SALJ* at 181.

¹⁴⁵ Act 108, 1996

¹⁴⁶ Peter David Blanck, R Rosenthal La Doris Hazzard Cordell (1985). “The Appearance of Justice: Judges’ Verbal and Nonverbal Behaviour in Criminal Jury Trials”. *Stanford Law review*, Rev 89, 1.

¹⁴⁷ 1980 (3) SA 1026 E.

accused applied for the recusal of the magistrate on the basis that when the accused finished giving his evidence the magistrate turned to the prosecutor, smiled and winked. Although the court could not make a specific finding on this allegation as the facts were in dispute, the court did remark that, “Such an action... could only have served to enhance the impression of possible bias which a reasonable layman would have had”.¹⁴⁸

During any trial proceeding in a courtroom there is always a certain procedure that will be followed. The various role players do certain things at certain times and conduct themselves in a particular manner. The typical courtroom, in which a criminal matter is held, features a bench for the presiding officer and this bench is generally elevated above the rest of the courtroom. The prosecutor is closest to the presiding officer and is always positioned to the presiding officer’s right. The defence is situated on the opposite side, to the left of the prosecutor. There is a dock for the accused, facing the bench, and a dock for the witness, to the left of the presiding officer.

As has become expected court etiquette in all courts all role players participating in the trial are supposed to be ready to proceed and in their respective places when the presiding officer enters the courtroom. When the presiding officer enters the courtroom everyone in the courtroom is expected to rise to their feet (“all rise please” are the words uttered by the court orderly as the presiding is about to enter the courtroom) and remain standing until the presiding officer takes his seat and nods his head in an almost bowing motion.

Court etiquette during court proceedings, as set out on in the Uniform Rules of Professional Conduct¹⁴⁹ prescribes how the various role players should behave themselves during court proceedings. The prosecutor, who is *dominus litis*, will remain standing. The act of rising to one’s feet is a gesture of respect. There are various other gestures, non-verbal cues and signs that manifest themselves during the proceedings and these need to be decoded and understood. The messages are decoded and understood taking into account the circumstances

¹⁴⁸ S v Herbst 1980 (3) SA 1035 E.

¹⁴⁹ Uniform Rules of Professional Conduct. 2004.

www.sabar.co.za>GCB-UniformRUles-o accessed on 25 March 2018.

under which the gestures, non-verbal cues and signs are exhibited. This is how we come to attach meaning to these signs. Signs, gestures, and non-verbal cues play a vital role during criminal proceedings. In the absence of non-verbal communication cues such as hand gestures or eye contact, the words we utter, would be nothing more than words on a page. Non-verbal communication colours every interaction we have and whether we use such cues knowingly or unconsciously, skilfully or haphazardly they inevitably impact upon every act of communication and, in a manner of speaking, create a canvas against which the spoken word is understood.

In 1967 communication scholars Albert Mehrabian and Susan Ferris conducted research and established that people derive ninety-three percent of a message's meaning from non-verbal communication and most scholars agree that there is incredible importance that can be attributed to non-verbal cues in all forms of social contact.¹⁵⁰ Vast research was conducted on non-verbal communication, although this research has been dealt with primarily under the umbrella of inter-personal communication as an offshoot of verbal communication. There has been very little research focussed primarily on non-verbal communication in the courtroom as well as the legal arena in general.

The diversity of non-verbal communication has resulted in an increase in the amount of research done regarding non-verbal communication. This bares testament to the impact that non-verbal communication has on the whole communication process and the interpretation of communicated messages.¹⁵¹

It is safe to say that, before and during the presentation of any verbal communication, non-verbal communication comes to the surface in order to contextualise the level of intimacy of the interaction, turn-taking between the communicators, the overall tone of the interaction itself and the multiple ways in which each communicator presents herself. The impact of the non-verbal cues may vary from interaction to interaction. Most people, irrespective of their intellect or training, attribute at least some importance to the way they present

¹⁵⁰ Mehrabian, Albert and R Ferris. (1967). "Inference of Attitudes from Nonverbal Communication in Two Channels." *Journal of Consulting Psychology* (31, 3): 248-252.

¹⁵¹ Mehrabian, Albert and R Ferris. (1967). "Inference of Attitudes from Nonverbal Communication in Two Channels." *Journal of Consulting Psychology* (31, 3): 248-252.

themselves non-verbally and this is often referred to colloquially as “body language”.

Body language is a phenomenon in the communication field that falls under the branch of “kinesics”. Kinesics includes facial expressions, gestures, posture and body movement. Body language should be understood within the context it is exhibited and in conjunction with spoken words.

During court proceedings there are social interactions that take place between the different role players. The adversarial system that South African courts follow influences how each participant behaves during his appearance in court, how this is interpreted and how it influences the responses from the rest of the role players in the proceedings.

As part of the theoretical framework of this study the work of Alfred Schutz was looked at. Schutz was concerned with the search for the basic principles of social interaction in general¹⁵². The attributes of common sense knowledge and the importance of “thinking as usual” to the members of a particular culture was one of the chief contributions of Schutz’s work.

Thinking as usual may be defined as the system of knowledge which a member of a culture acquires by virtue of his membership¹⁵³. Schutz¹⁵⁴ stressed the unquestioned and unquestionable aspects, which could be defined as the normative aspects of “thinking as usual”. It can thus be said that members of a particular culture have some kind of method drawn from “thinking as usual” which will govern their actions in a social situation, verbal and non-verbal, with appearance in court being one of these situations. Such an appearance, however, may be defined not simply as part of ordinary social interaction but as

¹⁵² Alfred Schutz, “The Stranger”, Collected Papers, Volume ii, Maurice Natanson (Ed.) Martinus Nijhoff: The Hague, 1962.

¹⁵³ Supra Schutz’s concept has some important ingredients: “the system of knowledge thus acquired (through cultural membership) incoherent, inconsistent and only partially clear as it takes on for the members of the in-group the appearance of a sufficient coherence, clarity and consistency to give anybody a reasonable chance of understanding and being understood. Any member born within the group accepts the ready-made standardised scheme of the cultural pattern handed down to him by ancestors, teachers and authority as an unquestioned and unquestionable guide in all the situations that normally occur within the social world.”

¹⁵⁴ The “unquestioned” aspects of Schutz’s “thinking as usual” are similar to the “taken for granted” aspects of Harold Garfinkel’s concept of “common understandings”.

part of the particular series of events that takes place in court and may be termed the judicial process. Interaction in the courtroom is structured not simply by the “thinking as usual” which governs social situations in general, but also the “thinking as usual” of the role players whose work environment is the courtroom.

During the proceedings in the courtroom there is constant communication, verbal and non-verbal, that takes place between the role players. This communication has to be interpreted and understood by those who are part of the communication process. It is hoped that this research will clarify the processes involved in the operation of common understandings in the courtroom and show how they structure the interaction in that setting.¹⁵⁵

With regard to common understandings shared by professional courtroom role players and specific to the courtroom setting, some familiarity was gained by conducting semi-structured interviews with presiding officers and prosecutors. The data/responses collected are intended to show that members of our common culture are able to understand each other and draw similar inferences and have a similar understanding of what is not explicitly stated in words.

Role players in the courtroom seem to generally make the implicit explicit, a part of the process of ascertaining “what really happened” at the time of the incident concerned in the process. Quite often witnesses are pushed to be more specific when they expected “socially sanctioned grounds of inference” to be applied. Witnesses are often unaware of the subtleties of the judicial process and the adversarial system South Africa follows. For example, a witness might not see the relevance of a particular statement, viewed as important to the case by the role players (presiding officer, attorney and prosecutor), or of his demeanour and non-verbal communication during the proceedings.

The role of the presiding officer during court proceedings is to determine, within acceptable limits of probability, the truth about a particular incident and hand down a verdict as to whether the party facing the allegations is guilty or not

¹⁵⁵ Tapper C. 2001 Cross and Tapper on Evidence 11edn. Oxford University Press. p. 12.

guilty. The verdict is arrived at by evaluating the evidence that is presented during the proceedings.

During a criminal trial the prosecution and the defence present evidence in support of their versions and this can be done by calling witnesses to testify in court and give *viva voce* evidence. The witness will present her evidence and the opposition will then cross-examine the witness in an attempt to discredit the witness.

Under the adversarial system the party calling the witness is placed in the position of vouching for the witness and the opposing party has the burden to discredit the witness¹⁵⁶. The finding of the presiding officer must be based solely on the interaction in the courtroom which comprises the witness's evidence in chief, evidence under cross-examination, and the evaluation of the evidence in its entirety.

Courts normally have to make a finding concerning the existence or non-existence of certain facts, thereby establishing a factual basis, before pronouncing on the rights, duties and liabilities of the parties engaged in a dispute.¹⁵⁷ The factual basis is determined by evaluating all the probative material admitted during the course of the trial.¹⁵⁸ In *Stellenbosch Farmer's Winery v Martell et Cie Nienaber* JA provided the following informative guidelines and principles that can be adopted when resolving factual disputes:¹⁵⁹

“...To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; (c) the probabilities. As to (a), the court's finding on credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

¹⁵⁶ Weinstein J.B, “The Law's Attempt to Obtain Useful Testimony”, *Journal of Social Issues* Vol 13 (2) 1957 p 7.

¹⁵⁷ Tapper C. 2001 *Cross and Tapper on Evidence* 11edn. Oxford University Press. p1.

¹⁵⁸ Schwikkard P. J., Van der Merwe et al, 2013, *Principles of Evidence*, 3rd ed. p. 526.

¹⁵⁹ 2003(1) SA 11 (SCA) p.5.

(i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant...".

Cross-examination, which is provided for by the adversarial system, has been described as a "hostile attempt to shake the witness' testimony"¹⁶⁰. The evaluation of the demeanour of the witness during her testimony becomes a factor when assessing credibility.

Demeanour forms a significant part of the non-verbal component of a role player's interaction during the proceedings. Diverse social backgrounds of the role players will lead to different understandings and interpretations of the demeanour and non-verbal communication of role players during the proceedings.

A common thread that runs through social interaction in general and is related to the utterances made during the court proceedings is Garfinkel's concept of "common understandings"¹⁶¹. When witnesses, especially lay persons, testify they usually express themselves using terms similar to those used during everyday interactions, thus assuming that the role players in the proceedings will draw the inferences, understand the implications, and accept the assumptions that are usually culturally sanctioned¹⁶².

These common cultural expectations are often violated in the courtroom because the role players do not take for granted that what is said is being made out in accordance with that common understanding¹⁶³. Often in court proceedings it seems like it is the task of the legal representatives, when leading their own witnesses or when cross-examining the opposition's witnesses, to make the implicit explicit. Thus, the elliptical talk of everyday interactions is often insufficiently explicit for the courtroom.

2.5 Conclusion

¹⁶⁰ 2003(1) SA 11 (SCA) p.5.

¹⁶¹ Harold Garfinkel, "Studies of the Routine Grounds of Everyday Activities", Studies in Ethnomethodology, Prentice Hall, Engelwood Cliffs, New Jersey, 1967.

¹⁶² Wilder G.M. 1969. The Witness in Court: Problems of Demeanour in the Courtroom Setting. University of British Columbia.

¹⁶³ Wilder G.M. 1969. The Witness in Court: Problems of Demeanour in the Courtroom Setting. University of British Columbia.

Having discussed the theories of jurisprudence and the social context of litigation in the South African context, the theoretical foundation has been established for this research to proceed in the direction of a legal realist investigation into the impact of non-verbal communication and demeanour on the outcome of a trial. Legal realism serves as my preferred choice because of its focus on the practical application of law. In the next chapter the researcher will deal with non-verbal communication/behaviour and how it impacts on the outcome of the trial.

CHAPTER 3 – NON-VERBAL COMMUNICATION

3.1 Introduction

In the previous chapter it was stated that during court proceedings there is a social interaction that takes place between the different role players. The adversarial system that South African courts follow influences how each participant behaves during his appearance in court, how this is interpreted and how it influences the responses from the rest of the role players.¹⁶⁴ The proceedings are in the form of communications between the parties. During a trial all the role players are seen before they are heard. As such, non-verbal communication occurs through the mere presence of the role players and therefore, for the purpose of this study, it is imperative to look at non-verbal communication so that its impact on the verdict can be better understood.¹⁶⁵

“Human communication is not a set, meaningful fact. Only he [human themselves give] himself gives meaning to it.”¹⁶⁶ Communication is an unclear concept at times.¹⁶⁷ To try and better conceptualize communication we can say that: “communication occurs when one organism (*the transmitter*) encodes information into a signal which passes to another organism (*the receiver*) which decodes the signal and is capable of responding appropriately”.¹⁶⁸

The communicative act can be broken down into three parts:

- (i) a sender who encodes the information into a signal;
- (ii) the physical sending of the signal; and

¹⁶⁴ 2.4. of Chapter 2 of this study.

¹⁶⁵ LeVan E.A. 1984. Nonverbal Communication in the Courtroom: Attorney beware. Law and Psychology review, 8. 83-104 at 83.

¹⁶⁶ Van Shoor M. 1986. Wat is Kommunikasie? Pretoria: J.L. van Schaik (Edms) Bpk. P2.

¹⁶⁷ Ellis A. and Beattie G. 1986, The Psychology of Language and Communication. London: Weidenfield and Nicolsen. 2.

¹⁶⁸ Ellis A. and Beattie G. 1986, The Psychology of Language and Communication. London: Weidenfield and Nicolsen. 2.

- (iii) a receiver, who decodes the signal, interprets the signal into information and responds appropriately.¹⁶⁹

A medium can be anything from a word, text etc. that sends a message to the listener or receiver.¹⁷⁰ Communication, as defined in the dictionary, is defined as the activity or process of expressing ideas and feelings or of giving people information.¹⁷¹ Communication is the foundation of all our interactions with others.¹⁷² It influences the way society perceives and judge not only other people, but also the facts and circumstances of cases, affecting the decision-making process in ways we are often not aware of.¹⁷³ The court system rests heavily on the communication skills of and communication between participants.¹⁷⁴

It has been estimated that only thirty-five percent of the social communication among people is verbal; the remaining sixty five percent finds expression through non-verbal modes of behaviour.¹⁷⁵ During the first two years of a child's life, a child exhibits an extensive repertoire of non-verbal signals and also learns to interpret the various non-verbal signals he receives. This aspect of communication remains with the child as he matures and does not lose its importance with age.¹⁷⁶ For this reason, the non-verbal aspects of communication play a vital role in our communication process.¹⁷⁷

Mirroring also plays an important role in effective communication.¹⁷⁸ When communicating with an accused, or if an accused communicates with a listener,

¹⁶⁹ Ellis A. and Beattie G. 1986, *The Psychology of Language and Communication*. London: Weidenfield and Nicolsen. 2.

¹⁷⁰ Ellis A. and Beattie G. 1986, *The Psychology of Language and Communication*. London: Weidenfield and Nicolsen. 2.

¹⁷¹ See definition of Communication in Oxford Advanced Learner Dictionary. 7th ed. p 291.

¹⁷² Tait K. and Sikora K. 2006. *Communication Tools for Cases Involving Self-Represented Litigants*. p. 1.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Harrison R. "Nonverbal Communication: Exploration into Time, Space, Action and Object," in *Dimensions in Communication*, ed. J. H. Campbell and H.W. Helper (Belmont, California: Wadsworth Publishing Company, Inc., 1965), p. 161.

¹⁷⁶ Duke C.R. *Nonverbal Behavior and the Communication Process*. College Composition and Communication, Vol 25, No. 5 (Dec 1974). Pp397-404, at p. 397.

¹⁷⁷ Ibid.

¹⁷⁸ Ellis A. and Beattie G. 1986, *The Psychology of Language and Communication*. London: Weidenfield and Nicolsen. p 7. See also Halloran J. 1983. *Applied Human Relations: An Organizational Approach*. (2nd ed.) New Jersey: Prentice: Hall, Inc. p. 38 on achieving

it would greatly assist whoever the listener is in the conversation, to mirror the speaker. This may assist the listener to grasp the message more clearly, and help the speaker to get his/her message across more readily.¹⁷⁹ For any communicative situation, whether verbal or non-verbal, to be successful there needs to be feedback from both the speaker and the listener respectively.¹⁸⁰

There are two fundamental forms of communication, viz. verbal and non-verbal communication.¹⁸¹ Verbal communication can be described as that part of the communication process that involves the use of words to convey meaning and the message, whilst non-verbal communication, on the other hand, involves communication by means other than words.¹⁸² When a person communicates, he or she communicates non-verbally for a big part of the conversation.¹⁸³ Anderson and Taylor maintain that “Non-verbal communication is conveyed by non-verbal means such as touch, tone of voice, and gestures. A punch in the nose is non-verbal communication. So is a knowing glance. A surprisingly large portion of our everyday communication with others is non-verbal although we

effective communication. “When two or more people are talking together, each person’s emotions influence the others and these in turn affect communication. If we parade our tastes, biases, and prejudices as proof of our moral superiority, such behavior is often interpreted as threatening and serves to distort understanding and cut off communication. A threatening sender automatically puts the receiver on the defensive. When defences are raised, arguments or silence follow, and good communication ceases. If we believe that our messages are being received with signs of coldness, disrespect, and indifference, we become tense and have difficulty expressing our thoughts. Face-to-face communicators tend to *mirror* each other’s moods.”

¹⁷⁹ Ellis A. and Beattie G. 1986, *The Psychology of Language and Communication*. London: Weidenfield and Nicolsen. p. 8.

¹⁸⁰ Halloran J. 1983. *Applied Human relations: An Organizational Approach*. (2nd ed.) New Jersey Prentice- Hall, Inc. p. 40. Halloran writes the following in this regard: “*In face-to-face communication both the listener and the speaker continuously give to each other (1) non-verbally by nodding agreement or disagreement, frowning or smiling, yawning or engaging in or avoiding eye contact; and (2) verbally, by the relevance of their questions and responses in relation to what is being talked about. Those responses likely to be perceived as rewarding (smiles or nods of agreement) are called positive feedback. Those perceived as punishing (yawns, signs of inattention) are called negative feedback. Feedback enables us to recognize misunderstandings while they are happening so that the messages can be modified and redefined until the confusions are cleared away. Feedback in its broadest usage includes all the verbal and non-verbal responses to a message that are perceived by the sender of that message. In its narrow usage, feedback means only those specific responses that correct misunderstandings.*”

¹⁸¹ Duke C.R. 1974(25) *Nonverbal Behavior and the Communication Process College Composition and Communication* p. 397.

¹⁸² Knapp M.L. and Hall J.A. *Nonverbal Communication on Human Interaction* (Crawfordsville, in: Thomson Learning 2002).

¹⁸³ Anderson M.L. and Taylor H. F. 2002. *Sociology: Understanding a Diverse Society*. 2nd ed. USA: Wadsworth/Thompson Learning. p. 128-129.

are generally only conscious of a small fraction of the non-verbal conversations in which we take part.”¹⁸⁴

Cleary¹⁸⁵ defines a number of characteristics of non-verbal communication. Non-verbal communication uses relational symbols, which means symbols that indicate meaning by relating what they convey. Non-verbal communication is a primal code that is older than verbal communication, according to Cleary.¹⁸⁶ Cleary states that non-verbal communication is symbolic because it involves the use of socially defined symbols that are intended to convey messages. Non-verbal communication can be used to hide or reveal true feelings and ideas, and non-verbal communication is consciously encoded by the sender and decoded by the receiver. The sender and the receiver must share the same set of rules to convey meaning.¹⁸⁷ Non-verbal communication can be intentional and is sometimes “used to achieve specific purposes or functions in communication processes”.¹⁸⁸ However, non-verbal communication is sometimes also involuntary and spontaneous.¹⁸⁹ According to Cleary non-verbal communication has three functions,¹⁹⁰ namely, it is used to express meaning, modify verbal messages and to regulate the flow of interaction. Non-verbal communication must therefore not be viewed in isolation from the verbal message.¹⁹¹

Another scholar on non-verbal communication, Galloway, highlights the significance of noticing and heeding non-verbal cues and states that:

“...to recognize that how we say something is as important as what we say is difficult to grasp because little conscious thought is given to

¹⁸⁴ Anderson M.L. and Taylor H. F. 2002. *Sociology: Understanding a Diverse Society*. 2nd ed. USA: Wadsworth/Thompson Learning. 128-129.

¹⁸⁵ Cleary S. 2003. *Communication Handbook: a Student guide to effective communication* (2nd Ed). Cape Town Juta. 18.

¹⁸⁶ Ibid.

¹⁸⁷ Cleary S. 2003. *Communication Handbook: a Student guide to effective communication* (2nd Ed). Cape Town Juta. 18.

¹⁸⁸ Cleary S. 2003. *Communication Handbook: a Student guide to effective communication* (2nd Ed). Cape Town Juta. 19.

¹⁸⁹ Ibid.

¹⁹⁰ Cleary S. 2003. *Communication Handbook: a Student guide to effective communication* (2nd Ed). Cape Town Juta. 21.

¹⁹¹ Cleary S. 2003. *Communication Handbook: a Student guide to effective communication* (2nd Ed). Cape Town Juta. 21.

process of providing information through non-verbal action. We are usually unaware of our own awareness.”¹⁹²

In as much as non-verbal communication is so diverse in depth, studies of this form of communication only actually gained momentum in the 1960's.¹⁹³ Since the 1960's public interest in non-verbal communication increased slowly, but people remained oblivious to non-verbal communication and the influence and effect of this non-verbal communication on everyday lives.¹⁹⁴ Two schools of thought exist in the behavioural sciences about body movements. Members of the psychological school view non-verbal communication as simply the expression of emotions. Individuals in the communicational schools, mainly anthropologists and ethologists, on the other hand are concerned with behaviours of posture, touch, and movement as they relate to social processes like group cohesion and regulation.¹⁹⁵ Scholars Condon and Ogston maintain that communication that humans engage in is part of a process called “self-synchrony” where the physical movements of the different parts of the body are synchronized with verbal speech.¹⁹⁶

Scholarly investigations into non-verbal communication and its place in the communication process gave rise to the development of categories of non-verbal communication.¹⁹⁷

3.2 Categories of Non-verbal Communication

Different scholars who have pursued research in non-verbal communication have classified non-verbal communication into various categories.¹⁹⁸ Duncan

¹⁹² Galloway C. 1968(7) *Nonverbal Communication Theory into Practice*. p. 172. According to Galloway, non-verbal cues may be used to effect an impression, convey an attitude, and influence others or be influenced by others.

¹⁹³ Fast J. *Body Language* (Pan Books London & Sydney 1970).

¹⁹⁴ Dunning G.B. 1971(10). Research in Nonverbal Communication *Theory into Practice*. p. 250.

¹⁹⁵ Duke C.R. 1974(25) Nonverbal Behavior and the Communication Process *College Composition and Communication* p. 397.

¹⁹⁶ Condon W.S. and Ogston W.D. 1966(143) Sound Film analysis of normal and pathological behavior Patterns. *Journal of Nervous and Mental Disease*. p. 338-347.

¹⁹⁷ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978). p. 52.

¹⁹⁸ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978). p. 52.

categorised non-verbal behaviour into six categories viz. kinesic behaviour, proxemics, paralanguage, artefacts, olfaction, and skin sensitivity.¹⁹⁹ Knapp, on the contrary, categorised non-verbal behaviour into seven categories, viz. proxemics, environmental influence, kinesics, artefacts, physical characteristics, paralanguage, and touching.²⁰⁰ For the purpose of this research I will focus on the main categories portrayed by Knapp as they are relevant to the non-verbal cues that are most pertinent to this research.

3.2.1 Kinesics

The word kinesics comes from the root word kinesis, which means “movement” and refers to the study of hand, arm, and face movements.²⁰¹ Kinesics is now scientifically referred to as body language.²⁰² Ray Birdwhistell, an American researcher and anthropologist, who focused on the studies relating to body language and how people communicate through posture, gesture, stance and movement, can be accredited for this concept.²⁰³ During the communication process the whole body contributes to the non-verbal communication through body movements which occur effortlessly, involuntarily, and often the individual is unaware of the body movements he is executing. Ekman maintains that the body discloses (leaks) information whilst the person is unaware that such disclosure (leakage) is actually taking place.²⁰⁴ Ekman submits that facial expressions are indicative of support, camaraderie, and deceit.²⁰⁵ The face is deemed to be the primary signifier of emotion and eye movement is vital when displaying emotion.²⁰⁶ The most common facial expressions that communicate

¹⁹⁹ Duncan S. 1969(72). Nonverbal Communication Psychological Bulletin. p 118-137

²⁰⁰ Knapp M.L. Nonverbal Communication in Human Interaction (New York: Holt, Rinehart and Winston 1978).

²⁰¹ Hans A. and Hans E. Kinesics, Haptics and Proxemics: Aspects of Non-Verbal Communication. IOSR Journal of Humanities and Social Science (IOSR –JHSS). Vol 20, Issue 2, Ver. IV (Feb 2015) pp47-52 at p. 47.

²⁰² Burgoon J.K. and Saine T. The Unspoken Dialogue An Introduction to Nonverbal Communication (Houghton Mifflin Company 1978). p. 52.

²⁰² Burgoon J.K. and Saine T. The Unspoken Dialogue An Introduction to Nonverbal Communication (Houghton Mifflin Company 1978). p. 52.

²⁰³ Birdwhistell R. Kinesics and Context (University of Pennsylvania Press: Philadelphia 1970). p. 1-15.

²⁰⁴ Ekman P. 1982. Emotion on the Human Face (Cambridge: Cambridge University Press 1982).

²⁰⁵ Ibid.

²⁰⁶ Ekman P. 1982. Emotion on the Human Face. Cambridge: Cambridge University Press.

emotion are disgust, anger, happiness, sadness, surprise and fear.²⁰⁷ Body language such as gestures, postures and body movements also convey meaning.²⁰⁸ Kendon believed that body movement can sometimes be a substitute for speech, especially where it may not be convenient to use speech.²⁰⁹ Kinesic messages are more subtle than gestures and comprise posture, gaze and facial movements.²¹⁰

Andersen and Taylor maintain that kinesic communication entails gestures, facial expressions and body movements which include waving hands, crossed arms and extended legs, plus hundreds of facial expressions and eye contact.²¹¹ Like most non-verbal communication, kinesic communication is also influenced by culture and ethnic subgroups. Conversely, some gestures retain the same meaning across different cultures, ethnic groups and societies.²¹² Facial expressions are mostly universal, for example, the facial expressions for disgust, happiness, anger, and sadness are mostly the same in all cultures.²¹³ Facial expressions are also used to portray fear and surprise, and will not vary much from culture to culture. Cleary states that although facial expressions will be the same irrespective of culture, it is the culture that determines when it is appropriate to use them.²¹⁴ Cleary states that body movements are used as regulators, for example when a person wants to end a conversation, he or she may get off the chair and take a step backwards.²¹⁵

Sillars²¹⁶ mentions some movements and gestures that may indicate nervousness and anxiety, namely, fidgeting with hands, frequently crossing and

²⁰⁷ Ibid.

²⁰⁸ Duke C.R. 1974(25) *Nonverbal Behavior and the Communication Process* College Composition and Communication p. 397-404.

²⁰⁹ Kendon A. 1985. Some uses of gesture. (In O. Tannen & M. Saville-Troike (Eds) *Perspectives on Silence* 1985). p. 215-234.

²¹⁰ Krisch M.S. (1979). "Non-Verbal Communication Across Cultures". *Modern Language Journal*. 63(8) p. 416.

²¹¹ Andersen M.L. & Taylor H.F. (2002). *Sociology: Understanding a diverse society*. 2nd ed. USA: Wadsworth/Thompson Learning. p. 13.

²¹² Andersen M.L. & Taylor H.F. (2002). *Sociology: Understanding a diverse society*. 2nd ed. USA: Wadsworth/Thompson Learning. p.131.

²¹³ Ibid.

²¹⁴ Cleary S. (2003). *Communication Handbook: a student guide to effective communication* (2nd ed.). Cape Town Juta. p. 22.

²¹⁵ Ibid.

²¹⁶ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 90.

uncrossing the legs, tapping the feet, and drumming the fingers on the table.²¹⁷ Sillars states further that the speaker should be conscious of the movements and gestures that he or she sends out: “some movements can be very distracting. Scratching the head, stroking your beard (real or imaginary), or cleaning your spectacles can interrupt the speaker’s flow, so try very hard to avoid those movements”.²¹⁸ Sillars makes a very applicable point concerning facial expressions.

“Visual signals are often stronger than verbal ones, so you should always try to match your own facial expressions to what you are trying to say, as the listener will otherwise be faced with conflicting messages. Similarly, take account of your listener’s expression when he or she is replying to you, as well as what is being said verbally. Only this way will you read the others’ messages with any degree of accuracy”.²¹⁹

Sillars further highlights that movements of the head can clarify a person’s feelings, for example, the nodding of the head can imply agreement or understanding, “smiling and nodding when someone is explaining something will let him or her know that you understand what is being said”, and shaking of the head can imply disagreement or disapproval.²²⁰

With regard to body direction, Sillars comments that it can be classified into four areas: orientation, posture, proximity and contact. Orientation is “simply the direction in which the body is facing. Facing the person you are speaking to suggests involvement; speaking with your body turned away suggests restlessness or a lack of commitment. Changes in orientation can convey significant changes of mood during a discussion”.²²¹ Posture “refers to the position of the body”.²²² Sillars, maintained that cognisance should be taken of posture positions during a conversation involving a speaker and listener: “someone sitting forward, looking intently at the speaker, is probably very

²¹⁷ Ibid.

²¹⁸ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 91.

²¹⁹ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 92.

²²⁰ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 91.

²²¹ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 90.

²²² Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 90.

interested in what is being said; conversely, a person sitting well back in his/her chair looking at the carpet, probably lacks interest or concentration; closed body postures – arms folded across the chest and shoulders hunched, for example – suggest a defensive or threatened attitude; open postures – such as leaning back with the hands crossed behind the head – suggest extreme confidence”.²²³

With regard to proximity, Sillars submits that it is of significance to note that while some welcome close, informal seating arrangements, others feel threatened by people who approach them too closely, and will respond nervously when they are treated in this way.²²⁴ With regard to contact, Sillars mentions that people react differently to contact: some will use touch as a sign of goodwill, whereas others will feel threatened or offended by any such touch.²²⁵

3.2.2 Paralinguistic Communication

“Paralanguage applies not to the *meaning* of the words we say, but to the meaning of *how* we say them: here the rhythm, pitch, intensity, nasality, slurring and so on come in.”²²⁶ Cleary maintains that the tone of an individual’s voice conveys meaning, therefore when listening to a speaker, it is always wise to pay attention to the speaker’s voice volume, pitch, inflection, pace and resonance.²²⁷

Anderson and Taylor claim that paralinguistic communication is influenced by the cultural and ethnic context; for example, in some cultures a pause in speech may mean emphasis, but in other cultures it may mean uncertainty.²²⁸ The same applies to a high-pitched voice in the speaker. In some cultures a high-

²²³ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 90.

²²⁴ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 91.

²²⁵ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 91.

²²⁶ Henley N. (1977). *Body Politics*. Englewood Cliffs, New Jersey: Prentice-Hall Inc. p. 70.

²²⁷ Cleary S. (2003). *Communication Handbook: a student guide to effective communication* (2nd ed.). Cape Town Juta. p. 23.

²²⁸ Andersen M.L. & Taylor H.F. (2002). *Sociology: Understanding a diverse society*. 2nd ed. USA: Wadsworth/Thompson Learning. p.131.

pitched voice may indicate excitement, but in other cultures it may express that the speaker is lying.²²⁹

Sillars provides a few pointers to take note of when people are speaking. He submits that:

- When a speaker speaks calmly and distinctly at a reasonable pace and volume this will convey an impression of control and assurance.
- When a speaker speaks very quickly, with variations in pitch and volume, he/she will appear nervous and lacking self-control.
- The speaker can use variations of pitch and tone positively to stress important words and avoid speaking in a monotone.
- Speakers should pay attention to each other's speech. If someone gives the impression of being nervous, try to help by speaking calmly and reassuringly.
- A speaker should make an effort not to become angry or excited, as this will only aggravate the other participant in the conversation.²³⁰

When non-verbal leakage occurs, the emotions of the speaker tend to leak out when the speaker tries to conceal them.²³¹ For example, when a person is lying emotions that betray him or her are usually nervousness, anxiety and tension. A higher voice than usual from the speaker when making a statement is an involuntary paralinguistic expression that gives the lie away.²³²

For the role players in a trial, it is vital to have clear knowledge, use, and understanding of paralinguistic communication in order to communicate the message correctly to the receiver.²³³

3.2.3 Gaze and Eye Contact

²²⁹ Ibid.

²³⁰ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 92.

²³¹ Ekman P., Friesen W.V. and O'Sullivan M. (1988). "Smiles When Lying." *Journal of Personality and Social Psychology* 54. (In Taylor H.F. and Andersen M.L. 2002. *Sociology: Understanding a diverse society*. 2nd ed. USA: Wadsworth/Thompson Learning at p. 131).

²³² Ibid.

²³³ McCardle E.S. 1974. *Nonverbal communication*. New York: Marcel Dekker Inc. p. 41.

According to Ellis and Beattie²³⁴ one of the two central components of non-verbal behaviour in conversation are speaker eye-gaze and speaker hand movement and gesture, and how they relate to each other. Sillars adds that during a one-on-one conversation in a euro-centric cultural setting, looking at the listener directly in the eye suggests openness, whereas looking away gives the impression of dishonesty or shiftiness.²³⁵ Halloran maintains that “Sometimes eye contact is a clue as to whether someone is lying. The liar tends not to make eye contact. The direction of the person’s gaze is also an important clue as to whether information or instructions are being absorbed. A wandering gaze with a shifting posture is usually evidence that the individual has stopped listening”.²³⁶

3.2.4 Proxemics

Proxemics refers to the study of how space and distance influence communication.²³⁷ We only need to look at the ways in which space shows up in common metaphors to see that space, communication and relationships are closely related. For example, when we are content with and attracted to someone we say we are “close” to him or her. When we lose connection with someone, we may say he or she is “distant”. In general, space influences how people communicate and behave.²³⁸ Smaller spaces with a higher density of people often lead to breaches of our personal space bubbles. According to anthropologist E.T. Hall, “we all carry around us a *proxemic bubble* that represents our personal three-dimensional space”.²³⁹ Proxemic interaction varies from culture to culture as well as in gender roles.²⁴⁰ We all have varying definitions of what our “personal space” is and those definitions are contextual

²³⁴ Ellis A. and Beattie G. 1986, *The Psychology of Language and Communication*. London :Weidenfield and Nicolsen. p. 136.

²³⁵ Sillars S. (1988). *Success in Communication*. UK: Murray Limited. p. 92.

²³⁶ Halloran J. (1983). *Applied Human Relations: An Organizational Approach*. 2nd ed. New Jersey: Prentice: Hall. p. 45.

²³⁷ Hans A. and Hans E. *Kinesics, Haptics and Proxemics: Aspects of Non-Verbal Communication*. IOSR Journal of Humanities and Social Science (IOSR –JHSS). Vol 20, Issue 2, Ver. IV (Feb 2015) pp47-52 at p. 49.

²³⁸ Ibid.

²³⁹ Hall E.T. (1966). *The Hidden Dimension*. New York: Doubleday. (In Andersen M.L. & Taylor H.F. (2002). *Sociology: Understanding a diverse society*. 2nd ed. USA: Wadsworth/Thompson Learning).

²⁴⁰ Ibid.

and depend on the situation and relationship. Scholars have identified four zones which are public, social, personal, and intimate distance.²⁴¹ Humans tend to use proximity or distance as a protective barrier and severe psychological and physical harm can result when such distance is encroached upon.²⁴²

3.3 Approaches to Non-verbal Communication

The increase in the importance of non-verbal communication has led to much research into this impactful form of communication, thus giving rise to different approaches adopted by researchers of non-verbal communication.²⁴³ For the purpose of this study I will deal briefly with the approaches that are more relevant.

3.3.1 The Functional Approach

This is a more recent approach in terms of which the focus is on the variety of factors that influence behaviour, rather than on the causes of behaviour.²⁴⁴ This model assumes that multiple non-verbal signals combine to serve important communicative goals.²⁴⁵ Egolf and Chester²⁴⁶ maintain that the functional approach looks at the non-verbal behaviours that are needed to reach a goal or serve a purpose and suggest that some assumptions of the functional approach are the following:

- The function being investigated determines what behaviours are to be observed.
- All functions are dependent upon the situation.
- All functional behaviours are dynamic, in process, and always changing.

²⁴¹ Hans A. and Hans E. Kinesics, Haptics and Proxemics: Aspects of Non-Verbal Communication. IOSR Journal of Humanities and Social Science (IOSR –JHSS). Vol 20, Issue 2, Ver. IV (Feb 2015) pp47-52 at p. 49.

²⁴² Myers G. T, and Meyers M.T. The Dynamics of Human Communication: A Laboratory Approach . 6th ed. (McGraw Hill Inc. New York 1992). p. 229.

²⁴³ Galloway C.M. 1971(10). The Challenge of Nonverbal Research Theory. p. 310.

²⁴⁴ Burgoon J.K. and Saine T. The Unspoken Dialogue An Introduction to Nonverbal Communication (Houghton Mifflin Company 1978). p. 48.

²⁴⁵ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. New Jersey Journal Of Communication. p.15.

²⁴⁶ Egolf D.B. and Chester S.L. (2013). THE NONVERBAL FACTOR: Exploring the other side of communication. (3rd ed.). Universe LLC: Bloomington. p. 29.

- A single function may involve many non-verbal modalities. The person exhibiting the non-verbal behaviour may communicate through his physical appearance, dress, and tone of voice, for example.
- The behaviours needed to achieve a function occur within a finite period of time.
- The important causes of behaviour are the immediate ones.

The functional approach is probably the one that most people take without even being aware of it.²⁴⁷ Most of us like to make a good impression, and, of course, non-verbal behaviour has an important role in impression formation.²⁴⁸

3.3.2 The Ethological Approach

This is an older approach which focuses on non-verbal behaviour within the animal kingdom.²⁴⁹ Non-verbal behaviour is believed to be innate or genetically driven.²⁵⁰ Ethologists maintain the view that some behavioural patterns have progressed from a pre-civilized era and non-verbal behaviour is more primitive than verbal behaviour.²⁵¹ The approach adopted by ethologists has been criticized by scientists who are more inclined to support the nurture approach and strongly maintain the view that non-verbal communication is learned.²⁵² Researchers with contrary views have rejected any comparative data linking animal and human beings, maintaining that there exists a noticeable difference in the cognitive abilities of human and animal species.²⁵³

3.3.3 The Body Language Approach

²⁴⁷ Ibid at p. 30.

²⁴⁸ Ibid at p. 30.

²⁴⁹ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. New Jersey Journal Of Communication.p.32.

²⁵⁰ Ibid.

²⁵¹ Burgoon J.K. and Saine T. The Unspoken Dialogue An Introduction to Nonverbal Communication (Houghton Mifflin Company 1978). p. 33.

²⁵² Ibid.

²⁵³ Ibid at p.34.

According to this approach, body movements transmit particular meaning that can aid in the interactive process.²⁵⁴ It is contended that these non-verbal messages are significantly more reliable than the verbal messages because the body emits movements that are normally impulsive, involuntary and instantaneous, and generally supports the verbal message.²⁵⁵

As with the other approaches, the limitation with regard to the body language approach is that people are inclined to draw inferences from random instances which are potentially deceitful, and it is difficult to ascertain precisely when behaviour becomes symbolic.²⁵⁶ Thus it is imperative that body language literature be treated with caution.²⁵⁷

The approaches to non-verbal communication mentioned above appear to be limited to empirical methods which appear to be based on the field of psychology.²⁵⁸ For that reason my focus will be more on looking at non-verbal communication as part of the social interaction that takes place in the courtroom and perhaps applying the jurisprudential theory and legal system of legal realism and the rules of evidence. The functional approach appears to be the most appropriate approach to adopt for the purpose of this study, as part of the process of evaluation of evidence presented is to establish credibility, and for that the court will look at why a witness or the accused said or did what he or she did within the context to how the witness or the accused presented their *viva voce* evidence.

3.4 The Importance of Non-verbal Communication in the Courtroom

It is now well documented that non-verbal signals serve many functions necessary for effective human interaction, the most important of these being:

- expressing our identity, e.g. culture, personality, gender, values, etc.;

²⁵⁴ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978). p. 29.

²⁵⁵ Ibid at p. 29-30.

²⁵⁶ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978). p. 31.

²⁵⁷ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978). p. 31.

²⁵⁸ Galloway C.M. 1971 (10). *The Challenge of Nonverbal Research Theory*. p. 310-314.

- communicating our attitudes and feelings, e.g. positive-negative feelings, and feelings of superiority-inferiority, as well as basic emotions such as anger, joy fear, etc.;
- creating first impressions of ourselves and stereotyping others;
- structuring and facilitating the flow of interactions, e.g. non-verbal actions serve as the “traffic signals” which direct the turn-taking among the speakers and the listeners;
- influencing others;
- assisting in the production and comprehension of speech; and
- allowing us to engage in deception and to send “mixed” messages.²⁵⁹

Despite the general importance of non-verbal behaviour in virtually all communicative contexts, little has been done to synthesize what we know about the impact of non-verbal communication in the courtroom environment. Indeed, the judgments of attorneys, jurors, clients, witnesses and judges are heavily influenced by the continuous exchange of non-verbal signals.²⁶⁰ The guilt or innocence of the accused, the credibility of a witness, the persuasiveness of an attorney, and the truthfulness of a prospective juror may hang in the balance.²⁶¹

In terms of modern jurisprudence legal procedure is divided into two distinct parts: legal activity and legal discourse.²⁶² Legal discourse holds that in each case there is a legal event, in which legal discourse is one kind of legal act, and that legal procedures, as communicative events in which both legal actors and non-authorized persons participate, are exchanges of official messages through the use of verbal and non-verbal signs, and are also legal acts of a non-verbal kind.²⁶³ The ability of the legal actors to detect, analyse and decode signs within the non-verbal communication process is essential for the improvement of the

²⁵⁹ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. New Jersey Journal Of Communication. p.4.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Kevelson R. The Law as a System of Signs (Plenum Press New York 1988).p. 5-10.

²⁶³ Ibid. This view was put forward by Lieber F. 1839. Legal and Political Hermeneutics. St Louis: G. I. Jones, 1963., as referred to by Kevelson.

communicative legal skills of the role players in legal proceedings²⁶⁴ and forms the mark of a skilled lawyer.²⁶⁵

Within the context of the courtroom and during proceeding, non-verbal signs have the potential to occasionally have a probative effect on the judgment of the presiding officer as well as on the evidence of the witnesses.²⁶⁶ Jury systems are used in certain countries and it is in these countries that knowledge of non-verbal techniques plays a fundamental role in influencing the jurors and steering the court proceedings in a specific direction.²⁶⁷ In a criminal trial, due process mandates that the trial judge does not show actual bias toward the accused. Trial judges are not only required to be fair and impartial, they must also “satisfy the appearance of justice”.²⁶⁸

LeVan²⁶⁹ emphasised the significance of non-verbal communication in the courtroom environment and remarked as follows:

“In the courtroom, non-verbal communication subtly affects the entire proceedings of a trial. It is constantly present and being asserted, yet the attorney is often unaware of its existence.”

3.4.1 Non-verbal Communication and its Impact in Respect of Jurors in a United States of America Courtroom

²⁶⁴ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988).p. 5-10.

²⁶⁵ Balkin J.M. *The Promise of Legal Semiotics* 1991 Faculty Scholarship Series Paper 278 at <http://digitalcommons.law.yale.edu/fss-papers/278> (Date of use: 13 October 2017).

²⁶⁶ Blanck P.D., Rosenthal R. and Cordell L.H. 1985(38) *The appearance of justice: Judges Verbal and Nonverbal Behavior in Criminal Jury Trials*, *Stanford Law Review* at 89 -164.

²⁶⁷ Ibid.

²⁶⁸ Blanck P.D., Rosenthal R. and Cordell L.H. 1985(38) *The appearance of justice: Judges Verbal and Nonverbal Behavior in Criminal Jury Trials*, *Stanford Law Review* at 89 -97.

²⁶⁹ LeVan E.A. 1984(8) *Non-verbal communication in the courtroom: Attorneys beware* *Law and Psychology Review* 83-104 at p. 83. “Gestures and facial expressions are transmitted by every individual in the court. LeVan contends that the attorney in her opening statement uses gestures and eye contact to persuade the jury. Likewise, the judge silently communicates her attitudes and feelings about the case to the jury through her posture and facial expressions.

Non-verbal signals are unwittingly sent by the witness messages through clothing, general appearance, posture and facial expressions. The witness on the stand, may reveal more through fidgeting with her clothes and body movements than through her testimony.”

The importance of non-verbal communication and its impact on the appearance of justice has been a common topic of research in the United States, especially relating to the verbal and non-verbal behaviour of judges in criminal jury trials. This research has yielded outcomes that are relevant to the research undertaken in this study.²⁷⁰ Considering the information yielded by that research, the study deals with jurors as part of the role players who participate in the court proceedings.

In the United States the courtroom formal setup conveys messages about the nature of roles and expectations. The judge, having the highest position, is in charge of interaction, takes a moderating and leading role, and may interrupt anyone at any time. Court officers seek permission from the judge to interrupt other participants.²⁷¹ The U.S. courtroom layout indicates the theoretical equivalence of the prosecuting and defending counsel by placing them at equal distances from the judge. In jury trials, the jury box has its place alongside the proceedings. The jurors are *spectators* at the proceedings, similar to a crowd watching a football match or bystanders looking at a car accident on the street.²⁷²

It has long been known that non-typical verbal and non-verbal behaviours by an accused or witness in a criminal or civil matter often are interpreted by judges and juries as evidence of guilt or untrustworthiness.²⁷³ The behaviours known to be associated with a lack of credibility and dishonesty are the shifty eye, shuffling feet, hesitancy in tone of voice, lack of expected emotion, and inconsistencies among verbal and non-verbal messages.²⁷⁴

²⁷⁰ Blanck P.D., Rosenthal R. and Cordell L.H. (1985). The Appearance of Justice: Judge's verbal and nonverbal behavior in criminal jury trials. *Stanford Law Review*, 38(1). Also see Levenson L.L. 2007. Courtroom Demeanour: the Theatre of the Courtroom. Legal Studies Paper 30. Social Science Research Network (SSRN). <http://ssrn.com/abstract=99471>.

²⁷¹ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. *New Jersey Journal of Communication* p. 12.

²⁷² Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. *New Jersey Journal of Communication* p. 13.

²⁷³ Blanck P.D., Rosenthal R. and Cordell L.H. (1985). The Appearance of Justice: Judge's verbal and nonverbal behavior in criminal jury trials. *Stanford Law Review*, 38(1), p. 89-164.

²⁷⁴ Hickson M. Stacks D.W. and Moore N. (2003). *Nonverbal Communication: Studies and applications*. Los Angeles, CA: Roxbury.

Interpersonal communication researchers have shown that the ways people process and interpret verbal and non-verbal messages are influenced importantly by broad elements of social context.²⁷⁵ Recent efforts have noted that it is the social context provided by circumstances and accompanying interpersonal cues that enables an observer to attribute meaning appropriately.²⁷⁶

Searcy, Duck and Blanck²⁷⁷ argue that within the spectrum of the social stage, the courtroom provides a unique context and hence, *disables* certain ordinary sorts of attribution of meaning about observed cues and behaviour. The courtroom is a context where pleasure and sociability are irrelevant and the determination of criminal guilt or civil liability, or the lack thereof, is the prescribed focus of the jurors and judges.²⁷⁸ The outcome-driven process, particularly where the presented evidence is finely balanced or confusing to lay jurors, often depends on their determination of witness credibility. In the courtroom, then the contextually forced and definitional focus on persuasive credibility gives verbal and non-verbal utterances more weight, as compared to typical conversation with intimates or strangers.²⁷⁹ However the courtroom context also *enables* attributions about certain performances. Clearly, not all role players in the trial drama are equally informed about the context and its parameters and processes. The regular role players, such as the judges and trial lawyers, learn to expect and use contextual cues; for instance, highlighting to the jury the inconsistency in a witness's verbal and non-verbal behaviour.²⁸⁰ These deviations from what may be expected as normal or "reasonable" in this context are sometimes read by lawyers as "leaking" or "oozing" guilt, culpability, or dishonesty.²⁸¹

²⁷⁵ Knapp M. & Hall J. (2002). *Nonverbal Communication in human interaction*. (5thed.). London: Wadsworth.

²⁷⁶ Ibid.

²⁷⁷ Searcy M., Duck M. and Blanck P. (2004). *Nonverbal Behavior in the Courtroom*. p. 4.

²⁷⁸ Ibid.

²⁷⁹ Ibid at p. 5.

²⁸⁰ Searcy M.A. (2003). Social problematic integration theory (the split model): Taking the cognitive theory of problematic integration into close family communication (paper presentation). Omaha, NE: Central States Communication Association.

²⁸¹ Ibid.

Lawyers also understand that jurors and most witnesses are acting in an unfamiliar and stressful context, while facing unfamiliar forms of prescribed interactions, with dramatic legal consequences. For such non-repeat players, a critical evaluation of the courtroom behaviour (for instance, in the assessment of witness credibility) is necessarily based on expectations formed elsewhere in life.²⁸²

Jurors bring to the courtroom their intuitive expectations about the ways in which ordinary people manifest guilt. Often, the jury's collective judgment of guilt in a criminal trial is a report that the accused "performed" non-verbally when testifying in a way that was consistent with expectations surrounding the presence of guilt.²⁸³ Likewise trial attorneys take care to observe the demeanour of potential jurors during the selection process and attempt to predict ("expect") the attitudes of those jurors toward the case.²⁸⁴ There are numerous recommendations about the way attorneys should conduct themselves during *voir dire* (jury selection) in order to build rapport with and elicit information from potential jurors.²⁸⁵ Building rapport includes the use of "warm" non-verbal behaviours such as close distances, eye contact, smiles, soft vocal tones, etc. and the avoidance of antagonistic cues such as sarcastic tones, turning away, intimidating gestures, amongst others. The research of Hatfield, Cacioppo and Rapson²⁸⁶ suggests that rapport may be associated with interactants adopting similar postures (mirroring), speech styles, facial expressions, and patterns of coordinated movement.

In an experiment on the effects of anxiety on non-verbal involvement behaviour, for instance, Remland and Jones²⁸⁷, found that interviewees spoke significantly longer in response to the personal questions when the interviewer used a direct

²⁸² Searcy M., Duck S. and Blanck P. (2012). *Communication in the Courtroom and the "Appearance" of Justice*. Lawrence Erlbaum Press. p. 5.

²⁸³ Searcy M., Duck S. and Blanck P. (2012). *Communication in the Courtroom and the "Appearance" of Justice*. Lawrence Erlbaum Press. p.6.

²⁸⁴ Ibid at p. 7.

²⁸⁵ Remland M.S. 1994. *The Importance of Nonverbal Communication in the Courtroom*. New Jersey Journal of Communication. p. 5.

²⁸⁶ Hatfield E., Cacioppo J.T. and Rapson R.L. (1994). *Emotional Contagion*. Cambridge United Kingdom: Cambridge University Press.

²⁸⁷ Remland M.S. and Jones T.S. (1989). The effects of nonverbal involvement and communication apprehension on state of anxiety, interpersonal attraction and speech duration. *Community Quarterly*, 37. p. 71-81.

body orientation, vocal backchannels, head nods, and eye contact than when the interviewer did not. This effect was achieved irrespective of whether or not the subjects were apprehensive about participating in the interview. Matlon,²⁸⁸ in discussions on non-verbal communication during jury selections, suggested that attorneys avoid standing too close or too far from the individuals who are being questioned, interrupting, using an angry tone of voice, and staring. In addition, the ability to detect deception may prove useful.²⁸⁹

Since true feelings and attitudes are more likely to be conveyed non-verbally than verbally, what a prospective juror says in response to a question may be less informative than how it is said. People generally have more control over their words than their non-verbal signals. In this regard their facial expressions, gaze behaviour, voice changes, and body movements – especially when they are not consistent with what has been said – ought to be deciphered²⁹⁰. These non-verbal messages might reveal the true attitudes, and thus biases, of prospective jurors toward the attorney, the accused, or the crime²⁹¹.

When applying the functional approach to the impact of non-verbal communication of courtroom participants on the jury, Remland²⁹² highlights five functions that these non-verbal signals might serve. They might serve to:

- alter judgments of credibility:
 - The opening and closing statements of attorneys, and the testimony of witnesses are likely to be more convincing with: fluent speech, moderately fast speech rates, eye contact, the avoidance of inconsistencies across different channels, strong and varied vocal tones, the use of purposeful rather than self-conscious movements, and the use of forceful but natural gestures.

²⁸⁸ Matlon R.J. (1988). *Communication in the legal process*. New York: Holt, Rinehart and Winston, Inc.

²⁸⁹ Matlon R.J. (1988). *Communication in the legal process*. New York: Holt, Rinehart and Winston, Inc.

²⁹⁰ Matlon R.J. (1988). *Communication in the legal process*. New York: Holt, Rinehart and Winston, Inc.

²⁹¹ Matlon R.J. (1988). *Communication in the legal process*. New York: Holt, Rinehart and Winston, Inc.

²⁹² Remland M.S. 1994. *The Importance of Nonverbal Communication in the Courtroom*. New Jersey Journal of Communication. p. 15.

- Courtroom participants may gain credibility if they violate the non-verbal expectations of jurors.
- Physically attractive persons may benefit from a "halo effect" whereby their looks help them to be perceived as more credible and less blameworthy.
- Numerous non-verbal signals may provide clues to deception from prospective jurors and witnesses. But, the accurate interpretation of these signals is problematic.
- If they wish to be seen as credible, witnesses should seek to avoid non-verbal behaviours associated with the stereotype of a liar (e.g., averting gaze, hesitating, shifting positions/postures, fidgeting, perspiring, etc.) or of an evasive person (e.g., long response latencies, long pauses, etc.).
- Non-verbal displays of status and power (e.g., staring, pointing, loud speech, close proximity, turning away, smiling, etc.) may serve to intimidate a witness during cross-examination which may undermine the credibility of the witness.
- Facial expressions of sadness or no emotion are more likely to evoke favourable judgments of accuseds than will expressions of anger or joy. In some cases an accused may benefit from the "halo effect" if a smile is seen as attractive.
- Facial features can influence impressions of guilt or innocence. Persons with baby-faced characteristics may be seen as more "innocent" than persons with mature-faced features. Or, they may be seen as more likely to commit certain kinds of crimes (i.e., those involving carelessness, negligence).
- facilitate self-disclosure:
 - Attorneys can use "warm" and "non-antagonistic" non-verbal behaviours to build rapport with prospective jurors and "reinforcing" cues to encourage self-disclosure from them.
- foster attitudes of like and dislike

- Attorneys and others may be able to affect jurors' attitudes toward them with the use of warm, "immediate" and synchronous non-verbal cues.
- The overall clothing and demeanour of witnesses is less likely to result in negative evaluations if witnesses adhere to the norms of the court, which require all participants to be respectful, attentive, and professional, than if they do not. This implies that individuals avoid various forms of "rude" behaviour (e.g. chewing gum, shouting, laughing, etc.) and dress in a conservative manner. Based on the "what is beautiful is good hypothesis," jurors are more likely to be attracted to good-looking courtroom participants than unattractive ones regarding the importance of physical appearance. The impact on the outcome of a trial will lessen as the severity of the crime increases and as the strength of the evidence increases.
- spread emotions
 - Members of a jury may catch and subsequently feel the emotions of key courtroom participants.
 - Certain individuals in a jury may be more vulnerable to emotional contagion than others.
- produce expectancy effects
 - The non-verbal behaviour of the judge may reveal concealed attitudes and biases toward persons in the courtroom and may produce expectancy effects on the jury (i.e., the judge non-verbally signals his/her expectations to the jury which influences their decision).²⁹³

Jurors have visual access to the accused and other role players throughout the proceedings, thus the stereotyped impressions they form based on the physical appearance and demeanour can be extremely influential on the outcome of the

²⁹³ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. New Jersey Journal of Communication. p. 19-21.

proceedings.²⁹⁴ Research done by Halverson, Hallahan, Hart and Rosenthal²⁹⁵ into how non-verbal communication in the courtroom impacts on the jurors revealed that when judges had very overt non-verbal behaviour, jurors inferred that the judge believed the accused was guilty. Further research was done by Burnett and Badzinski²⁹⁶ revealing and confirming that non-verbal communication cues from players during trial proceedings can have a serious influence and impact, especially among jurors.

3.4.2 The Impact of the non-verbal behaviour of the attorney on the outcome of the trial

The ability to communicate effectively is the most important tool of a lawyer's profession.²⁹⁷ In as much as research differs regarding the impact of non-verbal communication in the legal process, its bearing in the courtroom cannot be minimized.²⁹⁸ Klein remarks that "effectiveness in communicating ideas is as much or more influenced by non-verbal methods as by words themselves."²⁹⁹ Klein further maintains that "the most significant aspect of non-verbal communication" is eye contact.³⁰⁰

²⁹⁴ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. New Jersey Journal of Communication. p. 9.

²⁹⁵ Halverson A.M., Hallahan M., Hart A.J., & Rosenthal R. 1997. Reducing the biasing effects of judge's nonverbal behavior with simplified jury instruction. Journal of Applied Psychology, 82(4). p. 590-598.

²⁹⁶ Burnett A., & Badzinski D.M. 2005. Judge nonverbal communication on trial: Do mock trial jurors notice? Journal of Communication, 55(2). p. 209-224. An in depth study of the nonverbal cues was done by Robbins C.C 2007. Knowledge, Expertise, and Credibility in the Courtroom: Perceptions of Attorney's Dynamic Nonverbal Cues. Boston College.

²⁹⁷ Taylor K.P., Buchanan R.W., & Strawn D.U. 1984. Communication Strategies for trial attorneys. Glenview, IL Scott, Foresman and Company at p. x. advance that all legal knowledge is useless if an attorney "cannot effectively communicate that knowledge..." in the courtroom. See also Sellers P.H. 1993 (Thorpe and Benson 1983). Teach them something they can use. Journal for the Association for Communication Administration, 2. p. 10-16 at p. 12., where it is stated that "lawyers of every age, gender, and type of practice..." consider "communication skills to be crucial to their success".

²⁹⁸ Aaron R., Fast J., & Klein R.B. 1986. Trial communications skills. New York: McGraw-Hill, p. 27.

²⁹⁹ Klein R.B. 1995. Winning cases with body language: Moving toward courtroom success, *Trial*, 31 (7), p. 82.

³⁰⁰ Klein R.B. 1993. Trial techniques: Winning cases with body language: *Trial*. p. 56-60 at p. 56. This was also analysed in an ethnological study carried out by Phillip J. at the Aust Kennesaw State University, Attorney Eye Contact and Control. In the Courtroom: Act i. Communication Law Review. p. 80-96. Results of the study indicated that control varies as a function of the relationship in which an attorney engages. The study has substantiated that in lawyer/client interaction, attorneys consistently initiate eye contact, and, most

The courtroom is often described as a “stage” on which the lead actors, the attorneys, use non-verbal cues such as eye movements (behaviours) to guide their performance in each scene.³⁰¹ When entering a courtroom for arraignments or when dealing with motion proceedings and objections, lawyers often scan the courtroom, acknowledging the individuals they know with eye contact accompanied by a wave, a nod of the head, or by verbalizing a greeting.³⁰² Phillips³⁰³ conducted research in which the courtroom procedures of over 40 lawyers were observed in several Midwestern courtrooms in the U.S. vis-à-vis television in order to collect data relating to attorney eye engagement behaviours in the courtroom. The observations revealed that attorneys tend to display distinct eye behaviours based upon the individual with whom they associate. Most often, eye contact is used to establish a cooperative climate of the participant’s encounter.³⁰⁴ The results of the research by Phillip indicate that control varies as a function of the relationship in which an attorney engages; in a lawyer/client interaction, attorneys consistently initiate eye contact and, most frequently, use it to provide assistance. Eye contact was also used to persuade a client of a particular point.³⁰⁵ On this point Goffman maintains that the individual’s aim is to exert control over others by influencing them to perceive one’s self in a desired way.³⁰⁶ Lawyers use distinctive eye engagement patterns as a crucial mediating process in court proceedings, in an effort to exert control

frequently, use it to provide assistance. Lawyers often use eye engagement to punctuate crucial points in lawyer/judge interaction, though most often use eye engagement as a means of cooperation. p. 94.

³⁰¹ Goffman E. 1959. *The presentation of self in everyday life*. New York Double Day. See also Goffman E. 1963. *Behavior in public places*. New York: Free Press.; Leathers D. 1986. The impact of multicultural message inconsistency on verbal and nonverbal behaviors. *Communication Monographs*, 46. pp. 88-100.; Sellers P.H. 1993. Teach them something they can use. *Journal for the Association for Communication Administration*, 2. p. 10-16.

³⁰² Goffman E. 1959. *The presentation of self in everyday life*. New York Double Day.

³⁰³ Phillip J. Attorney Eye Contact and Control in the Courtroom: Act 1. *Communication Law Review*. Aust Kennesaw State University. commmlawreview.org/Archives/v5i1/Attorney%20Eye%20Contact.pdf. p.80. Accessed on 31 October 2017.

³⁰⁴ Phillip J. Attorney Eye Contact and Control in the Courtroom: Act 1. *Communication Law Review*. Aust Kennesaw State University. commmlawreview.org/Archives/v5i1/Attorney%20Eye%20Contact.pdf. p. 80. Accessed on 31 October 2017.

³⁰⁵ Phillip J. Attorney Eye Contact and Control in the Courtroom: Act 1. *Communication Law Review*. Aust Kennesaw State University. commmlawreview.org/Archives/v5i1/Attorney%20Eye%20Contact.pdf. p. 94. Accessed on 31 October 2017.

³⁰⁶ Goffman E. 1959. *The presentation of self in everyday life*. New York Double Day.

in communicative acts. Smith and Malandro³⁰⁷ maintain that successful attorneys must be successful communicators.

In the USA the O.J. Simpson trial³⁰⁸ was televised and the media's access to the legal proceedings made viewing a nationwide obsession. Both sides of the Simpson case argued the details of the Southern California murder scene where Simpson allegedly murdered his ex-wife, Nicole.³⁰⁹ The lawyers, Johnnie Cochran, Marsha Clark, Chris Darden, Allen Dirshowitz, and Robert Shapiro were watched on television by the public who observed the impact of communication in the jurisprudence process.³¹⁰ The messages communicated by each attorney from both the defence and the prosecution, cast a lasting image by which the jurors, and the audience, were persuaded to decide on whether Simpson was guilty or not guilty. Each lawyer's demeanour and behaviour in the courtroom contributed to the outcome of the trial.³¹¹ During cross-examination attorneys generally use non-verbal tactics to discredit the witness; to damage rather than to rebuild credibility by displaying non-verbal behaviour that will demean or intimidate the witness.³¹²

During opening and closing arguments, as well as during the presentation of evidence, the persuasive skills of the attorney must include the ability to deliver a statement in a credible manner. Specific non-verbal behaviours tend to increase or decrease depending on how dynamic, sincere, and competent the

³⁰⁷ Smith L.& Malandro L.A. 1985. Courtroom communication strategies. New York, NY: Kluwer Law Book Publishers, Inc. p. 5.

³⁰⁸ *People for the State of California for the County of Los Angeles v Orenthal James Simpson*, Case number BA097211 (1985).

³⁰⁹ Phillip J. Attorney Eye Contact and Control in the Courtroom: Act 1. Communication Law Review. Aust Kennesaw State University. commlawreview.org/Archives/v5i1/Attorney%20Eye%20Contact.pdf. p.80. Accessed on 31 October 2017.

³¹⁰ Phillip J. Attorney Eye Contact and Control in the Courtroom: Act 1. Communication Law Review. Aust Kennesaw State University. commlawreview.org/Archives/v5i1/Attorney%20Eye%20Contact.pdf. p.80. Accessed on 31 October 2017.

³¹¹ Ibid.

³¹² Remland M.S. 1984. The implicit ad hominem fallacy: Nonverbal displays of status in argumentative discourse. Journal of American Forensics Association, 19. p. 79-86.

attorney is.³¹³ Perceptions of attorneys and judgments of guilt or innocence can be influenced by the attorney's non-verbal communication.³¹⁴

Non-verbal signs like moderately fast speech rate, fluent speech, strong eye contact, avoiding inconsistencies between one's words and facial expressions as well as between two different non-verbal channels such as one's voice and body movements (channel inconsistencies), confident and varied tones, a direct and conversational style, natural gestures, the avoidance of body adaptors (self-touch), and purposeful movement can assist the delivery by the attorney.³¹⁵

Burgoon, Birk, and Pfau (1990)³¹⁶ analyzed the non-verbal behaviour of undergraduate students who were assigned to deliver in-class persuasive speeches. They discovered, in part, that speakers were judged as more persuasive when they exhibited greater vocal pleasantness (e.g., pitch variety and fluency), kinesic/proxemic immediacy (e.g., eye contact, body lean, orientation), facial expressiveness, and kinesic relaxation (e.g., tension-free random movement).

Opening and closing arguments by the legal practitioners during a trial is an integral part of the proceedings and as such the effective non-verbal style adopted by the practitioner has its impact on the adjudicators and the outcome of the proceedings.³¹⁷ A study in Rieke and Stutman³¹⁸ found that "aggressive" prosecuting attorneys using a fast rate of speech, a lot of eye contact, emotional gestures, hostile vocal inflections, and high volume were rated by jurors as more effective than either passive or assertive attorneys. Barge, Schlueter, &

³¹³ Burgoon J.K., Buller D.B. and Woodall J.B. (1989). *Nonverbal communication: The unspoken dialogue*. New York: Harper and Row.

³¹⁴ Remland M.S. 1994. *The Importance of Nonverbal Communication in the Courtroom*. New Jersey Journal of Communication. p.7.

³¹⁵ Burgoon J.K., Buller D.B. and Woodall J.B. (1989). *Nonverbal communication: The unspoken dialogue*. New York: Harper and Row.

³¹⁶ Burgoon J.K., Birk T., and Pfau M. (1990). Nonverbal Behaviors, persuasion, and credibility. *Human Communication Research*, 17. p. 140-169.

³¹⁷ Matlon R.J. (1988). *Communication in the legal process*. New York: Holt, Rinehart and Winston, Inc.

³¹⁸ Rieke R.D. 1990. *Communication in legal advocacy*. Columbia, SC: University of South Carolina Press.

Pritchard³¹⁹ also conducted a study of the effects of an attorney's non-verbal communication and found that fluent speech increased ratings of competence; a conversational style of speaking led to perceptions of trustworthiness, and non-fluent speech delivered in a public rather than in a conversational style was the least successful in securing a not guilty verdict.

Research done by Fatt³²⁰ indicates that a generally open and formidable body posture along with spontaneous, natural illustrations (eye contact, gesticulations, paralanguage, posture, and overall facial expressions) is favourable, and that how you say things is as important as what you say in order to establish credibility and leadership. In a study by Rockwell and Hubbard³²¹ the non-verbal communication of attorneys was examined such as fluency, pausing, variety, facial expressiveness, number of illustrative gestures, dynamic quality of the gestures, grooming, age, facial hair, height, weight, and attractiveness. All of these impact on perceptions of credibility, looking at competence, trustworthiness, friendliness, and dynamism. The study illustrated that attorneys with greater facial expression and greater pitch variety were perceived as less competent, whereas attorneys with greater facial expression, pitch variety, and tempo variety were perceived as less trustworthy, and attorneys with greater pitch and tempo variety were perceived as more friendly. These findings indicate that it is not so simple for an attorney to establish his credibility in the eyes of other role players in the proceedings.³²²

A courtroom trial is generally viewed as a verbal exercise involving debate and argumentation; however, non-verbal cues also play an important role in the

³¹⁹ Barge K.J., Schlueter D.W., & Pritchard A. (1989). The effects of nonverbal communication and gender impression formation in opening statements. *The Southern Communication Journal*, 54, p. 330-349.

³²⁰ Fatt J.P.T. 1999. It's not what you say, It's how you say it. *Communication World*. 16(6), p. 37.

³²¹ Rockwell P. & Hubbard A.E. 1999. The Effect of Attorney's Nonverbal Communication on Perceived Credibility. *The Journal of Credibility Assessment & Witness Psychology*, Vol 2, No. 1, p. 1-13.

³²² Rockwell P. & Hubbard A.E. 1999. The Effect of Attorney's Nonverbal Communication on Perceived Credibility. *The Journal of Credibility Assessment & Witness Psychology*, Vol 2, No. 1.

proceedings.³²³ These non-verbal cues impact on the impression jurors have of lawyers' credibility based on what lawyers do as well as what they say.³²⁴ Jurors form their first impressions of an attorney at the beginning of the trial during opening statements. And this initial impression may impact all judgments made by jury members throughout the trial in regards to the quality of the evidence presented and the arguments given. Some researchers argue that non-verbal behaviours are more influential than verbal behaviours in determining first impressions.³²⁵ Burgoon, Buller, and Woodall suggest that the physical appearance of the attorney is the most influential because it is the first non-verbal cue one experiences when interacting with someone for the first time. Jurors see the attorneys before they actually hear them, that is: they observe the physical appearance of attorneys before they begin to speak. The physical appearance, together with vocal and kinesic (or body movement) cues, impact first impressions.³²⁶

During a trial an attorney's goal is to influence the judge and/or the jury to get them to decide in his favour and therefore the attorney needs to have control over the way he is perceived. He needs to establish his credibility by using non-verbal cues to reduce the psychological distance between himself and the receiver, build on that perceived credibility, and use the non-verbal behaviours purposefully in the courtroom.³²⁷ All non-verbal cues ultimately have an important impact on the verdict therefore a better understanding of all types of non-verbal cues in the courtroom inevitably stands to benefit the litigation process and make it possible for good attorneys who fight for justice every day

³²³ Barge K., Schlueter D.W., & Pritchard A. 1989. The effects of nonverbal communication and gender on impression formation in opening statements. *Southern Communication Journal* 54(4).

³²⁴ LeVan E.A. 1984. Nonverbal communication in the courtroom: Attorney beware. *Law and Psychology review*, 8. p. 83-104.

³²⁵ Berger C.R., & Calabrese J. 1975. Some Explorations in initial interaction and beyond: Toward a developmental theory of interpersonal communication. *Human Communication Research Journal*, 1(2). p. 99-112.

³²⁶ Burgoon J.K., Buller D.B., & Woodall W.D. 1989. *Nonverbal communication: The unspoken dialogue*. New York: Harper and Row. p. 284-297.

³²⁷ Halverson H.M., Hallahan M., Hart A.J. & Rosenthal R. 1997. Reducing the biasing effects of judge's nonverbal behavior with simplified jury instruction. *Journal of Applied Psychology*, 82(4). p. 590-598.

to put their best selves forward.³²⁸ The non-verbal communication of the legal representative in the courtroom conveys powerful messages and therefore they should devote the same care they put into presenting the law into presenting themselves.³²⁹

3.4.3 The impact of the non-verbal behaviour of the witness on the outcome

Like other role players, witnesses also have their place in the courtroom, both with regard to their physical placement as well as the time at which they will be questioned during the proceedings. Witnesses take on a central position in the proceedings and seldom have the opportunity to give their evidence as a narrative of the event concerned without being guided, interrupted, or challenged by the principal players in ways that would ordinarily violate the general norms of a conversation.³³⁰ For witnesses to really impact on the outcome of the proceedings they have to possess credibility, which is believability as measured by another person. During the interaction the receiver consciously or subconsciously takes up all the communication and sums it up to measure the sender's credibility. Credibility³³¹ comprises competence, trustworthiness, and dynamism. Competence is the speaker's knowledge and expertise about the communication, trustworthiness is a measure of the speaker's honesty and sincerity, and dynamism is the speaker's energy and

³²⁸ Robbins C.C. 2007. Knowledge, Expertise, and Credibility in the Courtroom: Perceptions of Attorney's dynamic nonverbal cues. Boston College. This research study involved field research during which experiments were carried out observing attorneys of different races and using different nonverbal cues. At p. 41-42 " The findings of the data convey an interesting compilation of participants' perceptions concerning what different levels of nonverbal communication indicate, and what this gradient of cues mean for the attorney in the courtroom. Prior to viewing...subjects reported that more expertise and credibility would be attributed to an individual who is more highly controlled in their nonverbal behavior. Additionally, the subject pool provided that more controlled, warm, and animated individuals would be seen as more likeable. In their ratings concerning more negative characteristics, participants indicated that a greater degree of aggression and coldness would cause them to be more likely to dislike someone, or be skeptical of this individual.... In this, the study confirmed the importance of dynamic displays as a means for attorneys to impact jurors' perceptions of the attorney's level of knowledge, experience , expertise, and authority".

³²⁹ Milford L.S. 2001. Nonverbal Communication. Litigation, 27(4). p. 2-9.

³³⁰ Searcy M., Duck S. and Blanck P. (2012). Communication in the Courtroom and the "Appearance" of Justice. Lawrence Erlbaum Press. p. 13.

³³¹ *Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).

confidence in communicating. Of all the types of communication, non-verbal is the most important because the components of credibility will have to be inferred from the testimony of the speaker.³³² The overall manner in which the witness communicates in the courtroom becomes very important because violations of communicative norms can have serious consequences relating to the verdict and liability in the trial.³³³

In a criminal trial, a accused's appearance and non-verbal communications may become relevant only in the light of contextual appropriateness, which is a factor taken into account when evaluating the credibility of the accused as a witness. The accused might display high status by adorning professional attire (prison dress is usually not permitted during court appearances as it is discriminatory in this effect) which may lead to the appearance of high credibility.³³⁴ Jurors and judges have visual access to the accused throughout the trial and the stereotyped impressions they form, based on the physical appearance and demeanour, can be extremely significant to the outcome of the trial.³³⁵

Research on attractiveness, attire, physical features, and body language has confirmed that people tend to assign positive attributes to good looking individuals; in particular, attractive accuseds are seen as less guilty of a crime than their unattractive counterparts and may tend to receive lighter sentences.³³⁶ This "halo effect" for appearance in the courtroom has been examined by many researchers with one of the earliest being Efran³³⁷ who found that, even though more than ninety percent of the subjects questioned during

³³² Rockwell P. & Hubbard A.E. 1999. The Effect of Attorney's Nonverbal Communication on Perceived Credibility. *The Journal of Credibility Assessment & Witness Psychology*, Vol 2, No. 1.

³³³ VanderVoort L.A., & Duck S.W. 2003. In appropriate relationships and out of them: The social paradoxes of normative and non-normative relational forms. In G.A. Allan & J. Duncombe & K. Harrison & D. Marsden (Eds.), *The State of Affairs*. Mahwah, NJ: Erlbaum.

³³⁴ Lefkowitz M., Blake R.R., & Mouton J.S. 1955. Status factors in pedestrian violations of traffic signals. *Journal of Abnormal and Social Psychology*, 51. p. 704-706.

³³⁵ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. *New Jersey Journal of Communication*. p.9.

³³⁶ Remland M.S. 1994. The Importance of Nonverbal Communication in the Courtroom. *New Jersey Journal of Communication*. p.10.

³³⁷ Efran M.G. 1974. The effect of physical appearance on the judgment of guilt, interpersonal attraction and severity recommended punishment in a simulated jury task. *Journal of Experimental Research in Personality*, 8. p. 45-54.

the research said it would be unfair to allow a accused's looks to influence judgments of guilt or innocence, male subjects were more likely to find an unattractive student guilty of cheating than an attractive student and were more likely to recommend harsher punishment for the unattractive student as well. The impact of physical appearance on the outcome of the trial was also confirmed in a study done by Kulka and Kessler.³³⁸

In the case of rape and sexual assault trials, the looks of both the victim and the perpetrator can be significant to adjudicators who might doubt the claims of a homely accuser, question the denials of an ugly accused, or trust the allegations of a beautiful victim. This was confirmed in a study where subjects who were asked to read a description of a case in which a woman is assaulted and raped while walking to her car, were more likely to believe the woman's identification of the perpetrator if he was ugly than if he was handsome.³³⁹ With regard to the impact of an accused's physical appearance on the outcome Rieke³⁴⁰ states that one must be cautious not to overestimate the effect of physical appearance and identifies two important factors that need to be taken into account:

- as the severity of the crime increases, the impact of appearance decreases; and
- the impact of appearance is likely to far less significant in cases with strong evidence as opposed to weak evidence.

During a witness's testimony the evidence given during evidence in chief contributes significantly towards credibility, and as such eye contact, fluent speech, and natural gestures become very significant.³⁴¹ The need for non-verbal consistency in the delivery of emotional content (i.e., if one is discussing

³³⁸ Kulka R.A., and Kessler J.B. 1978. Is justice really blind? The influence of litigant physical attractiveness on judicial judgment. *Journal of Applied Social Psychology*, 8. p. 366-381.

³³⁹ Jacobson M.B. 1981. Effects of victim's and accused's physical attractiveness on subjects judgments in a rape case. *Sage Journals* (1). p. 247-255. Also see Deitz S.R., & Byrnes L.E. 1981. Attribution of responsibility for sexual assault: The influence of observer empathy and accused occupation and attractiveness. *The Journal of Psychology*, 108.p 17-29.

³⁴⁰ Rieke R. D. 1990. *Communication in legal advocacy*. Columbia, SC: University of South Carolina Press. p. 129.

³⁴¹ Hemsley G.D., & Doob A.N. 1978. The effect of looking behaviour on perceptions of a communicator's credibility. *Journal of Applied Social Psychology*, 8.p. 136-144.

something sad one should look and sound sad), becomes rather significant, and one should avoid non-verbal behaviours known to be associated with the stereotype of a liar (e.g., shifting gaze, squirming in seat, fidgeting, perspiring, etc.), or of an evasive person (lack of spontaneity, overly long pauses, etc.).³⁴² Hemsley and Doob found that a witness testifying for a accused was judged as less credible when looking slightly down while testifying (gaze aversion) than when looking directly toward the listener.

Individuals usually have less conscious awareness of and control over the non-verbal channel of communication than the verbal channel and their non-verbal messages may be more truthful than their spoken words.³⁴³ Deception on the part of the witness can be detected from the various non-verbal cues such as vocal pitch, hesitations, speech errors, response length, blinking, pupil dilation, adaptors, channel discrepancies³⁴⁴, false smiles and illustrators.³⁴⁵ At the end of a trial, however, the presiding officer is expected to evaluate the evidence in its totality.³⁴⁶

3.4.4 The impact of the non-verbal behaviour of the presiding officer on the outcome

Due process³⁴⁷ requires that the presiding officer conduct the trial in a fair, orderly and impartial manner. In our adversarial system the presiding officer is in principle a passive umpire who should not descend into the arena where the

³⁴² Ibid.

³⁴³ Remland M.S. 1993. The importance of nonverbal communication in the courtroom. New Jersey Journal of Communication. p.16.

³⁴⁴ Burgoon B.K., Buller D.B., & Woodall W.G. 1989. Nonverbal communication: The unspoken dialogue. New York: Harper and Row.

³⁴⁵ Ekman P., O'Sullivan M., Friesman W.V., & Scherer K.R. 1991. Face, voice, and body in detecting deceit. Journal of nonverbal behaviour, 15.p. 125-136.

³⁴⁶ Nicholas H.C. 1985. The credibility of witnesses. South African Law Journal, 102.p. 32. Also see S v Trainor 2003 (1) SACR 35 (SCA) at p.9. Navsa JA said "A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such evidence that may be found to be false. Independently verifiable evidence, if any, should be weighted to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated, as must corroborative evidence, if any. ... The compartmentalized and fragmented approach of the magistrate is illogical and wrong."

³⁴⁷ The Constitution of the Republic of South Africa, Act 107 of 1996, as amended, Section 35(5)., and U.S. Constitution Amendments V, VI, and XIV. See also Schwikkard P.J. 1999. Presumptions of Innocence. Juta Legal and Academic Publishers. p. 7-9. In the US the principle of due process was also highlighted in the case In re Murchinson, 349 U.S. 133,136 (1955).

issues relating to the conflict might cloud his judicial vision.³⁴⁸ In *S v Nnasolu*³⁴⁹ Stewart AJ said the following:

“The presiding officer should not enter the arena. ... The presiding officer should not only ensure that justice is done, he or she should ensure that justice is seen to be done. ... The presiding officer should refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or her or unduly influence the quality or nature of the replies and thus affect his or her demeanour or impair his or her credibility”.³⁵⁰

Due process violations have arisen when a trial judge’s behaviour created just the appearance of partiality, and the courts have held that such behaviour is sufficient to reverse criminal court verdicts.³⁵¹ In the *Brown* case³⁵² the trial judge had repeatedly intervened in the prosecution’s case; and he was antagonistic to the prosecution, to the extent that his conduct was ‘deserving of censure’. Appellate courts have recognized that the appearance of judicial bias or unfairness at the trial can be manifested by trial judges in both explicit, and

³⁴⁸ *S v Mseleku* 2006 (2) SACR 237 (N).

³⁴⁹ *S Nnasolu* 2010 (1) SACR 561 (KZP) p.38. Stewart AJ. said “The presiding officer should not enter the arena. He or she is entitled and often obliged in the interest of justice to put such additional questions to witnesses, including the accused, as seem to him or her desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case. The presiding officer should not only ensure that justice is done, he or she should ensure that justice is seen to be done. The trial should therefore be conducted in such a way that the open-mindedness, impartiality and fairness of the judicial officer are manifest to all those who are concerned in the trial and its outcome, especially the accused. The presiding officer should refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him or her from detachedly or objectively appreciating and adjudicating upon issues being fought out before him or her. The presiding officer should refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or her or unduly influence the quality or nature of the replies and thus affect his or her demeanour or impair his or her credibility

³⁵⁰ See also the case of *S v Brown* 2015 (1) SACR 211 (SCA)., and *S v Du Plessis* 2012 (2) SACR 247 (GSJ) at p. 25 where the court remarked that cross-examination of a accused by the presiding officer can “only lead to the administration of justice being brought into disrepute and a perception of bias on the part of the presiding officer”.

³⁵¹ *S v Brown* 2015 (1) SACR 211 (SCA), and *Johnson v Metz*, 609 F.2d 1052, 1057 (2d Cir. 1979).

³⁵² *S v Brown* 2015 (1) SACR 211 (SCA) at 145.

subtle verbal and non-verbal ways that are never reflected in the record sent to the appellate court.³⁵³

South African criminal court judgments reveal that the remaining silent, which is can be described as a form of non-verbal testimony, also has a significant impact on the verdict under certain circumstances. In the case of *S v Mahlangu and another*³⁵⁴ two accused were charged with housebreaking with intent to rob and robbery with aggravating circumstances, murder and attempted robbery with aggravating circumstances. Horn J remarked that the case against the accused is arguably unanswerable and one would have expected a response from accused 1 and that the accused's failure to proffer any explanation leads to no other conclusion that he committed the crimes attributed to him.

In *S v Thebus and Another*³⁵⁵ the failure of an accused to give evidence does not necessarily mean that he is guilty of the crime or crimes with which he has been charged. It is an accused's constitutional right to remain silent. However, where the evidence against the accused is so overwhelming, an accused's failure to answer those allegations can be a factor that may weigh against him when the court considers his guilt or innocence.

During a jury trial, the judge may reveal his/her own beliefs or expectations regarding the guilt or innocence of the accused by trying to engineer the trial in accordance with these expectations – for example, in comments on the evidence, in responses to witnesses, or in rulings on objections.³⁵⁶

Blanck, Rosenthal and Cordell, through their research state that the following are some of the principal ways in which trial judges can impermissibly influence the criminal trial process:

³⁵³ Blanck P.D., Rosenthal R., and Cordell L.H. 1985. The Appearance of Justice: Judges' verbal and nonverbal Behavior in Criminal Jury trials. *Stanford Law Review*, Vol. 38, No. 1, pp. 89-164.

³⁵⁴ *S v Mahlangu and Another* (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012) p. 11.

³⁵⁵ *S v Thebus Another* [2003] ZACC 12; 2003 (6) SA 505 (CC).

³⁵⁶ *Ibid.*

- disparaging remarks or gestures concerning the accused, the defence counsel, the prosecution counsel, or the witnesses;³⁵⁷
- bias in rulings, questions, or comments in favour of one party;
- considering matters not in evidence;
- forming expectations for trial outcome before the defence has presented its case;
- statements to the jury that a mistake in convicting can be corrected by authorities or making statements to the jury that if the accused is found guilty, his sentence will be appealed or suspended;
- statements to the jury that smart jurors form rapid decisions; and
- failing to control misconduct of counsel.

Courts have acknowledged that non-verbal judicial behaviours, for example the facial expressions or tone of voice cues of the judge, can alone influence the verdict and sometimes do so in impermissible ways or to an impermissible extent.³⁵⁸ When the non-verbal behaviour of the presiding officer becomes a ground for appeal the appellate court attempts to balance factors such as the relevance of the behaviour, the emphatic or overbearing nature of the verbal or non-verbal behaviour, the efficiency of any instruction used to cure the error, and the prejudicial effect of the behaviour in light of the entire trial.³⁵⁹

³⁵⁷ *People v Franklin*, 56 Cal. App. 3d 18,128 Cal Rptr. 94 (1976) - where the appeal court commented on the trial judge's unconscious facial expressions towards a defence witness. Also see *People v Hefner*, 127 Cal. App. 3d 88, 91-92, 179, Cal. Rptr. 336, 337-338 (1981) – where the trial judge prejudiced the jury by creating a “negative courtroom atmosphere” through numerous demeaning comments directed at the defence counsel and by accusing the attorney of using misleading vocal inflections while reading prior testimony before the jury. As referred to in Blanck P.D., Rosenthal R., and Cordell L.H. 1985. *The Appearance of Justice: Judges’ verbal and nonverbal Behavior in Criminal Jury trials*.

³⁵⁸ Mehrabian A. 1972. *Nonverbal Communication*. Aldine Transaction – A Division of Transaction Publishers, U.S. and U.K.

³⁵⁹ Blanck P.D., Rosenthal R., and Cordell L.H. 1985. *The Appearance of Justice: Judges’ verbal and nonverbal Behavior in Criminal Jury trials*. p. 95-96.

In the U.S. judicial training programmes across the country teach judges the importance of communication behaviour and style in the courtroom.³⁶⁰

Legal scholars including judges in the U.S. have expressed an interest in the impact of judges' communicative behaviour on courtroom fairness, to the extent that the American Bar Association made amendments to the Code of Judicial Conduct by including a new Canon that emphasises the need for the appearance of fairness and justice in the courtroom and provides that a judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in the proceedings impairs the fairness of the proceedings and brings the judiciary into disrepute. Facial and body language, in addition to oral communication, can give to the parties, lawyers in the proceedings, jurors, the media and others, an appearance of judicial bias. A judge must be alert to avoid behaviour that may be perceived as prejudicial.³⁶¹

It is clear from the analysis of the literature available that non-verbal communication is an integral part of the communication process and does indeed impact on the outcome of the proceedings.³⁶² From the research³⁶³ it is also clear that demeanour is a fundamental component of non-verbal communication and also has a significant impact on the outcome of the trial. The next chapter will accordingly focus on the impact of demeanour.

³⁶⁰ Blanck P.D. 1991. What Empirical Research Tells Us: Studying Judges' and Juries' Behavior. American University Law Review.

³⁶¹ Canon 3(B) (5), American Bar Association Model Code of Judicial Conduct, 9-10 Standing Committee on Ethics and Professional Responsibility (1990), states that: "a judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest any bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so".

³⁶² Hees v Nel 1994(1) PH F11(T) at p.32 said "included in the factors which a court would look into when examining credibility or veracity of any witnesses, are matters such as the general quality of his testimony (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses), his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candor, his age where this is relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability to effectively communicate what he intends to say, and the weight attached and the relevance of his version against the background of the pleadings."

³⁶³ Remland M.S. 1993. The importance of nonverbal communication in the courtroom. New Jersey Journal of Communication. p. 5.

CHAPTER 4 – Demeanour in the Courtroom

4.1 Introduction

The previous chapter entailed a discussion of non-verbal component of the communication process, and the influence and impact that non-verbal communication has on the verdict. From the literature discussed, relating to non-verbal communication and non-verbal behaviour, and its impact on the verdict, demeanour evidence emerged as a common feature. This chapter entails an in-depth discussion of demeanour and its impact on the verdict.

Demeanour is defined as the way somebody looks or behaves.³⁶⁴ This study looks at demeanour in the courtroom as it relates to the management of impressions by the lay participants, as well as how, if at all, it impacts on the outcome of the proceedings. Until the middle of the twentieth century, evidence of demeanour was dealt with in a huge amount of psychological literature and it motivated insightful discussions in older trial practice and trial advocacy textbooks.³⁶⁵ In 1985 Prof Imwinkelried wrote an article on the deficiencies in the legal literature at that time with regards to demeanour evidence.³⁶⁶ Imwinkelried highlighted that the “witness’s demeanour seemingly determines the outcome of a large percentage of trials.”³⁶⁷ It is not only the presiding officer who uses the demeanour evidence to determine the credibility of a witness, but attorneys also; when preparing witnesses for court, in selecting jurors, in

³⁶⁴ Oxford Advanced Learner’s Dictionary. 2006. 7th edition. Oxford University Press. p. 388.

³⁶⁵ Timony J.P. 2000. Demeanour Credibility. Catholic University Law Review, Vol 49. 903-943. 903-904. Available at <http://scholarship.law.edu/lawreview/vol48/iss4/2>.

³⁶⁶ Imwinkelried E.J. 1985. Demeanour Impeachment: Law and Tactics, 9 AM. J. Trial Advocacy. 183,186. (noting that the “leading evidence treatises” and “[m]ost evidence casebooks” of the time were virtually silent on the role of demeanour). Imwinkelried attributes the lack of discussion on demeanour evidence in legal literature to fewer “swearing contests,” or he-said, she-said scenarios between a plaintiff and accused. *Id.* at 233-234. Imwinkelried contends that the lack of legal analysis of demeanour evidence arises out the greater use of expert testimony, greater acceptability of polygraph evidence, and psychiatric testimony on the issue of a witness’s credibility, and liberalized admissibility of opinion or reputation testimony of the character of a witness. *Id.* pp. 233-234.

³⁶⁷ Imwinkelried E.J. 1985. Demeanour Impeachment: Law and Tactics, 9 AM. J. Trial Advocacy. p. 234.

examining witnesses, and in counsels' own dress, mannerisms, body language, and voice modulation.³⁶⁸

The term "demeanour" is used to denote certain aspects of the participants' behaviour, which Goffman has examined using concepts of "face", "line" and "demeanour"³⁶⁹. Goffman distinguishes between "face", "the positive social value a person effectively claims for himself"³⁷⁰, and "line", "The pattern of verbal and non-verbal acts by which the witness expresses his view of the situation and through this his evaluation of the other participants"³⁷¹.

Various factors of the situation in the courtroom shape the interaction and make the presentation and maintenance of demeanour difficult; amongst these factors is the level at which the trial is taking place and the institutionalised adversarial system that prescribes the procedure that should be followed. Goffman proposes that a participant must maintain proper demeanour (demeanour which is acceptable to the other participants) in order to be able to claim "face". Goffman's term demeanour involves, "attributes derived from interpretations others make of the way in which the individual handles himself during the social interaction during proceedings and it is typically conveyed through presentation, dress and bearing".³⁷²

Goffman proposes that there are two types of rules which shape social interactions in general and determine the participant's demeanour. These are avoidance rituals and presentation rituals.³⁷³ The principle of avoidance (rules

³⁶⁸ For an example of literature written for courtroom lawyers on how to use psychological principles to their advantage, see generally Sannito T. & McGovern J.D. 1985. *Courtroom Psychology for Trial Lawyers*, (chapter 4).

³⁶⁹ Goffman E. 1967. *The Nature of Deference and Demeanour: Interaction Ritual*. Doubleday and Company, Garden City, New York. "Facework" and "Deference and Demeanour". 5-46 and 47-96.

³⁷⁰ Goffman E. 1967. *The Nature of Deference and Demeanour: Interaction Ritual*. Doubleday and Company, Garden City, New York. "Facework" and "Deference and Demeanour". 5-46 and 47-96. p. 5.

³⁷¹ *Ibid*.

³⁷² Goffman E. 1967. *The Nature of Deference and Demeanour: Interaction Ritual*. Doubleday and Company, Garden City, New York. "Facework" and "Deference and Demeanour". 5-46 and 47-96. p. 5.

³⁷³ Goffman E. 1967. *The Nature of Deference and Demeanour: Interaction Ritual*. Doubleday and Company, Garden City, New York. "Facework" and "Deference and Demeanour". 5-46 and 47-96.

regarding keeping a distance), its implications in everyday interactions, and its operation in courtroom interactions are relevant to this study.

Goffman proposes that rules of avoidance help to maintain both “face” and “demeanour”³⁷⁴. Often witnesses, especially accuseds, feel themselves to be in wrong face during their appearance in court despite the presumption of innocence until proven guilty beyond a reasonable doubt. It is useful though, to draw a distinction when analysing courtroom demeanour. Certain demeanour exhibited by a witness, e.g. certain reactions to questions put to him can be attributed simply to the fact that he/she finds himself/herself in this unfamiliar environment called the courtroom and participating in unfamiliar proceedings. When personal questions are put to witnesses this may take them by surprise and the witness might be hesitant in answering the question for fear of revealing certain aspects of his/her personal life³⁷⁵. This can materially affect the case as it can easily be interpreted as the witness being dishonest and evasive.³⁷⁶

Cross-examination is also often seen as a hostile attack and can affect the demeanour of the witness.³⁷⁷ Legal representatives have a fairly consistent means of attacking the credibility of the witness being questioned which results in the witness feeling that he/she is being attacked.

The attributes of a witness most relevant to an appearance in court are integrity, honesty and composure.³⁷⁸ For this reason it seems essential for a lay witness

³⁷⁴ Goffman E. 1967. *The Nature of Deference and Demeanour: Interaction Ritual*. Doubleday and Company, Garden City, New York. “Facework” and “Deference and Demeanour”. 5-46 and 47-96.

For the “avoidance process” as one kind of face-work see Goffman, *On Face Work* p 15. For “Avoidance rituals” as a form of deference see Goffman, *Deference and Demeanour* p 62.

³⁷⁵ Goffman E. 1967. *The Nature of Deference and Demeanour: Interaction Ritual*. Doubleday and Company, Garden City, New York. “Facework” and “Deference and Demeanour”. 5-46 and 47-96.

³⁷⁶ Gillian M Wilder, *The Witness in Court: Problems of Demeanour in the Courtroom Setting*, University of British Columbia, 1969, p 27-64.

³⁷⁷ Weinstein J.B. 1957. The Laws Attempt to Obtain Useful Testimony. *Journal of Social Issues*, Vol 13, No. 2. 7

³⁷⁸ Gillian M Wilder, *The Witness in Court: Problems of Demeanour in the Courtroom Setting*, University of British Columbia, 1969, p 27-64. Gillian M Wilder, *The Witness in Court: Problems of Demeanour in the Courtroom Setting*, University of British Columbia, 1969, p 27-64. With respect to integrity, witnesses are expected to take the prescribed oath and swear to tell the truth, the whole truth and nothing but the truth. The question of what constitutes “the truth” is not one which can be decided on in isolation.

testifying in a courtroom to have attributes of composure, self-possession and emotional self-control³⁷⁹.

Often legal representatives use different methods of cross-examination to test the demeanour of the witness as regards her credibility and then use the witness' reactions as part of the argument at the end of the trial.³⁸⁰

4.2 The Relevance of Demeanour in the Trial Process

The previous chapters of this study dealt with courtroom interaction and the adversarial system that South African courts follow. As part of the adversarial system the trials have to be conducted in terms of the provisions of the Constitution³⁸¹ and the Criminal Procedure Act.³⁸² The adversarial system is in line with accusatorial procedures where the prosecution makes an accusation against the accused, the prosecution is *dominus litis* and bares the burden of proof to lead evidence against the accused that will prove the guilt of the accused beyond reasonable doubt. Evidence is led by each party calling witnesses and such witnesses testifying and being cross-examined. The right of an accused to face one's accusers is considered to be an old and revered tradition and can be traced back to early Roman Law, which recognised that the law does not find a man guilty before he is given an opportunity to defend himself face-to-face with his accusers.³⁸³ For many centuries, the English also

³⁷⁹ Gillian M Wilder, *The Witness in Court: Problems of Demeanour in the Courtroom Setting*, University of British Columbia, 1969, p 27-64.

³⁸⁰ For Examples of cross-examination questions and how it impacts on the witness see Gillian M Wilder, *The Witness in Court: Problems of Demeanour in the Courtroom Setting*, University of British Columbia, 1969, p 27-64.

³⁸¹ Section 35(5) (i) of the Constitution, Act 108 of 1996, which provides in essence that the accused has the right "to adduce and challenge evidence". The right to challenge evidence includes the right to cross-examine evidence presented during the proceedings. Cross-examination is regarded as an example of confronting one's adversary. On that basis it can be said that the right to challenge evidence may well include the right to confrontation.

³⁸² The Criminal Procedure Act, Act 51 of 1977, as amended. Section 158 of the Act deals with the right to confrontation by providing that all criminal proceedings in any court must take place in the presence of the accused, except where this has been expressly excluded by any other law. It is indeed a basic principle of criminal procedure that the accused is entitled to be present during the trial and to hear all the evidence against him, and to demand that the accusation be made face- to- face. Also see s 166 of the Act.

³⁸³ The Roman Governor Festus is reported to have made the following comments regarding a prisoner: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers *face to face*, and has been given a *chance to defend himself* against the charges.' See Jones 'Testimony via closed circuit television after *Gonzales v State*' (1992) *Baylor Law Review* 960. Also see *Coy v Iowa* 487 US 1012 (1988). According

practised a form of confrontation that required an open face-to-face system, referred to as “altercation”.³⁸⁴ It has been claimed³⁸⁵ that the right to confront can be traced to the primitive ordeal of the “trial of the battle”³⁸⁶ and that the notion that demeanour must be observed finds its early roots in the *corsnaed* or so-called “ordeal of the accused morsel”.³⁸⁷

Section 35(3) (e) of the Constitution³⁸⁸ provides in essence that an accused has a right “to be present when being tried”. This right is closely related to the right to be present and the right to present one’s case. These rights provide for the right to confrontation, which allows the accused to see witnesses first hand as they testify against him and so that he can observe their demeanour.³⁸⁹ The right to confrontation allows the accused the opportunity to assess not only the content of the evidence, but also the demeanour of the witnesses, facial expressions, body language, and inflections of voice, and to use these observations to formulate the accused’s argument relating to the credibility of the witnesses.³⁹⁰ In *S v Motlala*³⁹¹ Colman J remarked that

to Natalie Kijurna, the Hebrews also endorsed the right to confrontation by requiring that the accused have the right to hear testimony from the witnesses in the offender’s presence. This is reflected in the writings of the Hebrews in the King James Bible. See Kijurna N. *‘Lilly v Virginia: the confrontation clause and hearsay - “oh what a tangled web we weave”* (2001) 50 *DePaul Law Review* 1133 at 1138.

³⁸⁴ The battle for confrontation rights was also fought in England during the treason cases of Sir Walter Raleigh and John Lilburne. Both men fought for civil liberties in England during the 17th century. See Kijurna N. 2001. *‘Lilly v Virginia: the confrontation clause and hearsay - “oh what a tangled web we weave”* (2001) 50 *DePaul Law Review* 1133 at 1139-1141.

³⁸⁵ Schwikkard P.J. and Van Der Merwe S.E. 2009. *Principles of Evidence* 3rd ed. Juta and Co. Cape Town. 378.

³⁸⁶ Re “Oral v Written Evidence: The Myth of the Impressive Witness”. 1983. 57 *Australian LJ* 679.

³⁸⁷ Paton & Derham (eds). 1972. *A Textbook of Jurisprudence*. 4th ed. 597.

³⁸⁸ Act 108 of 1996.

³⁸⁹ Basdeo M., Geldenhuys T., Karels K. G. et al. 2017. *Criminal Procedure Handbook*. Joubert J.J. (Ed) 12th ed. Juta and Company (Pty) Ltd. at 111. It is the accepted opinion that a witness is less likely to lie in the accused’s presence; hence the need for witness confrontation. See also *Coy v Iowa* 487 US 1012 (1988) at 1019-1020.

³⁹⁰ The same principles apply to the accused’s adversaries, the prosecutor and the judge. The “impulses” coming from these parties, may influence how the accused conducts his own defence.

³⁹¹ 1975 1 SA 814 TPD at 815 the accused was only added as an accused after the complainant had already testified. The court held that a denial of a confrontation amounted to a failure of justice. The court relied on s 156(1) of the Criminal Procedure and Evidence Act 56 of 1955, which provided that every criminal trial, except in special circumstances, shall take place and the witness shall give their evidence in an open court and in the presence of the accused.

“the right to confrontation means more than that an accused person must know what the state witnesses are saying about him... There must be a confrontation in that ... he can observe their *demeanour*...”.³⁹² (Emphasis added)

The importance of confrontation is that the witness is under oath and the court has an opportunity to observe him/her and determine if he/she is a credible witness.³⁹³ The concept of confrontation was also referred to as live testimony and was an early Roman legal practice requiring that witnesses testify orally before a judge.³⁹⁴ The Sixth Amendment of the US Constitution provides, *inter alia*, that “in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him”.³⁹⁵ The right to confront an accuser under the Sixth Amendment is firmly rooted in federal jurisprudence. The earliest case to deal with the interpretation of the confrontation clause was *Mattox v United States*³⁹⁶, where the court remarked that the Sixth Amendment grants the accused the right to be confronted by their accusers and to cross-examine the witnesses. The court in the Mattox case remarked that the function of the confrontation clause is to provide the accused with an opportunity

³⁹² In *S v Mottala* 1975 1 SA 814 TPD at 815, the court remarked that where an irregularity had occurred in that a witness had not given evidence in the presence of the accused, such irregularity was found to amount to a failure of justice. The court found that a denial of the right to confrontation is so fundamental in nature that it amounts *per se* to a failure of justice.

³⁹³ *Lee v Illinois* 476 US 530, 540 (1986).

³⁹⁴ *NLRB v Dinion Ciol Co.* 201 F. 2d 484 (2d Cir. 1952). In this case Judge Frank remarked that the “indispensable requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appeared before him personally. “The oral testimony was not recorded, but the judge put on the record the “personal impressions made upon the judge by the witnesses, their way of answering questions, their reactions and behavior in court... [such as] that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation.”

³⁹⁵ This is known as the Confrontation Clause of the Sixth Amendment. The origins of the clause have been traced to the trial of Sir Walter Raleigh in 1603. Raleigh was convicted of treason on the basis of a coerced confession by an alleged co-conspirator. Raleigh requested the right to face the witness in court, saying: 'The proof of the common law is by witness and jury; let (the accuser) be here, let him speak it. Call my accuser before my face.' However, the court denied his request, and he was convicted and executed. See Murphy C.M. 1997. Justice Scalia and the confrontation clause: a case study in originalist adjudication of individual rights. *American Criminal Law Review* 1243 at 1244, and, Pollitt D.H. 1959. The right of confrontation: its history and modern dress. *Journal of Public Law* 381. at 388-389.

³⁹⁶ 156 US 237, 242-243 (1895).

“... not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”³⁹⁷

A proper comprehension of the role of demeanour in evidence in a trial requires one to understand the use of demeanour evidence as a component of the credibility of the witness's evidence in its entirety.³⁹⁸ In the course of a trial, when a witness gives testimony about his/her knowledge of what happened during an event at issue in the proceedings, his/her evidence might vary from that of another witness. Under these circumstances the presiding officer must now decide whom to believe, and this decision involves the evaluation of the evidence presented on the credibility of each witness.³⁹⁹ Evidence relating to credibility may include the witness's opportunity and capacity to observe and relate to the event in question; his/her demeanour, bias, character and any prior inconsistent statement the witness might have made; as well as contradiction or corroboration of a witness's version of the events by other evidence that had been adduced.⁴⁰⁰

4.3 Demeanour and its Impact on the Credibility of the Witness

As alluded to above, demeanour is often used as part of the evidence to establish the credibility of a witness. During their testimony a witness may use irony or sarcasm to convey meaning; however the written transcript will be unable to reflect all the subtleties of a witness, such as inflection of voice or a particular gesture that may completely change the meaning of the testimony and the words being uttered.⁴⁰¹ Often the sincerity of the witness may be

³⁹⁷ *Mattox v United States* 156 US 237, 242-243 (1895).

³⁹⁸ Timony J.P. 2000. Demeanour Credibility. *Catholic University Law Review*, Vol 49. 903-943.

³⁹⁹ Hallahan T. 1996. An Overview of Trial Techniques. *Prac. Litigator* 5, 21, 25-26 (arguing, in a discussion on the relevancy of credibility evidence, that “[a] witness's credibility is always at issue” in a trial).

⁴⁰⁰ Hallahan T. 1996. An Overview of Trial Techniques. *Prac. Litigator* 5, 21, 25-26 (arguing, in a discussion on the relevancy of credibility evidence, that “[a] witness's credibility is always at issue” in a trial). *Also see* *Hillen v Department of the Army*, 35 M.S.P.B. 453, 458 (1987)

⁴⁰¹ *Untermeyer v Freund* 37 F. 342, 343 (S.D.N.Y. 1889) (“A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may

determined only by observing the witness' sounds or looks.⁴⁰² A proper assessment of demeanour therefore depends on the direct observation of the witness.⁴⁰³

The demeanour of a witness impacts on his/her credibility. Demeanour includes various factors such as the behaviour of the witness in the witness dock, the appearance of the witness in relation to the image he/she projects, the character and personality of the witness, the overall impression he/she creates and the manner in which the witness gives his/her evidence.⁴⁰⁴ When assessing the manner in which the witness testifies the court may consider the following questions:

- Was the witness confident?
- Did he/she speak clearly and without hesitation?
- Was the witness evasive?
- How did the witness react to awkward questions?
- Did the witness fidget nervously?
- Did the witness have nervous facial twitches in response to straightforward, relevant questions?

convey a most favourable impression.”). Judging credibility by demeanour is a precept of human behavior well studied by philosophers and poets. See Lieberman D.J. 1998. *Never be Lied to Again*, p. 124 where reference was made to a Sigmund Freud quote, in which Freud noted that “he that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his fingertips; betrayal oozes out of him at every pore”). As referred to in Timony J.P. 2000. *Demeanour Credibility*. Catholic University Law Review, 49 at 903-904.

⁴⁰² Ibid.

⁴⁰³ *Weaver v Department of the Navy*, 2 M.S.P.B. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*) where one of the prosecutions key witnesses with a rather unappealing appearance was called to testify and the defence counsel, Clarence Darrow, used demeanour evidence when he observed: “[The witness] was a squat, heavy-set man of medium height... His swollen face, bleary eyes, puffy eyelids, and reddish-purple nose marked the habitual drunkard. His shaggy... hair had been a stranger to the brush or comb for so long as to have become tangled and matted. His clothes... were covered with dirt and grease. His huge hands... were covered with grime.” As quoted by Imwinkelried E.J. 1985. *Demeanour Impeachment: Law and Tactics*, 9 AM. J. Trial Advocacy at 226-227. Darrow’s cross-examination consisted only of asking that the witness stand up and turn around for the jury to see him. Darrow thereafter simply made a simple, effective, and concise statement: “That’s all. I just wanted the jury to get a good look at you.”

⁴⁰⁴ *Cloete NO and Others v Birch R and another* 1193 (2) PH F17 E at 51 quoted in *S v Shaw* ZAKZPHC 32: AR 342/10 (1 August 2011).

- Did the witness stammer?
- Did the witness make ready concessions or was he/she evasive or sarcastic?
- Did the witness hesitate unnecessarily in responding to questions – especially under cross-examination?
- Was he/she too bold or too timid?⁴⁰⁵

Le Roux ⁴⁰⁶ maintains that the following are important factors when evaluating the demeanour of a witness:

- Was the witness convincing as opposed to unconvincing?
- Was the witness calm as opposed to moody?
- Was the witness respectful or arrogant?
- When answering the questions, was the witness direct or evasive?
- Was the nature of the evidence logical or was the description of events illogical?
- Did the witness testify with openness, or was the witness embarrassed?
- Did the witness appear to be trustworthy or untrustworthy?
- Was the witness honest as opposed to dishonest?
- Was the witness willing or unwilling to furnish information?

⁴⁰⁵ Jones J in *Cloete v Birch* 1993 2 PH F17 (E) 51. In *R v Haefele* 1938 SWA 21 Van den Heever J gave the following broad description of demeanour (at 22): “ [T]he word demeanour does not merely signify the appearance of a witness in the box; whether he give his evidence with assurance, sometimes amounting to impudence, or whether he has the sheepish look which one would expect from a liar; it means much more; it signifies that which distinguishes the living word from mere written records and it includes such matters as momentary hesitation and an intonation of the voice and a thousand considerations which one may enumerate... .” See Schwikkard P.J. and Van Der Merwe S.E. 2009. *Principles of Evidence* 3rd ed. Juta and Co. Cape Town. 534-535. See also Bellengere A., Palmer R., Theophilopoulos C., et al. 2014. *The Law of Evidence in South Africa: Basic Principles*. Oxford University Press Southern Africa. 204-205. See also *R v Mokwena* 1940 OPD 130.

⁴⁰⁶ Le Roux JA. 1992. *Evaluering van Getuines in Strafregatelike Verrigtinge*. Die Landros (1992) 26 (4) DL 123-135.

- Was the evidence of an objective or prejudicial nature?
- Was the evidence clear or unclear?
- Was the witness an independent witness or someone who was involved in the dispute due to some or other interest in the case?

The observations that the court makes of the demeanour of the witness while testifying amounts to real evidence.⁴⁰⁷ For centuries, judges or juries⁴⁰⁸ have determined the credibility of testimony⁴⁰⁹ based on the demeanour of the witness, including the appearance of the witness, attitude, and manner.⁴¹⁰ As members of society are “hard-wired” to judge people based on their appearance, so too do the role players in the courtroom.⁴¹¹

4.4 The Impact of the Accused’s /Accused’s Demeanour

⁴⁰⁷ Nokes. 1967. *An Introduction to Evidence*. 4th ed. 449: “the blush of a witness is as real as a dried blood-stain on a knife.”

⁴⁰⁸ The adjudicator may include a trial judge in a bench trial, a jury, an administrative law judge, or some other presiding official in judicial or administrative adjudicatory proceedings.

⁴⁰⁹ See *NLRB v Dinion Coil Co.*, 201 F 2d 484, 488 (2d Cir. 1952) (noting that observing one’s demeanour “confer[s] immense discretion on those who, in finding facts, rely on oral testimony”). In the Federal courts in the nineteenth century, the fact finder was often unable to observe the demeanour of the witness as “oral testimony in open court was not required in equity litigation; indeed, for many years it was virtually banned.”

⁴¹⁰ Shaver K. 1999. *If Looks Could Convict, Clark’s Presence May Sway Jurors*. Washington Post, at B1, (as referred to in Timony J. P. 2000. *Demeanour Credibility*. Catholic University Law Review Vol 49, p. 905), where Shaver comments that in the present day jury in a criminal trial:

Although jurors are instructed to weigh strictly on the evidence, defence lawyers say jurors also carefully watch an accused, perhaps imagining whether the person in front of them could have committed such horrible crimes. In other words, the jurors try to picture whether the person fits the part ... In a case that relies almost entirely on circumstantial evidence, jury experts say, the accused’s appearance and the vibes he sends to the jurors are even more important. “If the evidence is not as clear-cut, the jurors still have to make same decision- whether he is guilty or not- but they’ll have less hard evidence to go on,” said Majorie Fargo, president of the Jury Services Inc.

⁴¹¹ Wiley D.L. 1995. *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27. St Mary’s Law Journal. 193, 211-212. (“Research suggests that people viewed as facially unattractive are more likely to be perceived as criminal than are facially attractive persons.”) “Demeanour evidence as the backbone of the adversarial process” available at www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-837/demeanour-evidence-as-the-backbone-of-the-adversarial-pr. March 2014. Accessed on 22 March 2018. Here it is suggested, regarding credibility, that credibility is often not directly in issue in a case. The demeanour of a witness will likely always be used in determining both the believability of a witness (this relating more to credibility) or the weight to be given to their testimony. It would appear that the New Zealand scholars are supporting a move away from the notion that demeanour be taken into account when making a credibility finding. Fisher R. 2013. *The Demeanour Fallacy*. Available at www.robertfisher.co.nz/wp-content/uploads/2013/05/TDF.docx

An accused has the right to be present at all times during the proceedings and as such is always being observed by the other role players in the courtroom. It is undeniable that an accused's demeanour and appearance in the courtroom can influence the outcome of the trial.⁴¹² The extent to which the demeanour of the accused/accused impacts on the outcome of the trial is best illustrated by decided cases where demeanour was commented on.

4.4.1 Cases Involving Jurors

In this regard the study done by Prof Levenson is of particular relevance as the study involved the interviewing of jurors to establish the relevance of demeanour evidence in arriving at a verdict.⁴¹³ Levenson's study comprised interviews with jurors in high-profile cases and revealed that it is undeniable that a accused's demeanour and appearance in the courtroom can influence their decisions, and that jurors readily consider all conduct in the courtroom, not just the testimony of witnesses, in reaching their decisions.⁴¹⁴ The cases discussed below demonstrate the impact of demeanour and non-verbal communication/behaviour on the outcome of the trial and on the jury.

4.4.1.1 The Lorena Bobbitt trial⁴¹⁵

Lorena Bobbitt was charged with maliciously injuring her husband by cutting off his penis whilst he was asleep. During the trial her defence counsel adopted the strategy of making Lorena Bobbitt appear as small and as helpless as possible so as to make her defence, that she was incapable of being the aggressor against her "burly, ex-marine husband, seem more probable.⁴¹⁶ Levenson⁴¹⁷

⁴¹² Levenson L.L. 2007. Courtroom Demeanour: The Theatre of the Courtroom. Legal Studies Paper No. 2007-30. Social Science Research Network (SSRN) electronic library at: <http://ssrn.com/abstract=999471>.

⁴¹³ Levenson L.L. 2007. Courtroom Demeanour: The Theatre of the Courtroom. Legal Studies Paper No. 2007-30. Social Science Research Network (SSRN) electronic library at: <http://ssrn.com/abstract=999471>.

⁴¹⁴ Ibid at 7.

⁴¹⁵ John Wayne and Lorena Bobbitt Trials: 1993 & 1994. Great American Trials. *Encyclopedia.com*. 28 Nov. 2017 <<http://www.encyclopedia.com>>.

⁴¹⁶ Hinds J. 1994. Dressing for a Hoped-for Success. USA Today, at 3A, available at 1994 WLNR 2334687. (noting the various ways in which the attorneys for both Lorena and John Bobbitt attempted to sculpt their clients' appearance to their respective advantages at trial. Both sides tried to influence the jury with their presentations of the parties. For example, John Bobbitt dressed without a tie to look less powerful and more like someone who would

states that, technically the jurors should not have taken into account factors such as the manner in which Bobbitt was dressed, the innocent looks she cast towards counsel's table, and her cringing when her husband appeared, as it was not evidence, post-trial interviews of the jurors indicated that they did indeed take those factors into account when arriving at the verdict.

4.4.1.2 The Erik and Lyle Menendez trial⁴¹⁸

Erik and Lyle Menendez, two brothers, convicted of the murder of their parents, sat through two trials. During the first trial,⁴¹⁹ the brothers appeared as youthful and conservative teenagers yielded a hung jury.⁴²⁰ The defence tried to manipulate the jury by dressing the accuseds in crewneck sweaters, button-down shirts, and slacks to enhance the illusion that the "boys"⁴²¹ were incapable of committing the vicious acts with which they had been charged. First-hand accounts from the jurors in the first Menendez trial reflect the extent to which the jurors took note of the non-testimonial demeanour of the accuseds. Thornton,⁴²² a juror in the first trial, recalled that "Erik cried, noticeably but unobtrusively, when Ms. Abramson talked about his mother."⁴²³ Thornton noted

never attack his wife.) As referred to by Levenson in Levenson L.L. 2007. Courtroom Demeanour: The Theatre of the Courtroom. Legal Studies Paper No. 2007-30. Social Science Research Network (SSRN) electronic library at: <http://ssrn.com/abstract=999471>.

⁴¹⁷ Levenson L.L. 2007. Courtroom Demeanour: The Theatre of the Courtroom. Legal Studies Paper No. 2007-30. Social Science Research Network (SSRN) electronic library at: <http://ssrn.com/abstract=999471>. at 8.

⁴¹⁸ *Menendez v. Superior Court (People)* (1992) 3 Cal.4th 435, 11 Cal.Rptr.2d 92; 834 P.2d 786. [No. S017206. Aug 27, 1992.] Thornton H. 1995. Hung Jury: The Diary of Menendez Juror. 47.

⁴¹⁹ Lyle and Erik Menendez became the subject of one of the most sordid, publicized murder cases in history when they went on trial for killing their parents with a shotgun in their family mansion in Beverly Hills in 1989. See also Stewart S.A. 1993. Beverly Hills Horror Story. USA Today, 21 September 1993, at 1A. As Cited by Levenson L.L. 2007. Courtroom Demeanour: The Theatre of the Courtroom. Legal Studies Paper No. 2007-30. Social Science Research Network (SSRN). The brothers attempted to justify murdering their parents by asserting that their parents had sexually abused them and that the brothers were afraid for their lives.

⁴²⁰ The jury could not agree on whether the accused committed murder or manslaughter.

⁴²¹ Thornton H. 1995. Hung Jury: The Diary of Menendez Juror. 73-74. (stating that the jurors noticed the brothers' dress, references to "boys" and defence counsel's maternal behaviour; by referring to the accuseds as "boys", the defence associated the alleged killers with youth who were too innocent to commit the alleged heinous crime).

⁴²² Thornton H. 1995. Hung Jury: The Diary of Menendez Juror.

⁴²³ Thornton H. 1995. Hung Jury: The Diary of Menendez Juror. 73-74. Of course, it is impossible to know why Menendez cried when his mother was mentioned. Like other non-testimonial demeanour, a accused may be reacting because he is genuinely saddened by the loss of his mother or because he regrets his involvement in her death. Even the

that even during deliberations jurors observed the demeanour of the accuseds during testimony read backs.⁴²⁴ It is clear that jurors do indeed notice occurrences in the courtroom which are not evidence, and “it is difficult, if not impossible, for someone to ignore or fail to be influenced by information provided by *any* avenue.”⁴²⁵

4.4.1.3 The Timothy McVeigh Trial⁴²⁶

Timothy McVeigh was tried, convicted, and sentenced to death on eleven counts stemming from the bombing of the Alfred P. Murrah Federal Building (“Murrah Building”) in Oklahoma City, Oklahoma, that resulted in the deaths of 168 people.⁴²⁷ In cases where the death penalty is an option in terms of punishment, jurors are instructed to consider all aspects of the accused, which include his/her character. It is accordingly expected that jurors are likely to be influenced by a accused’s demeanour and reactions in the courtroom.⁴²⁸ McVeigh’s demeanour during the trial came under scrutiny and was analysed by the jurors and the media. McVeigh’s demeanour was described as

sincerest reactions can be confusing to jurors. They add an emotional dimension to the case, but do little to answer key factual questions in a case. (As cited in Levenson L.L. 2007. Courtroom Demeanour: The Theatre of the Courtroom. Legal Studies Paper No. 2007-30.).

⁴²⁴ Thornton H. 1995. Hung Jury: The Diary of Menendez Juror. 85. (describing how Erik was mortified when read back testimony focused on him being a homosexual).

⁴²⁵ Thornton H. 1995. Hung Jury: The Diary of Menendez Juror. 112.

⁴²⁶ *United States of America, Plaintiff-Appellee, v. Timothy James McVeigh, Accused-Appellant*. No. 97-1287. United States Court of Appeals, Tenth Circuit. Decided: September 08, 1998.

⁴²⁷ Collins J. et al. 1996. Days of Reckoning: The Jury That Found McVeigh Guilty Wrestles with Emotion and Tears as It Prepares to Decide His Fate. Time Magazine, June 16, 1996. 26. Jurors reported being influenced by McVeigh’s icy composure as prosecutors argued that he should be sentenced to death. See also Killer Maintains Icy Composure, Waves to Parents, Cleveland Plain Dealer, June 14, 1997, at A1 available at 1997 WLNR 6322051.

⁴²⁸ Sunby S.E. 1998. The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty. 83 Cornell Law Review. 1557, 1561-1566. (Providing a sampling of juror statements that indicate that one of the primary factors used by jurors in deciding that a death penalty accused lacked remorse and therefore deserved to die was the juror’s perceptions of the accused’s flat and nonchalant behavior at trial). See also *State v Rizzo*, 833 A.2d 363, 431-432 (Conn 2003)(stating that “[a]mong the factors that may be considered by a court at a sentencing hearing are the accused’s demeanour and his lack of veracity and remorse as observed by the court during the course of the trial on the merits”) (quoting *State v Anderson*, 561 A.2d 897, 905 (Conn. 1989); *Shiro v State*, 479 N.E. 2d 556, 559-560 (Ind 1985) (holding that the trial judge did not violate the accused’s due process rights or Fifth Amendment right against self-incrimination when he considered the accused’s continuous rocking motions during the trial in sentencing the accused to death).

personifying that of a “cold, heartless and calculating killer,”⁴²⁹ causing a juror to later state, “I don’t understand how any man or woman could not have shown any emotion one way or the other. It said he didn’t care.”⁴³⁰

4.4.1.4 The Bizzell Trial⁴³¹

Bizzell was convicted of assault, attempted murder and other crimes after he attacked his ex-girlfriend by choking her and holding a knife to her throat.⁴³² Whilst the trial was proceeding Bizzell often interrupted proceedings when he made comments or laughed at statements and the court sustained numerous objections to Bizzell’s answers when on the stand, including that they were narratives or non-responsive or that no question was pending.⁴³³ During opening statements the prosecutor was bold enough to argue that the jury would “see” that Bizzell’s “own behaviour in the courtroom will indicate that he’s guilty.” Bizzell, during the trial, exhibited anger both on and off the witness stand to the point that his own representative had to remind him to be “careful”.⁴³⁴ These actions by Bizzell supported the prosecutor’s argument that the accused was out of control when he tried to kill his victim.⁴³⁵

From the above cases it is apparent that jurors do take the demeanour of the accused into account when arriving at the verdict. There are courts that permit jurors to take the accused’s demeanour into account, as well as permitting the parties to comment⁴³⁶ on the demeanour of the accused during their addresses because it is unrealistic and counterproductive to assume that jurors are “mentally blind” to a accused’s demeanour during the proceedings. In their view,

⁴²⁹ Killer Maintains Icy Composure, Waves to Parents, Cleveland Plain Dealer, June 14, 1997, at A1 available at 1997 WLNR 6322051.

⁴³⁰ Jurors’ Enduring Question: Why? But Little Wavering When It Came Time for Their Decision, USA Today, June 16, 1997. 4A.

⁴³¹ *People v Bizzell* 2005 WL 2842055, at (Cal. Ct. App. 2005).

⁴³² *People v Bizzell* 2005 WL 2842055, at (Cal. Ct. App. 2005). At 2-3.

⁴³³ *People v Bizzell* 2005 WL 2842055, at (Cal. Ct. App. 2005). At 4.

⁴³⁴ *People v Bizzell* 2005 WL 2842055, at (Cal. Ct. App. 2005). At 8.

⁴³⁵ *People v Bizzell* 2005 WL 2842055, at (Cal. Ct. App. 2005). At 6. (“[W]e all know why we’re here, power and control. The accused’s conduct shows that. It showed that when he took the stand, it showed throughout this whole event... He’s out of control. You saw that.”).

⁴³⁶ *Commonwealth v Smith*, 444 N.E.2d 374, 380 (Massachusetts 1983). The Supreme Court of Appeal held that a prosecutor may comment on the accused’s squirming, smirking, and laughing during the trial and that the jury were entitled to observe the demeanour of the accused during the trial. At 376-381.

the manner in which the accused conducts himself/herself during the proceedings is a legitimate factor for jurors to consider when arriving at the verdict.⁴³⁷

In order to arrive at the verdict members of the jury use all their senses, including their intuition, however the outcome must be based on concrete, verifiable information and not simply impressions of the parties' personalities.⁴³⁸ The non-testimonial behaviours that impact on the jurors' decision range from facial expressions, body movements, smells, and gestures to paralanguage.⁴³⁹ Courts have realised the impact that the demeanour and the appearance of the accused have on the outcome of the matter and have accordingly discouraged the appearance of a accused in court dressed in prison clothes and in shackles.⁴⁴⁰

Having established that the demeanour of the accused does impact on the verdict, Levenson⁴⁴¹ puts forth the following arguments in favour of allowing demeanour evidence:

- Historically, there was no problem with jurors considering an accused's demeanour and the jury had a general responsibility to assess the accused's character and decide on a just result for the case.⁴⁴²

⁴³⁷ Wigmore J.H. 1979. Evidence. S 274(2), 119-120. Chadbourne Revision 1979. Wigmore strongly believed that a accused's demeanour off the witness stand and in the courtroom is admissible evidence.

⁴³⁸ Bothwell R.K. and Jalil M. 1992. The Credibility of Nervous Witnesses. 7 J. Social Behaviour and Personality. 581.

⁴³⁹ LeVan E.A. 1984. Nonverbal Communication in the Courtroom: Attorney Beware. 8. Law and Psychology, Review. 83.

⁴⁴⁰ *Deck v Missouri*, 544 U.S. 622 (2005). Carmen Deck was convicted of robbing and killing an elderly couple, and he received the death penalty. During the hearing Deck was forced to wear leg irons, handcuffs, and a belly chain, to which his counsel objected thrice but to no avail. The Supreme Court overturned the sentence, maintaining that unless specific circumstances warrant a shackling, such as security concerns, that "courts cannot routinely place accuseds in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." At 633.

⁴⁴¹ Levenson L.L. 2007. Courtroom Demeanour: The Theatre of the Courtroom. Legal Studies Paper No. 2007-30. Social Science Research Network (SSRN) electronic library at: <http://ssrn.com/abstract=999471>. at 46-51.

⁴⁴² Rubenstein A.M. 2006. Verdicts of Conscience: Nullification and the Modern Jury Trial, 106 Columbia Law Review. 960-961

- It is impractical to expect or believe that jurors will be able to disregard their impressions of the accused as formulated from their observations in the courtroom, even if they are instructed to do so. Jurors adjudicate cases based on inferences and subjective evaluations of the proceedings.⁴⁴³
- With proper instructions jurors will be able to give demeanour evidence the weight, if any, that it warrants.
- Acknowledging demeanour evidence does not violate the accused's Fifth Amendment rights because the accused is not being forced to testify, accordingly, an accused's reactions, facial expressions, and demeanour not elicited through testifying cannot be considered "compelled testimony."⁴⁴⁴
- Although there are rules of evidence, trials should not become so regimented that the natural dynamic of the courtroom is lost. The verdict should reflect the juror's evaluation of the evidence, as it makes sense in light of what they observed first-hand about the accused. Courtrooms are not laboratories, but halls of judgment where "[j]urors confront a real, live accused and real life consequences."⁴⁴⁵

Levenson suggests that the jury should be given instructions regarding the proper consideration of accused's demeanour in the courtroom and the impact thereof from an evidential point of view.⁴⁴⁶

4.4.2 South African Cases

Evidence adduced during a trial needs to be dealt with in terms of the Law of Evidence Amendment Act.⁴⁴⁷ For evidence to be deemed admissible in a

⁴⁴³ Solomon R.C. 1990. *A Passion for Justice: Emotions and the Origins of Social Contract*. 201.

⁴⁴⁴ Finkle N.J. 1995. *Common Sense Justice: Juror's Notions of the Law*. 39.

⁴⁴⁵ Finkle N.J. 1995. *Common Sense Justice: Juror's Notions of the Law*. 39.

⁴⁴⁶ Levenson L.L. 2007. *Courtroom Demeanour: The Theatre of the Courtroom*. Legal Studies Paper No. 2007-30. Social Science Research Network (SSRN) electronic library at: <http://ssrn.com/abstract=999471>. 54.

⁴⁴⁷ Act 45 of 1988.

criminal trial it must be relevant.⁴⁴⁸ The impression a witness creates in the mind of the role players during the trial plays an important role when the evidence is being evaluated and probative value is being attached to the evidence.⁴⁴⁹ The demeanour of a witness while testifying is in many cases the determining factor when searching for the truth.⁴⁵⁰ In the case of *S v Kelly*⁴⁵¹ however, the court indicated that demeanour must be approached with caution because a crafty witness can on occasion portray honest demeanour and a brazen witness who is being dishonest, and this may sometimes deceive the observer into believing that he is actually telling the truth. In the Pretorius case⁴⁵² Harms J remarked that if a witness appears to be sophisticated, it does not necessarily mean that the witness will be honest.

It would appear from the decided cases that in as much as demeanour is taken into account, the courts suggest that this be done with caution.⁴⁵³ In Momokela's case the court said that caution must be exercised not to base a decision solely on the demeanour of the witness exclusively⁴⁵⁴ even though demeanour may play a decisive role in the evaluation of the credibility of a witness.⁴⁵⁵

The trial court always has the benefit of observing the witness while he/she testifies and, as such, is in a position to observe and record the demeanour of the witness. Therefore, the appeal court will be reluctant to interfere with the findings of the *court a quo* which are based on the demeanour of the witness observed by the *court a quo*.⁴⁵⁶

⁴⁴⁸ Section 210 of the Criminal Procedure Act, Act 51 of 1977, as amended.

⁴⁴⁹ *S v Kelly* 1980 (3) SA 301 (AD). Diemont JA remarked that the Appellant became emotional even while some of the state witnesses were testifying. 308 B-G.

⁴⁵⁰ *R v Abels* 1948 1 SA 706 (O). 708.

⁴⁵¹ *R v Kelly* 1980 (3) SA 301 (AD).

⁴⁵² *S v Pretorius* 1991 (2) SACR 601 (A).

⁴⁵³ *R v Momokela* 1936 OPD 23, 24. According to this case the court indicated that in addition to demeanour, "probabilities" also play an important role in that: 'In addition to the demeanour of the witness one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under enquiry'.

⁴⁵⁴ *R v Haefele* 1938 SWA 21.

⁴⁵⁵ *R v Masemung* 1950 (2) SA 488 (A)., *S v Civa* 1974 (3) SA 844 (T). Also see Schmidt C.W.H. and Rademeyer H. 2006. Bewysreg. Butterworths: Durban. 105.

⁴⁵⁶ *Motor Vehicle Insurance Fund v Kenny* 1984 (4) SA 432. See Schmidt C.W.H. and Rademeyer H. 2006. Bewysreg. Butterworths: Durban. 105.

4.4.2.1 *A S v S*⁴⁵⁷

In this case the appellant was convicted of indecent assault. The conviction was based on the evidence of a single witness who was a child and the court found the evidence of the child to be reliable and consistent. The matter was taken on appeal to the Supreme Court of Appeal and this court of appeal had to re-evaluate the evidence of the appellant and the complainant, even though the trial court and the high court (first court of appeal) did a full analysis and assessment of the evidence. During the trial in the regional court the complainant contradicted himself by giving an answer to a question during cross-examination which was inconsistent with an answer he gave during examination-in-chief. When asked about the inconsistency, the complainant said he gave that answer just to stop the questioning and he immediately apologised for misleading the court. Bosielo JA⁴⁵⁸ commented on how the complainant answered when the inconsistency was put to him by the appellant's representative and remarked that the "complainant openly and frankly admitted that he lied to the court". The court also noted⁴⁵⁹ that it was clear from the transcript the protracted cross-examination "literally wore him [the complainant] down".⁴⁶⁰ Bosielo JA also pointed out that from reading the transcript he concurred with finding of the regional magistrate who found that the appellant was "evasive and failed to answer relevant and pertinent questions", and the regional magistrate's view that the appellant was "arrogant and felt offended when certain questions were put to him". From the judgment of the Supreme Court of Appeal it is clear that the appeal court is unlikely to interfere with the finding of the trial court regarding credibility findings on the basis of demeanour.

4.4.2.2 *The President of the Republic of South Africa v South African Football Union*⁴⁶¹

⁴⁵⁷ *A S v S* (349/10) [2011] ZASCA 52 (30 March 2011).

⁴⁵⁸ *A S v S* (349/10) [2011] ZASCA 52 (30 March 2011). 14 para 33.

⁴⁵⁹ *A S v S* (349/10) [2011] ZASCA 52 (30 March 2011). 16 para 36.

⁴⁶⁰ *A S v S* (349/10) [2011] ZASCA 52 (30 March 2011). 14 para 33. "At some stage, the complainant appeared to be so tired that the regional magistrate offered him a break to recover."

⁴⁶¹ *The President of the Republic of South Africa v South African Football Union* 2000 (1) SA 1 (CC). 79

The Constitutional Court had to assess the validity of two presidential notices that appeared in the Government Gazette on 26 September 1997. The President was called to testify during the trial of the matter. Regarding the finding made concerning the President's demeanour the Constitutional Court remarked that the demeanour of the President must be viewed "in the context of the order that he gave evidence and the manner of his cross-examination."⁴⁶² The Court further commented that during cross-examination the President was, at times, "impatient", "imperious", "hurt", "angry" and "insulting". The Constitutional Court highlighted the danger of assuming that 'all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different, culture, class, race or gender and someone whose life experiences differs fundamentally from that of the trier of fact'.⁴⁶³ The court also remarked that an appeal court will be reluctant to interfere with the observations of the trial court regarding demeanour.⁴⁶⁴ An interesting fact about this case is that the trial court devoted twenty five pages of the judgment to dealing with considerations of the credibility of the President's evidence.

4.4.2.3 *S v Makhudu*⁴⁶⁵

This was an appeal against sentence. The appellant was convicted in the Pretoria Regional Court on five counts of fraud to which she pleaded guilty. The accused was sentenced on each of the five counts to pay a fine of five thousand rand or undergo one hundred days of imprisonment, plus a further one hundred days of imprisonment suspended for five years on condition that she was not found guilty of fraud in the next five years. She was also sentenced to eighteen

⁴⁶² *The President of the Republic of South Africa v South African Football Union* 2000 1 SA 1 (CC). 74 para 85.

⁴⁶³ *The President of the Republic of South Africa v South African Football Union* 2000 1 SA 1 (CC). 79

⁴⁶⁴ *The President of the Republic of South Africa v South African Football Union* 2000 1 SA 1 (CC). 77. 'The trial court sees and hears the witness testifying and is thus able to evaluate how a witness responds to questions and produces answers. This immediate relationship between the witness and the trier of fact enables the latter to assess the evidence in the light of the behaviour and conduct of the witness while testifying, whereas the court of appeal is restricted to the written record of the witness's oral testimony'.

⁴⁶⁵ *S v Makhudu* 2003(1) SACR 500 (SCA). 501.

months of correctional supervision in terms of section 276(1) (h) of the Criminal Procedure Act⁴⁶⁶

The relevant aspect of this judgment is that which deals with the accused person showing remorse. The court remarked⁴⁶⁷ that repentance may be relevant to the sentence handed down by the court. The court submitted that the demeanour and the behaviour of the accused cannot be taken into account in isolation, and that when the court is taking demeanour into account the court must be satisfied that the demeanour establishes that the accused is the kind of person that deserves the firmer punishment. Makhudu's case sends out a message that caution should be exercised and that it is essential to guard against the risk in, and the potential imbalance and injustice of, making a sentence harsher because of the way in which a defence was conducted, or on the basis of the accused's poor demeanour or arrogant behaviour in court or while testifying.⁴⁶⁸ An important point that arose out of this judgment stems from the remark of Marais JA who states that the behaviour of the accused/appellant did not entitle the *court a quo* to its sentencing power to "put (her) in her place".

4.4.2.4 *Ngada v S*⁴⁶⁹

In this case the accused was convicted of the rape of a fifteen-year-old complainant and sentenced to twenty-three years imprisonment. This sentence imposed was taken on appeal. The appeal court reduced the sentence to eighteen years imprisonment. The appeal court commented that the court had to consider the facts of the case in relation to the offence, the accused and the requirements of society. The court took note of the physical stature of the

⁴⁶⁶ Act 51 of 1977.

⁴⁶⁷ *S v Makhudu* 2003(1) SACR 500 (SCA). 504 f-h. [7] " While the behaviour of the accused during the trial may be indicative of a lack of repentance or intended future defiance of the laws by which society lives and therefore be a relevant factor in considering sentence, neither the fact that an accused's defence is conducted in an objectionable manner nor the fact that the accused's demeanour in court is obnoxious, is a proper factor to be taken into account unless it is of a kind which satisfactorily establishes that the accused is the kind of person who would be best deterred from future criminal activity by being dealt in a firmer manner than would have been appropriate if the accused was not that kind of person." [8] "The court should be slow to jump to conclusions regarding an accused's character and reaction to punishment when such conclusions are based solely upon the accused's demeanour and behaviour in court."

⁴⁶⁸ *S v Makhudu* 2003(1) SACR 500 (SCA). 504 f-h. [7].

⁴⁶⁹ *Ngada v S* (CA 379/08) [2008] ECHC (16 March 2009) (unreported).

complainant and remarked that “if she had been a tiny child, the offence would have been more serious.”⁴⁷⁰

4.4.2.5 *Van Wyk v S*⁴⁷¹

The accused had been convicted of the murder of a nineteen-year-old single female and sentenced to ten years of imprisonment by the trial court. The accused applied for leave to appeal and the leave to appeal was granted. The matter was taken on appeal and credibility findings of the *court a quo* formed the basis of the appeal. The appeal court had to establish whether there had been any misdirection on the part of the *court a quo* in making the factual and credibility findings. The appeal court acknowledged the advantages presented to the trial judge and conveyed a reluctance to interfere with matters relating to the demeanour of witnesses. The appeal court commented that the appellant was the only person who could tell the court what had happened but that the appellant was evasive on this fundamental issue. This evasive behaviour was a factor that contributed to the initial verdict and sentence being confirmed by the appeal court. The appeal court commented that the trial court judge had weighed the intrinsic quality of the evidence and the probabilities carefully and, in the view of the appeal court judge, accurately. It is important to note here the comment by the appeal court judge on how the trial court judge conducted the proceedings.

4.4.2.6 *Ngema v S*⁴⁷²

The accused was convicted of the rape of his fifteen-year-old biological daughter, who was thirteen at the time of the commission of the offence. At the trial the accused pleaded not guilty to the charge and elected to remain silent and not make a statement in terms of Section 115.⁴⁷³ The complainant was a single witness and as such the court had to consider her evidence with caution and ensure that her evidence was clear and satisfactory in every material

⁴⁷⁰ *Ngada v S* (CA 379/08) [2008] ECHC (16 March 2009) (unreported). Para 12.

⁴⁷¹ *Van Wyk v S* (A417/2007) [2007] OFSPD (16 October 2008) unreported.

⁴⁷² *Ngema v S* (AR 140/2006) [2006] KZNPD (2 February 2010). Unreported.

⁴⁷³ Act 51 of 1977.

respect.⁴⁷⁴ The appeal court remarked that the perusal of the evidence confirmed that the complainant was a good witness who did not overstate her evidence. The appeal court also stated that it would be reluctant to interfere with the finding of the magistrate that the complainant's demeanour was favourable.

4.4.2.7 *Ramokolo v S*⁴⁷⁵

The accused in this matter was convicted of extortion and sentenced in the trial court. The accused was a consulting engineer responsible for facilitating payment to the building contractor in a state road construction project. The accused coerced the contractor to give him monies from the proceeds. These monies were not legally due to the accused. The matter was taken on appeal. The state led evidence against the accused and the accused elected to remain silent and not to testify, and not call any witnesses to testify on his behalf, thereby leaving the state's case unchallenged. The court drew an adverse inference from the appellant's failure to testify when his counsel had put to the state witness under cross-examination that the appellant would testify and said that this suggested that 'he changed his mind because he had something to hide'.⁴⁷⁶ This case demonstrates how the silent demeanour of the accused had an adverse effect on the outcome of his case.

4.4.2.8 *Modiga v The State*⁴⁷⁷

The appellant had been convicted of several counts of robbery with aggravating circumstances, and the evidence during the trial consisted primarily of the evidence of a single witness. The trial court had to evaluate circumstantial evidence. At the appeal the appellant raised, amongst other issues, the demeanour of the single witness, contending that the demeanour of this witness left much to be desired because the witness' eyes were shifty whilst testifying; that he was long-winded and evasive with his response.⁴⁷⁸

⁴⁷⁴ *R v Mokeona* 1932 OPD 79. 80.

⁴⁷⁵ *Ramokolo v The State* (251/10) [2011] ZASCA 77 (26 May 2011)

⁴⁷⁶ *Ramokolo v The State* (251/10) [2011] ZASCA 77 (26 May 2011). Para 16.

⁴⁷⁷ *Modiga v The State* (20738/14) [2015] ZASCA 94 (01 June 2015).

⁴⁷⁸ *Modiga v The State* (20738/14) [2015] ZASCA 94 (01 June 2015). Para 18.

The appeal court, when considering the record of the trial, stated that ‘the trial court was steeped in the atmosphere of the trial’⁴⁷⁹. The appeal court will only interfere with factual and credibility findings made by the trial court if the appeal court was convinced that the trial court erred. The appeal court did not have carte blanche to interfere with the factual and credibility findings that were properly made by the trial court.⁴⁸⁰ The appeal court highlighted that the record showed that the witness in question was subjected to lengthy, robust, and at times, hostile cross-examination from the appellant’s counsel. The appeal court also noted that the trial court had the benefit of hearing and observing the witness’ testifying, which the appeal court did not have. The trial court found that the witness’ demeanour did not detract from his credibility, or the truthfulness and cogency of his testimony. The appeal court said that the evidence in its entirety should be considered as a mosaic, and that once that has been done, the court should identify the strengths and weaknesses in the evidence and consider the merits, demerits, and the probabilities when evaluating demeanour and credibility.⁴⁸¹

4.4.2.9 *Director of Public Prosecutions, Gauteng v Pistorius*⁴⁸²

This case caused a media sensation globally when the court found the accused guilty of culpable homicide and later of murder and sentenced the accused to imprisonment. There was much mention made of the physical stature of the accused and his behaviour and reactions during the trial. The accused had on many occasions become emotional to the point of actually throwing up whilst seated in the accused’s dock. These emotional outbursts and the physical stature of the accused were taken into account by the trial court when deciding on the appropriate sentence. During the appeal the Leach JA commented on the demeanour and behaviour of the trial judge⁴⁸³ stating that the trial judge conducted the trial with a degree of dignity and patience, in spite of the trial

⁴⁷⁹ *R v Dhlumayo* 1948 (2) SA 677 (A). 705.

⁴⁸⁰ *Modiga v The State* (20738/14) [2015] ZASCA 94 (01 June 2015). Para 24.

⁴⁸¹ *Modiga v The State* (20738/14) [2015] ZASCA 94 (01 June 2015). Para 28.

⁴⁸² *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015).

⁴⁸³ *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015). Para 57. Also available at <http://www.politicsweb.co.za/documents/gauteng-dpp-vs-oscar-pistorius-sca-judgment>.

being conducted in the glare of international attention and focus of television cameras which must have added to the inherently heavy rigors that are brought to bear upon trial courts conducting lengthy and complicated trials. The appeal court highlighted that even though it determined that certain mistakes were made during the trial, those mistakes ‘should not be seen as an adverse comment upon [the trial court judge’s] competence and ability.’ The appeal court congratulated the trial court judge for the manner in which she conducted the trial.⁴⁸⁴

4.4.2.10 *Ngada v S*⁴⁸⁵

In this case the accused was a Principal at a facility that cares for the homeless. The trial court convicted the accused of sodomy and four counts of indecent assault. The matter was taken on appeal and the High court set aside the sodomy conviction and upheld the conviction on the indecent assault. The accused took the matter on appeal to the Supreme Court of Appeal. Zulman JA commented on the manner in which the trial court dealt with the matter, especially with regards to the magistrate’s comment regarding the “accused’s failure to convince the court...”. Zulman JA highlighted that there is no obligation on the accused to convince the court. Of particular relevance in this case is the remark by Zulman JA that it is of little value to judge an accused on his demeanour in the witness box because it is not unusual for an accused to be afraid or overwhelmed by the experience of giving evidence in a court possibly for the first time.

4.4.2.11 *S v Robiyana and Others*⁴⁸⁶

The appellants in this matter were convicted on various counts including murder, attempted murder, malicious injury to property and unlawful possession of firearms on the basis of their alleged involvement in a turf war between rival

⁴⁸⁴ *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015). Para 57. Also available at <http://www.ibtimes.co.uk/oscar-pistorius-appeal-justice-eric-leachs-judgment-full-1531812>.

⁴⁸⁵ Unreported *M V H Viveiros v The State Supreme Court of Appeal* 75/98. Judgment delivered on 9 March 2000.

⁴⁸⁶ *S v Robiyana and Others* (CC 55/2001) [2008] ZAECHC 107; 2009 (1) SACR 104 (Ck) (27 June 2008).

taxi organisations. The main issue before the appeal court revolved around the admissibility of a statement of an accomplice to corroborate a Section 204⁴⁸⁷ witness. The appeal court dealt with the issue of demeanour and credibility.

Greenland AJ said that it was obvious that the trial court was not impressed by each of the appellants as witnesses but the *court a quo* made no adverse findings as to the demeanour of the appellants. The appellants accordingly raised this as a ground of appeal submitting that the trial court should not have found that “...*the evidence of the accused is not reasonably possibly true*”. Greenland AJ stated that it is trite law that demeanour is one of the factors, and sometimes a critical factor, that a court is entitled to take into account when assessing a witness. The judge on appeal went on to say that a court is not obliged to accept the evidence of a witness whenever the “court is unable to make an adverse finding regarding the demeanour of such witness because such an approach would lead to an absurd result that criminals skilled in the art of mendacity, would be entitled to an acquittal despite the most comprehensively damning evidence simply on account of their ability to calmly and assuredly brazen out their denials without being ruffled in any way”. The judge on appeal said that the trial court did actually make an adverse finding on the demeanour of the appellants and it did so by rejecting their versions because of the manner in which the appellants testified. The appeal court said that if any references to demeanour are to carry any weight then the findings regarding demeanour should be supported by the facts.

4.4.2.12 *S v Minnies*⁴⁸⁸

In this case the court dealt with the evidence of a police officer. The police officer testified and his evidence was similar to that of another witness. The court commented that the demeanour of the police officer could not be criticised, but the evidence of the police officer was rejected as being untruthful because the police officer, in spite of his seniority, could not explain why the interrogation of the suspect was done in a lonely shed and not at the police

⁴⁸⁷ Section 204 of the Criminal Procedure Act 51 of 1977.

⁴⁸⁸ 1991 (3) SA 364 (NM). 376

station. This case demonstrates that good demeanour does not guarantee the conclusion that the evidence will be accepted as the truth.

4.4.2.13 *S v Martinez*⁴⁸⁹

In this case the court commented on the utility of demeanour being considered a reliable indicator of truthfulness. Levy J held that some witnesses are quite capable of deceiving the court while other, unsophisticated witnesses might be misjudged by the court just because they are overwhelmed by the experience of being in court.

4.4.2.14 *Cele v The State*⁴⁹⁰

The accused was convicted of raping a five-year-old child. The matter was reported nine days after the incident took place, but the prosecution only took place three years later. The prosecution tendered no explanation for the delay. The accused was sentenced to fifteen years imprisonment and took the conviction on appeal. In the dissenting judgment Pillay J said that demeanour is not decisive of a witness's credibility but could reinforce an objective assessment on the possibilities. The appeal court made reference to the finding of the trial court that the complainant 'was a very credible and impressive witness'. This finding was made on the basis of the manner in which the complainant gave her evidence. The trial court noted that the complainant withstood the cross-examination "stoically" and she was coherent and consistent. The trial court also made findings regarding the appellant and described the appellant as "not a great witness... evasive". The appeal court found the trial court's finding in respect of the appellant to be a misdirection

⁴⁸⁹ 1991 (4) SA 741 (NM). 758. Levy J said "This court hesitates and is loath to condemn a witness of his or her demeanour in the witness-box. Some people follow occupations which frequently expose them to the public eye and they have learnt to speak with conviction even when they are lying. Others are able to disguise their feelings and may be so crafty that they can simulate an honest demeanour. On the other hand some people who are entirely truthful are shy, withdrawn and nervous by nature and unable to express themselves. They hesitate and sometimes even lean over backwards to be fair. When the witness is a foreigner from a different cultural background the difficulty is compounded. ... Where witnesses speak through interpreters one has even greater difficulties. Voice intonations, nuances of language, which may convey different shades of meaning, are frequently lost."

⁴⁹⁰ (AR191/13) [2016] ZAKZPHC 4; [2016] 2 All SA 75 (KZP). (12 January 2016)

because the trial court furnished no reasons for arriving at the conclusion about the appellant.

4.4.2.15 *S v Shaw*⁴⁹¹

In this case the appellant was convicted of murder and sentenced to twelve years imprisonment. The appeal court said that demeanour means much more than the appearance of a witness in the box. It includes the witness' manner of testifying, character, personality, and the impression he/she creates; whether he/she is candid or evasive, ready or reluctant in giving their version; whether he/she hesitates unnecessarily, fidgets nervously, etc. cumulatively contributing to shaping the demeanour of the witness. The court said that the trial court is in the best position to make findings regarding demeanour because the trial court gets the opportunity to observe the witness while he/she testifies.

4.4.2.16 *Knox D'Arcy AG v Land and Agricultural Development Bank of SA*⁴⁹²

In this matter the court dealt with whether the appellants proved compliance with the provisions of an agreement entitling them to a cession of book debts. The appeal court commented that the trial court made adverse credibility findings against an appellant (Steele) because it found Steele unimpressive for being long-winded, defensive and incoherent. On the other hand, the court found another witness to be strikingly favourable because the witness gave evidence without hesitation and 'gave evidence in a very relaxed and confident manner.' When reconsidering the evidence, the appeal court found that the trial court misdirected itself and did not support its finding with evidence.

4.4.2.17 *M v Vallabh*⁴⁹³

In this case the accused performed a hysterectomy on the plaintiff. After her discharge the plaintiff developed sepsis in the surgery wound and had to

⁴⁹¹ [2011] ZAKZPHC 32; AR 342/10 (01 August 2011).

⁴⁹² *Knox D'Arcy AG v Land and Agricultural Development Bank of SA* (654/12) [2013] ZASCA 93 (05 June 2013).

⁴⁹³ *M v Vallabh* (44326/13) [2017] ZAGPJHC 397 (24 November 2017).

undergo further surgery that was carried out by another specialist. The plaintiff then instituted a claim for damages against the accused. Ramapuputla AJ commented that the plaintiff was not shaken during cross-examination and expressed emotion when certain questions were put to her. The accused on the other hand was described as arrogant and condescending. The court remarked that the accused leaned against the witness box and even walked out of the witness box, he did not face the bench when testifying, he was rude to the plaintiff's representative, and epitomised nonchalance. The court ruled in favour of the plaintiff and in its reasons for the finding the court went beyond the evidence presented and looked at the professional obligations of the accused in terms of the doctor-patient relationship as well as the general attitude of the accused towards the plaintiff and the issues at hand.

4.4.2.18 *Central News Agency, Ltd. v Schocher*⁴⁹⁴

In this case the Appeal Court set aside the decision of the trial court. Greenberg, J.P. remarked that the *court a quo* erred in only taking into account the demeanour of the witnesses for one party and not the demeanour of the witnesses of the other party. Greenberg, J.P. went on to say that it cannot be correctly said that because a magistrate is favourably impressed by the demeanour of the witnesses on one side he is therefore justified in rejecting the evidence if the witness on the other side. The trial court magistrate ought to have included comments in respect of the demeanour of all witness as this would put the appeal court in a better position to evaluate the substantive correctness of the verdict in the *court a quo*.⁴⁹⁵

4.4.2.19 *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA)⁴⁹⁶

The *court a quo* accepted the evidence of Mrs Shiloane on the basis of demeanour alone without making reference to the probabilities of her evidence in the light of other evidence. Harms, J. remarked that the judge in the *court a*

⁴⁹⁴ *Central News Agency, Ltd. v Schocher* 1943 TPD 355.

⁴⁹⁵ *Central News Agency, Ltd. v Schocher* 1943 TPD 355, at p. 357

⁴⁹⁶ *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA).

quo failed to distinguish between demeanour and credibility and that the judge's failure to decide that case without regard to the wider probabilities is a clear misdirection and entitles the Supreme Court of Appeal to reassess Mrs Shiloane's evidence.⁴⁹⁷

4.4.2.20 *Santam Beperk and Vincent Biddulph*⁴⁹⁸

This was a matter that was taken on appeal to the Supreme Court of Appeal by the plaintiff. The *court a quo* relied on the demeanour of the witness, Sigasa, in the witness box as being such that he was “ ‘n patetiese en wankelrige figuur wat nie die stempel van betrubbaarheid waardig is nie”. Zulman, JA remarked that this characterisation of Sigasa was unwarranted bearing in mind the record of his evidence, the lengthy cross-examination of him, the fact that he gave evidence through an interpreter and the deplorable attitude of the learned judge towards Sigasa. Zulman, JA went further to say that the importance of demeanour as a factor in the overall assessment of evidence should not be over-estimated.⁴⁹⁹

4.4.2.21 *Estate Kaluza v Braeur*⁵⁰⁰

Wessels, JA stated as follows:

“A crafty witness may simulate an honest demeanour and the judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story. On the other hand an honest witness may be shy or nervous by nature, and in the witness box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.

Nevertheless, while demeanour can never serve as a substitute for evidence, it can, and often does reflect on and enhance the credibility of oral testimony. The experienced trial officer is well aware of this fact; it is a matter of common sense. He observes the witness closely – evasions,

⁴⁹⁷ *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA), at p. 980.

⁴⁹⁸ *Santam Beperk and Vincent Biddulph* 2004 (5) SA 586 (SCA).

⁴⁹⁹ *Santam Beperk and Vincent Biddulph* 2004 (5) SA 586 (SCA) at p. 591.

⁵⁰⁰ *Estate Kaluza v Braeur* 1926 AD 243.

*hesitations and reactions to awkward questions. He will note, if he is alert, all the incidental elements so difficult to describe which make up the atmosphere of an actual trial.”*⁵⁰¹

4.4.2.22 *Medscheme Holdings (Pty) Ltd and Another v Bhamjee*⁵⁰²

In this case the Appeal Court interfered with the credibility findings based on the demeanour of a witness arrived at without regard to the probabilities of the case. Nugent, JA said in his judgment that:

*“It has been said by this court before, but it bears repeating, that an assessment of evidence on the basis of demeanour- the application of what has been referred to disparagingly as the ‘Pinocchio theory’ without regard for wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given ... against the underlying probabilities ... little weight can be attached to credibility findings, undifferentiated as they were in relation to the various issue, were clearly incorrect when viewed against the probabilities”.*⁵⁰³

4.4.2.23 *Ferreira v Van Heerden and Others*⁵⁰⁴

Pakade, ADJP was mindful of the fact that the demeanour and credibility findings of a trial court will ordinarily not be lightly disturbed on appeal. Pakade, ADJP further remarked that the *court a quo*, however, misdirected itself in finding that because it is not apparent from the demeanour of the witness, Van Heerden, that he was lying, it can “*therefore be rejected only if his version is itself improbable or if it is inconsistent with the indirect evidence presented by the defendant and with the inferences that can safely be drawn from that evidence.*” It was further held on appeal that it is undesirable for a court to first consider the question of the credibility of a witness and then, having concluded that enquiry to consider the probabilities of the case, as though the two aspects are separate enquiries. “*In deciding whether the plaintiff has discharged the*

⁵⁰¹ [Estate Kaluza v Braeur](#) 1926 AD 243 at 266.

⁵⁰² [Medscheme Holdings \(Pty\) Ltd and Another v Bhamjee](#) 2005 (5) SA 339 (SCA).

⁵⁰³ [Medscheme Holdings \(Pty\) Ltd and Another v Bhamjee](#) 2005 (5) SA 339 (SCA) at para [14].

⁵⁰⁴ [Ferreira v Van Heerden and Others](#) (3253/2009) [2014] ZAECHGHC 29 (20 February 2014).

*onus of proof, the estimate of eth credibility of a witness will be inextricably bound with a consideration of the probabilities of the case”.*⁵⁰⁵

4.4.3 Cases Relating to the Demeanour of the Presiding Officer

4.4.3.1 *Steven Malcolm Musiker v The State*⁵⁰⁶

The appellant was convicted of assault with intent to cause grievous bodily harm and sentenced to pay a fine of four thousand rand or undergo twelve months imprisonment. The appeal court made a point of commenting on the manner in which the magistrate in the trial court dealt with the matter and said that the magistrate conducted the trial in an unacceptable manner. The legal representative in the trial was inexperienced and, on many occasions, that showed that the representative was unable to deal with issues but the magistrate did nothing to assist. The appeal court also pointed out that numerous times the magistrate interjected while the defence counsel was questioning the witness, and that the magistrate ‘got agitated and in the process misled counsel.’ The court overturned the conviction because the alibi of the accused was wrongly rejected by the trial court. The Supreme Court of Appeal remarked that had it not reached its conclusion based on the rejection of the alibi, it would have had justification in making a finding that the appellant had not had a fair trial because of the manner in which the magistrate conducted the trial and conducted himself during the trial.

From this case it is clear that the demeanour of the judicial officer can also have an impact on the ultimate outcome of the trial and that, under certain circumstances, how the magistrate conducts proceedings can have an adverse effect on the fairness of a trial.

4.4.3.2 *Mofokeng v The State*⁵⁰⁷

⁵⁰⁵ *Stellenbosch Farmer’s Winery Group Ltd and Another v Martell Et Cie and others* 2003 (1) SA 11 (SCA) at par [5].

⁵⁰⁶ (272/12) [2012] ZASCA 198 (30 November 2012).

⁵⁰⁷ (A170/2013) [2015] ZAFSHC 13 (5 February 2015).

The appellant in this matter was convicted on two counts of rape of two young girls aged eleven and twelve years respectively and sentenced to life imprisonment in respect of each count. The sentences were to run concurrently. The appellant took the matter on appeal. The appeal court decided to interfere with the decision of the trial court. One of the grounds of appeal was that the magistrate was not impartial in the conduct of the trial and that he posed questions that were not limited to the elucidation of evidence, but had the effect of favouring the State's case. The appeal court also found that the magistrate committed such a high number of irregularities in the way that he conducted the trial and that coupled with the nature and extent of the irregularities amounted to the appellant not having a fair trial. The appeal court accordingly set aside both the conviction and the sentence.

4.4.3.3 *City of Johannesburg Metropolitan Council v Patrick Ngobeni*⁵⁰⁸

The plaintiff in this matter was wrongfully shot, arrested and detained by a metro police officer. One of the grounds of appeal raised by counsel for the appellant was that the trial judge descended into the arena and committed various irregularities during the trial, namely the judge *mero moto* called witnesses, called for an inspection *in loco* to be held and interfered when a witness testified. Counsel contended that the judge evidenced bias in favour of the plaintiff. The appeal court commented that one third of the record of the trial proceedings is occupied by the trial judge. The appeal court found this to be inappropriate. The trial judge also refused to excuse a witness, even when the issue that the witness was going to testify on was admitted. The trial judge asked a witness questions and these questions amounted to cross-examination. The judge became aggressive while questioning the witness. The Supreme Court of Appeal set aside the findings of the *court a quo*.

4.4.3.4 *Santam Beperk and Vincent Biddulph*⁵⁰⁹

In this case Zulman, JA commented on the demeanour of the presiding officer in the *court a quo* and described the attitude of the learned judge in the *court a*

⁵⁰⁸ (314/11) [2012] ZASCA 55 (30 March 2012).

⁵⁰⁹ *Santam Beperk and Vincent Biddulph* 2004 (5) SA 586 (SCA), at p. 591.

quo as “deplorable”. Sigasa, the witness, was of a different “culture, class and race” whose “life experience differs fundamentally from that of the trier of fact”. Zulman, JA remarked that the learned judge’s failure to have regard to the social dynamics is quite apparent from his questioning of Sigasa and the assessment of his evidence. Zulman, JA remarked further that the finding on demeanour is limited where evidence is given through an interpreter.⁵¹⁰

4.4.3.5 *Munyai v The State*⁵¹¹

Here the court on appeal commented on the manner in which trial judge conducted the trial. Sutherland, J remarked that the trial was conducted with such robustness that the many finer details and nuances which are important in this type of case (rape charges) were not addressed.

4.4.3.6 *Vilakazi v The State*⁵¹²

In the principle highlighted was that the evidence of young children in sexual assault cases, the imperfections in evidence is not necessarily fatal and the evidence must be considered carefully and holistically to determine trustworthiness. Mhlantla, JA criticised the conduct of the regional magistrate during the trial. The regional magistrate readily accepted the complainant’s evidence notwithstanding the contradictions inherent in her testimony. The regional magistrate was also criticised for making complimentary remarks about the complainant’s sister at the end of her testimony. The regional magistrate repeated this at the end of the mother’s testimony. Mhlantla, JA remarked that a judicial officer should avoid making remarks about a witness during the trial as this should be done at the end of the trial and during judgment.⁵¹³

⁵¹⁰ *S v Malepane and Another* 1979 (SA) 1009 (W) 1016H-1017A; *S v Martinez* 1991 (4) SA 741 (NmHC) 758 B-D. See also Nicholas, H.C. 1985. *Credibility of Witnesses*. 102 SALJ 36-37.

⁵¹¹ *Munyai v The State* (A109/2016) [2017] ZAGPJHC 121; [2017] 3 All SA 23 (GJ); 2017 (2) SACR 168 (GJ) (22 March 2017)

⁵¹² *Vilakazi v The State* (636/2015) [2015] ZASCA 103 (10 June 2016).

⁵¹³ *Vilakazi v The State* (636/2015) [2015] ZASCA 103 (10 June 2016), at par [36].

4.5 Conclusion

The decided cases discussed above make it clear that the courts do take demeanour into account when making decisions during the trial. Presiding officers, however, have to do so taking all the evidence into account. During the trial presiding officers are expected to conduct the trial proceedings and themselves in a certain manner which is set out in the Code of Conduct.⁵¹⁴ Presiding officers are required to act with integrity at all times and to display such integrity in court in the form of dignity, respect, courtesy, patience, self-control, impartiality, competence, diligence, and allegiance to the Constitution. It can be very scary and frustrating for parties in proceedings to appear before a magistrate who appears to be disinterested, or who displays an obvious prejudice, or who fails to take control of the proceedings.⁵¹⁵ In the Rall case⁵¹⁶ the court set out the following guidelines for the conduct of the presiding officer:

- The judicial officer must always ensure that justice is done and seen to be done.
- Any line of questioning of witnesses or the parties which may preclude the judicial officer from objectively assessing the evidence and facts before him or her should be avoided.
- A judicial officer should always avoid any line of questioning that may intimidate or unduly influence the parties or their witnesses and thus affect their credibility or demeanour.⁵¹⁷

Presiding officers often explain the details of their impressions derived from observing the witness while he/she testifies. In this regard Mullin suggests that where a presiding officer makes findings based on the witness' demeanour such findings should have some reference point in observed behaviour, such as

⁵¹⁴ Article 1 of the Code of Conduct for Magistrates (Regulation 54A promulgated in terms of s 16 Magistrates Act 90 of 1993).

⁵¹⁵ Ethical Issues for Magistrates: Manual for Trainers. Directory of Open Education Resources available at <http://doer.col.org/handle/123456789/2299> accessed on 18 November 2017.

⁵¹⁶ S v Rall 1982 (1) SA 828 (A).

⁵¹⁷ S v Rall 1982 (1) SA 828 (A). 831-832.

evasiveness, hesitation, or discomfort while testifying, as this will enhance the probative value of the credibility finding.⁵¹⁸

The traditional discourse on demeanour leads to witness demeanour being regarded as a primary method of ascertaining the truth and accuracy of the witness's narratives. In order to more fully understand demeanour evidence, we need to look at the dynamics of demeanour evidence and how it impacts on the decision-making process, and to do so there must be an appraisal of the demeanour evidence against pre-existing schemas.⁵¹⁹

In the *Estate Kaluzar*⁵²⁰ case Wessels JA remarked that although

“demeanour can never serve as a substitute for evidence, it can and often does ‘reflect on and enhance the credibility of oral testimony’. The experienced trial officer is well aware of this fact; it is a matter of common sense. He observes the witness closely – evasions, hesitations and reactions to awkward questions.”⁵²¹

Demeanour should therefore be admissible as evidence to the extent that it reinforces a conclusion reached by an objective evaluation of the probabilities, or possibly to shift the scale when the probabilities are evenly balanced.⁵²² The cases cited above emphasise that when assess the demeanour of the witness in order to make a credibility finding the court should always assess the

⁵¹⁸ Mullins E.M. 1993. *Manual for Administrative Law Judges*. 3rd ed. 111-112. Mullins suggested the following standard:

Where credibility is in issue the reviewing authority may look to the judge's demeanour findings in the theory that the judge observed the witness and therefore was in the best position to evaluate the witness' credibility. Consequently, the judge should exercise extreme care in such findings, and avoid conclusory statements such as “from the witness' demeanour it is concluded that the testimony cannot be believed.” Instead, credibility findings should be supported by specific conduct or observations. For instance, a witness may be talkative and comfortable in response to all questions, except those addressing the issue on which credibility is doubtful, but whenever the questioning turns to that issue, the witness becomes evasive and starts looking away from the judge and toward counsel, as if for signals. At any rate, to the extent possible, findings grounded on witness demeanour should have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort under questioning.

⁵¹⁹ Shuster M.L. and Proppen A.D. 2011. *Victim Advocacy in the Courtroom: Persuasive Practices in Domestic Violence and Child Protection Cases*.

⁵²⁰ *Estate Kaluzar v Braeuer* 1926 AD 243.

⁵²¹ *Estate Kaluzar v Braeuer* 1926 AD 243. 266.

⁵²² *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 SCA. 979. See Zeffert D.T., Paizes A.P. 2007. *The South African Law of Evidence*. (2nd ed). LexisNexis: Durban (Interpak Books, Pietermaritzburg). 149-150.

demeanour of the witness within the context of the evidence in totality and that of other evidence and the probabilities that arise out of the evidence that is deposited to by the witness.

CHAPTER 5 – RESEARCH METHODOLOGY

5.1 Introduction

In Chapter 1 a basic orientation of the research methodology of this study was provided. This study focuses on the impact of non-verbal communication and demeanour on the verdict. Arising out of the problem statement set out in Chapter 1, the aim of this research is to perhaps gauge the extent of the impact and look at training and guidelines that could be put in place to improve the manner in which courts deal with non-verbal communication and demeanour as evidence.

In this chapter, the focus shall be on the research methodology, research paradigm, research design, data collection methods, and the analysis method. The researcher will discuss all the methods used to gather the data, research participant selection and the validity and reliability of the research, as well as the ethical considerations surrounding this study.

5.2 Research Methodology

Methodology refers to the approaches, methods and procedures adopted when solving a problem or making discoveries.⁵²³ To ensure that the solutions or discoveries have credibility and reliability it is imperative that we choose the correct research method and make the proper underlying assumptions, as these constitute the “building blocks” of the research undertaken.⁵²⁴ The methodology adopted during this research is a mixed methodology incorporating a qualitative and quantitative study, incorporating a case study approach involving in-depth, semi-structured interviews with ten participants. Taking into consideration the research question and the purpose this study is hoped to achieve, the mixed methodology seems most appropriate as it will allow the researcher to become the instrument through which the data is

⁵²³ Davies M.B. 2007. *Doing a Successful Research Project*. Palgrave MacMillan New York and U.K. 212-213.

⁵²⁴ Davies M.B. 2007. *Doing a Successful Research Project*. Palgrave MacMillan New York and U.K. 212-213.

collected and analysed.⁵²⁵ Using a combination of both the qualitative and quantitative methodologies will provide a better understanding of the research problem.⁵²⁶ The responses received from the participants during the interviews were recorded, analysed, interpreted, and the findings were discussed using quantitative methods.⁵²⁷

5.2.1 Qualitative Methodology

Strauss and Corbin⁵²⁸ state that,

“By the term ‘qualitative research’, we mean any type of research that produces findings not arrived at by statistical procedures or other means of quantification. It can refer to research about persons’ lives, lived experiences, behaviours, emotions, and feelings, as well as about organizational functioning, social movements, cultural phenomena, and interactions between nations.”

Van Maanen⁵²⁹ describes qualitative research as “an umbrella term covering an array of interpretive techniques which seek to describe, decode, translate, and otherwise come to terms with the meaning, not the frequency, of certain more or less naturally occurring phenomena in the social world.” Denzin and Lincoln⁵³⁰ contended that “Qualitative research is multi-method in focus, involving an interpretive, naturalistic approach to its subject matter. Leedy and Ormrod⁵³¹ maintain that qualitative research focuses on phenomena that occur in natural settings, in the “real world”, and the study of those phenomena in all their

⁵²⁵ Creswell J.W., Ebersohn J., Eloff I. and others. 2012. *First Steps in Research*. Van Schaik Publishers: Pretoria. 60.

⁵²⁶ Creswell J.W., and Plano Clark V.L. 2007. *Designing and Conducting Mixed Research Methods*. (3rd ed.) Thousand Oaks, California: Sage Publications Inc. 5.

⁵²⁷ Schurink E.M. 1998a. Participatory Action Research as a Research Tool For Sustainable Social Development And Reconstruction. In De Vos A.S. (Ed), *Research At Grassroots: A Primer For The Caring Professions*. Pretoria: J.L. Van Schaik.

⁵²⁸ Strauss A.L. and Corbin J. 1990. *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*. Newbury Park: Sage Publications. 11.

⁵²⁹ Van Maanen J. 1979. Reclaiming Qualitative Methods for Organisational Research: A Preface. *Administrative Science Quarterly*, 24(4). 520-526. Available at <http://dx.doi.org/10.2307/2392358>. 520.

⁵³⁰ Denzin N.K. and Lincoln Y.S. 1994. *Handbook of Qualitative Research*. London: Sage Publications. 2.

⁵³¹ Leedy P.D. and Ormrod J.E. 2005. *Practical Research: Planning and Design*. (8th ed). Upper Saddle River: Prentice Hall. 133.

complexity. Considering the aforementioned qualitative research seems to be an overarching concept under which a variety of issues may be placed, and it has its own pros and cons.

Qualitative research, according to Leedy and Ormrod⁵³² serves one or more of the following purposes:

- Description - revealing the nature of certain situations, settings, processes, relationships, systems or people.
- Interpretation - gaining insights into a particular phenomenon, developing new concepts or theoretical perspectives about the phenomenon, and/or discovering problems that exist within the phenomenon.
- Verification - allowing the researcher to test the validity of certain assumptions, claims, theories, or generalisations in real-world contexts.
- Evaluation - providing a means through which a researcher can judge the effectiveness of particular policies, practices or innovations.

The scholarly work of Bell,⁵³³ Pickard,⁵³⁴ and Yin⁵³⁵ contend that the advantage of qualitative research is that it provides rich descriptions of phenomena being studied in their natural environment as opposed to a laboratory setting. The reason for this is that qualitative data does not only involve numbers and statistics, but full descriptions of phenomena that occurred, including the real experiences.⁵³⁶ Qualitative research also emphasizes the human element, uses close first-hand knowledge of the research setting, and avoids distancing the

⁵³² Leedy P.D. and Ormrod J.E. 2005. Practical Research: Planning and Design. (8th ed). Upper Saddle River: Prentice Hall. 134.

⁵³³ Bell J. 2010. Doing Your Research Project. Open University Press. McGraw- Hill Education.

⁵³⁴ Pickard A.J. 2007. Research Methods in Information. London: Facet Publishing.

⁵³⁵ Yin R.K. 2011. Qualitative Research from Start to Finish. 2011. (1st ed). Guilford Press.

⁵³⁶ Gorman G.E. and Clayton P. 2005. Qualitative Research for the Information Professional: A Practical Handbook. (2nd ed.) London: Facet Publishing.

researcher from the people or subject/phenomena being studied.⁵³⁷ It is for these reasons that the qualitative method was adopted in this study.

On the basis of Leedy and Ormrod's⁵³⁸ discussion above, this study can be said to be interpretive and evaluative because, on the one hand, the study aims at gaining insights into the approaches and reasoning adopted by the interviewees, discovering problems that might exist, and developing new theoretical perspectives (interpretive); and on the other hand it aims at judging the effectiveness of the current practices and rules of evidence pertaining to non-verbal communication and demeanour (evaluative). Thus, it can be said that this qualitative research serves both interpretive and evaluative purposes.

5.2.2 Quantitative Methodology

Quantitative research is described as that type of research that entails numbers and measurements with a focus on frequencies and statistics. Struwig and Stead⁵³⁹ maintain that quantitative research requires that data be collected and expressed in numbers. Leedy and Ormrod⁵⁴⁰ maintain that quantitative research is an approach that yields quantitative information that can be summarized through statistical analysis. Pickard⁵⁴¹ suggests that quantitative research begins with a theoretical framework established from a review of relevant literature; from this framework aims and objectives can be established. The applicability of the quantitative method is limited to the analysis and evaluation of the recordings from the interviews.

Leedy and Ormrod⁵⁴² as well Babbie and Mouton⁵⁴³ assert that when the researcher makes reference to research methodology the researcher is in effect

⁵³⁷ Neuman W.L. 2003. *Social Research Methods: Qualitative and Quantitative Approaches*. (5th ed.) Allan and Bacon.

⁵³⁸ Leedy P.D. and Ormrod J.E. 2005. *Practical Research: Planning and Design*. (8th ed). Upper Saddle River: Prentice Hall. 134.

⁵³⁹ Struwig F.W., and Stead G.B. 2001. *Planning, Designing and Reporting Research*. Cape Town: Pearson Education South Africa.

⁵⁴⁰ Leedy P.D. and Ormrod J.E. 2005. *Practical Research: Planning and Design*. (8th ed). Upper Saddle River: Prentice Hall. 179.

⁵⁴¹ Pickard A.J. 2007. *Research Methods in Information*. London: Facet Publishing. 18.

⁵⁴² Leedy P.D. and Ormrod J.E. 2010. *Practical Research: Planning and Design*. (9th ed.) Pearson. 12.

⁵⁴³ Babbie E. and Mouton J. 2001. *The Practice of Social Research*. Cape Town: University Press. 74.

referring to the general approach adopted by the researcher during the course of the particular study or research project, and gathering and analysing the data.⁵⁴⁴

During this research the researcher first carried out a literature review (cf. Ch. 2-4) and then non-empirical research (cf. Ch. 6); therefore for the purpose of this study, the qualitative methodology is the dominant method. Having selected qualitative research as the methodology we now have to look at the research paradigm and the research design.

5.3 Research Paradigm

A paradigm can be described as a whole system of thinking,⁵⁴⁵ and it refers to the well-founded research traditions in a specific field of study.⁵⁴⁶ A paradigm includes the traditions, approaches, frame of reference, models, body of research, accepted theories, and methodologies.⁵⁴⁷ A paradigm could also be viewed as a model or framework for observation and understanding.⁵⁴⁸ A paradigm can therefore be said to be a simple set of viewpoints that steer action and plays an integral role in social sciences.

The foundations of qualitative and quantitative research methodologies spread into varying philosophical research paradigms, which include realism, positivism and post-positivism.⁵⁴⁹ Post-positivism is made up of two sub-paradigms; interpretivism (constructivism) and critical theory (critical post-modernism).⁵⁵⁰

⁵⁴⁴ Carter S.M. and Little M. 2007. Justifying Knowledge, Justifying Method, Taking Action: Epistemologies, Methodologies, and Methods in Qualitative Research. Sage Publications. 1317, 1320.

⁵⁴⁵ Neuman W.N. 2011. Social Research Methods: Qualitative and Quantitative Approaches. (7th ed.) University of Wisconsin, Whitewater: Pearson.

⁵⁴⁶ Mouton J. 1996. Understanding Social Research. Pretoria: Van Schaik. 203.

⁵⁴⁷ Creswell J.W. 2007. Qualitative Inquiry and Research Design: Choosing Among Five Approaches. London: SAGE. 5.

⁵⁴⁸ Creswell J.W. 2007. Qualitative Inquiry and Research Design: Choosing Among Five Approaches. London: SAGE. 19.

⁵⁴⁹ Neuman W.L. 2006. *Social Research Methods: Qualitative and Quantitative Approaches*. (6th ed.) Boston: Pearson Education Inc. 81.

⁵⁵⁰ Blumberg B., Cooper D.R., and Schindler P.S. 2011. Business Research Methods. McGraw-Hill Higher Education. 18; 6.

Realism is considered to be the connector that links positivism and post-positivism.⁵⁵¹

5.3.1 Positivism

Human beings are viewed objectively; therefore, social scientists investigate different avenues to study human society.⁵⁵² The positivist approach may be viewed as an approach in the field of social science and it attempts to make use of the model of research applied by the natural sciences to differentiate between investigations of social phenomena and explanations of the social world.⁵⁵³

Denscombe⁵⁵⁴ states that positivism fosters the belief that the social sciences as well as the natural sciences deal with procedures, patterns, methods, cause-and-effect issues and generalisations. This view of positivism suggests that people, who form the subject matter of social science research, can also be used for scientific research. *Welman, Kruger and Mitchell* link⁵⁵⁵ the positivist approach to the scientific model which attempts to formulate laws that are applicable to populations. The purpose of the said laws is to unpack the causes of measurable and observable behaviour. The positivist researcher favours to working with a social reality that can be observed. The results of that kind of research would be the production of generalisations that share a similarity with those produced by the natural scientists. Positivists support the idea that an objective reality exists separately from personal experiences and it has its own cause-and-effect relationships.⁵⁵⁶

Firstly, a researcher adopting the positivist approach generally remains detached from the research, maintains a distance, is non-interactive and is

⁵⁵¹ Blumberg B., Cooper D.R., and Schindler P.S. 2011. *Business Research Methods*. McGraw-Hill Higher Education. 18; 6.

⁵⁵² De Vos A.S., Strydom H., Fouche' C.B., and Delport C.S.L. 2011. *Research at Grass Roots*. Pretoria: Van Schaik Publishers. 5.

⁵⁵³ Denscombe M. 2008. *Ground Rules for Good Research: A 10-Point Guide for Social Researchers*. London: Open University Press. 14.

⁵⁵⁴ Denscombe M. 2010. *The Good Research Guide: For Small-Scale Social Research Projects*. (4th ed.) McGraw-Hill Education. 324.

⁵⁵⁵ Welman C., Kruger F., and Mitchell, B. 2009. *Research Methodology*. 3rd ed. Cape Town: Oxford. 6.

⁵⁵⁶ Neuman W.L. 2006. *Social Research Methods: Qualitative and Quantitative Approaches*. (6th ed.) Boston: Pearson Education Inc. 82.

therefore able to objectively analyse and interpret the data collected.⁵⁵⁷ The researcher should link the abstract ideas of the social relationship to the precise measurements of the social world.

Secondly, followers of positivism believe in order to acquire substantial and valid knowledge the researcher must gather data using direct observation. This belief suggests that there is no scope for phenomena which the researcher cannot be observe either directly, through experience and observation, or indirectly, with the aid of instruments. The researcher should be able to measure all data using scientific methods; there can be no deductions drawn from that which were not physically observed, for instance people's thoughts and attitudes, cannot be accepted as valid evidence and knowledge.

Further, as highlighted by De Vos *et al.*⁵⁵⁸, theories relating to scientific research are viewed by positivists as providing hypotheses, which are subsequently subjected to empirical testing.

Finally, positivism is said to involve a certain attitude with regard to values. This means that the researcher would need to dismiss her/his subjective values, as these can adversely affect the impartiality and objectivity and so compromise the soundness of knowledge. Positivism requires the researcher to draw a clear distinction between norms, statements and issues.⁵⁵⁹

Taking into consideration what has been stated above regarding scientific theories, positivism's primary concern is the formulation of laws that can be applied to all people at all times.⁵⁶⁰ Collis and Hussey⁵⁶¹ explain that the purpose of positivism is to look for theories that are founded on and situated in the natural science laws, which can be applied to social structures. To summarise, positivism "*equates legitimacy with science and scientific*

⁵⁵⁷ Druckman D. 2005. Doing Research: Methods of Inquiry for Conflict Analysis. London: Sage. 5

⁵⁵⁸ De Vos A.S., Strydom H., Fouche' C.B., and Delport C.S.L. 2011. *Research at Grass Roots*. Pretoria: Van Schaik Publishers. 6

⁵⁵⁹ Flick U. (Ed.) 2007. Designing Qualitative Research. The Qualitative Research Kit. Thousand Oaks, CA: Sage. 12.

⁵⁶⁰ Welman, C., Kruger, F. & Mitchell, B. 2009. Research Methodology. 3rd ed. Cape Town: Oxford. 192.

⁵⁶¹ Collis J. and Hussey R. 2009. Business Research: A Practical Guide for Undergraduate and Postgraduate Students. Palgrave Macmillan. 58, 61-62.

*methods*⁵⁶² involving a number of assumptions. In this thesis, theories are sought in Chapter six, where the contents of the interviews with presiding officers is evaluated and interpreted to enable the researcher to extract the common contents.

The positivist tradition has unfortunately failed to secure the support of all scientists, due it causing some serious problems, as well as resulting in some questionable assumptions. Henning⁵⁶³ and Babbie⁵⁶⁴, criticise the assumption of early positivist social scientists, that social reality can be explained in rational terms, because people always act rationally. Babbie⁵⁶⁵ states that people do not always act rationally and that even irrational behaviour could be rationally understood and predicted. Babbie⁵⁶⁶ also stated that everybody acts, thinks and interprets subjectively to a certain degree. The subjectivity exercised by each individual is exclusive to each individual; and the attempt to ascertain objectivity could best be achieved by individuals using intersubjective interests that exist between them.

All things considered, the positivist view is not consistent with this approach. Considering the statements put forth by Babbie⁵⁶⁷ it is not easy to select the most appropriate paradigm among those discussed in this chapter. As will be revealed in the ensuing chapters, this research is not seated in the natural sciences; therefore it cannot be completely position itself within the positivist paradigm.⁵⁶⁸ It is however crucial to take heed of Babbie, who clearly warns against the total negation of the possibility of the applicability of the positivist paradigm, since each paradigm acts as a supplement for the other by suggesting additional perspectives. One should therefore view the varying

⁵⁶² Scott, D. and Usher, R. 2011. *Researching Education: Data Methods and Theory in Educational Inquiry*. (2nd ed.) London: Continuum. 13.

⁵⁶³ Henning E. 2004. *Finding your way in Qualitative Research*. Pretoria: Van Schaik.17.

⁵⁶⁴ Babbie E. 2010. *The Practice of Social Research*. London: Wadsworth Cengage Learning. 41.

⁵⁶⁵ Babbie E. 2010. *The Practice of Social Research*. London: Wadsworth Cengage Learning. 41.

⁵⁶⁶ Babbie E. 2010. *The Practice of Social Research*. London: Wadsworth Cengage Learning. 42.

⁵⁶⁷ Babbie E. 2010. *The Practice of Social Research*. London: Wadsworth Cengage Learning. 44.

⁵⁶⁸ Babbie E. 2011. *Introduction to Social Research*. (5th ed.) Wadsworth. 44.

paradigms as different pointers that could be used according to the requests and requirements of the situation.

Isolating, analysing, and understanding the causes of human behaviour is also a principle of positivism. Livesey⁵⁶⁹ is of the view that behaviour is sparked by some phenomena or the other, which if adequately comprehended, could be used to amplify and foresee human behaviour. Another principle is that which relates to objectivity. In terms of this principle, the positivist's focus will be on the methodology adopted to facilitate replication and quantification of observations for statistical analysis.⁵⁷⁰ In this instance the researcher remains completely independent of the research. The researcher remains unaffected by and does not affect the subject of the research.

Welman, Kruger and Mitchell⁵⁷¹ maintain that the positivist approach is elementary to the natural scientific method adopted studies relating to human behaviour and maintain further that study should extend only to what can be observed and measured objectively. Taking the current study into account this would mean that the data generated should be unrelated to or influenced by human opinions and judgment. The researcher conducted face-to-face in-depth interviews with presiding officers and carried out the function of interviewer in a natural setting.

Considering the principles of positivism, it makes it cumbersome to qualitative methods of data generation would not effortlessly fit within the positivist approach to research. It would appear that quantitative methods, where control groups could be used, use of experimental and survey methods to collect data will be more suitable for the positivist approach.⁵⁷²

⁵⁶⁹ Livesey, C. 2011b. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies[1]. Notes. <http://www.sociology.org.uk/tmmeth1.pdf> Date of access: 12 December 2017.

⁵⁷⁰ Gratton, C. and Jones, I. 2010. Research Methods for Sport Studies. (2nd ed.) London: Routledge. 25.

⁵⁷¹ Welman, C., Kruger, F. & Mitchell, B. 2009. Research Methodology. 3rd ed. Cape Town: Oxford University Press. 6.

⁵⁷² Wisker, G. 2008. The Postgraduate Research Handbook. 2nd ed. Basingstoke, Hampshire: Palgrave Macmillan. 65.

As stated by Gratton and Jones⁵⁷³ the positivist approach clearly has advantages, especially in terms of objectivity, precision, and control. Positivist research appears to be more defined from a planning point of view, on the basis that the data is gathered all at once, and the analysis of all the data that has been gathered takes place simultaneously. The literature review revealed that in the previous years of law-related research, such research was strongly influenced by the positivism. This created the need for alternative approaches to be explored. These approaches, one of them being known as post-positivism, will be discussed below.

5.3.2 Post-positivism

Over the years researchers became more and more dissatisfied with positivism and have leaned more towards post-positivism.⁵⁷⁴ The increased appeal for post-positivism increased the credibility of post-positivistic work in the field of social science.⁵⁷⁵ Creswell⁵⁷⁶ viewed post-positivism as a branch of positivism, because it represented the line of thought of subsequent positivism, thereby testing the conventional perception of the absolute and objective truth of knowledge in the social sciences. Other scholars like Gratton and Jones⁵⁷⁷ understood post-positivism as meaning that, in actuality, it is impossible to reach understanding exclusively through measurement. Post-positivist paradigms display a higher degree of candour towards varying methodological approaches, and often incorporate both qualitative and quantitative methods. An approach of this nature makes it possible to develop alternative research strategies that could be used to find information in rare and creative ways.⁵⁷⁸

⁵⁷³ Gratton, C. and Jones, I. 2010. *Research Methods for Sport Studies*. (2nd ed.) London: Routledge. 25.

⁵⁷⁴ Teddlie, C. & Johnson, B. 2009. Methodological Thought Since the 20th Century. (In Teddlie, C. & Tashakkori A., eds. *Foundations of Mixed Methods Research*. London: SAGE. p. 62-82). 68.

⁵⁷⁵ Teddlie, C. & Johnson, B. 2009. Methodological Thought Since the 20th Century. (In Teddlie, C. & Tashakkori A., eds. *Foundations of Mixed Methods Research*. London: SAGE. p. 62-82). 68.

⁵⁷⁶ Creswell, J.W. 2009. *Research design: Qualitative, Quantitative and Mixed Methods Approaches*. 3rd ed. London: SAGE.

⁵⁷⁷ Gratton, C. & Jones, I. 2010. *Research Methods for Sport Studies*. 2nd ed. London: Routledge. 26-27.

⁵⁷⁸ Glicken, M.D. 2003. *Social Research: A simple guide*. Boston, Massachusetts: Allyn & Bacon.

Also, researchers who support this paradigm generally believe several points of view from participants instead of an isolated reality.⁵⁷⁹

De Vos⁵⁸⁰ submits that according to positivism, there exists an objective truth out there to be researched, conquered and understood, whilst on the other hand, post-positivists contend that that truth cannot be completely understood, but only approximated. Denzin and Lincoln⁵⁸¹ maintain that post-positivism relies on the use of mixed methods in order to capture as much of reality as possible, whilst still placing emphasis on discovering and verifying theories. Post-positivism emphasizes the use of traditional evaluation criteria, such as internal validity, similar to that used in qualitative procedures which lean towards structured analysis of the data collected. Other techniques, such as low-level statistical analyses, computer-assisted methods of analysis that permit frequency counts and tabulations are also available to be utilised.

Post-positivist research focuses on the understanding of the study while it is undergoing changes and developing in the course of the investigation, starting off with a specified field of study. The study commences with the development of a question and a hypothesis.⁵⁸² Although post-positivists believe in an objective reality, they acknowledge that is not exclusively the natural sciences that provide a model for social research. Post-positivists concentrate on confidence, assessing the amount of reliance the person carrying out the research can place on his/her findings and how accurately the outcomes can be predicted; instead of concentrating on aspects of certainty and absolute truth.

Researchers who advocate the post-positivistic approach contend that research projects, including scientific research projects, is often a result of previously established practices. Post-positivism suggests that there is no guarantee that

⁵⁷⁹ Creswell, J.W. 2009. Research design: Qualitative, Quantitative and Mixed Methods Approaches. 3rd ed. London: SAGE. 7.

⁵⁸⁰ De Vos, A.S., Strydom, H., Schulze, S. & Patel, L. 2011b. The sciences and the professions. (In De Vos, A.S., Strydom H., Fouche C.B. & Delpont C.S.L., eds. Research at Grass Roots for the social sciences and human service professionals. (4th ed.) Pretoria: Van Schaik. p. 3-27). 2011b:7.

⁵⁸¹ Denzin, N.K. & Lincoln, Y.S. 2011a. Introduction: The Discipline and Practice of Qualitative Research. (In Denzin, N.K. & Lincoln, Y.S. (4th ed.) The SAGE Handbook of Qualitative Research: London. p. 1-19). 2011a:8.

⁵⁸² Morris, T. 2006. Social work research methods: four alternative paradigms. London: SAGE. 77.

following the correct method will yield true results, and displays a trust in absolutes and foundational truths. On the contrary, post-positivism suggests that there is more than one truth and that truth fundamentally depends on language; and is a community based phenomenon. This displaces the reality that forms that basis of positivism.

Following post-positivism affords the persons carrying out the research the opportunity to make use of measures that are more subjective in nature for data collection. The extent of the honesty on the part of the person carrying out the research becomes a crucial factor in research of this nature because subjectivity in the study can have a negative impact on the data. Glicken⁵⁸³ maintains that post-positivist research makes it possible for a social scientist to do research on a small scale by utilising very creative methodologies. Thus, in the current study a mixed method of research was used. The researcher made use of in-depth interviews in order to gather the information for this study.

As a result of the limitations of positivism a collection of related paradigms was developed; one of them being interpretivism.

5.3.3 Interpretivism

This paradigm is also referred to as the phenomenological approach and aims at understanding people.⁵⁸⁴ De Vos et al.⁵⁸⁵ and Neuman⁵⁸⁶ state that the interpretive social science can be traced back to the works of Max Weber (1864-1920) and Wilhelm Dilthey (1833-1911). Dilthey maintains that the natural sciences and the human sciences are fundamentally different from each other. Natural science is premised on *Erklärung*, or abstract explanation, whilst the human sciences have a foundation in an understanding, or *Verstehen*, of the

⁵⁸³ Glicken, M.D. 2003. *Social Research: A simple guide*. Boston, Massachusetts: Allyn & Bacon. 29.

⁵⁸⁴ Babbie, E. & Mouton, J. 2008. *The Practice of Social Research South African ed.* Vasco, Boulevard, Goodwood, Cape Town: Oxford University Press. 28.

⁵⁸⁵ De Vos, A.S., Strydom, H., Schulze, S. & Patel, L. 2011b. The sciences and the professions. (In De Vos, A.S., Strydom H., Fouche C.B. & Delport C.S.L., eds. *Research at Grass Roots for the social sciences and human service professionals*. 4th ed. Pretoria: Van Schaik. p. 3-27). 2011b:8.

⁵⁸⁶ Neuman W.N. 2011. *Social Research Methods: Qualitative and Quantitative Approaches*. (7th ed.) University of Wisconsin, Whitewater: Pearson. 101.

lived experiences of people.⁵⁸⁷ Weber maintains that every human being is constantly attempting to make sense of their worlds, and in doing that they continuously rationalise, create, assign meaning, , interpret, justify, and define everyday actions.⁵⁸⁸ (Babbie & Mouton, 2008:28).

The focus of interpretivism can therefore be said to be on the exploration of the complex nature of social phenomena with the intention of understanding such phenomena. According to interpretivism the goal of research is to understand and interpret everyday occurrences, experiences, and social frameworks – including the values people ascribe to these phenomena.⁵⁸⁹ Interpretivists hold the belief that since social reality is shaped by the participants' perceptions, and the values and aims of the researcher, it is subjective and nuanced.

Gephart⁵⁹⁰ submits that interpretivism focuses on understanding the social interactions between humans, and on ascribing meaning. It can accordingly be said that the mind interprets the events and experiences and formulates meaning from them. From this it can be inferred that meaning does not exist outside the mind. Willis⁵⁹¹ and Fouché and Schurink⁵⁹² concur with Gephart⁵⁹³ in rejecting the idea that research in the field of the social sciences ought to follow the research guidelines and principles applicable to the natural sciences. Interpretivists maintain that there is a fundamental difference between the subject matter of the social sciences and the natural sciences; therefore, it is

⁵⁸⁷ De Vos, A.S., Strydom, H., Schulze, S. & Patel, L. 2011b. The sciences and the professions. (In De Vos, A.S., Strydom H., Fouché C.B. & Delport C.S.L., eds. *Research at Grass Roots for the social sciences and human service professionals*. 4th ed. Pretoria: Van Schaik. p. 3-27). 2011b:8.

⁵⁸⁸ Babbie, E. and Mouton, J. 2008. *The Practice of Social Research*. South African ed. Vasco, Boulevard, Goodwood, Cape Town: Oxford University Press. 28.

⁵⁸⁹ Collis, J. & Hussey, R. 2009. *Business Research. A Practical Guide for Undergraduate & Postgraduate Students* 3rd ed. Basingstoke, Hampshire: Palgrave Macmillan. 56-57. Also see Rubin, A. & Babbie, E. 2010. *Essential Research Methods for Social Work*. 2nd International ed. Belmont, California: Brooks/Cole, Cengage Learning. 37.

⁵⁹⁰ Gephart, R. 1999, Summer. *Paradigms and Research Methods*. http://division.aomonline.org/rm/1999_RMD_Forum_Paradigms_and_Research_Methods.htm Date of access: 13 December 2017. 5

⁵⁹¹ Willis, J. 2007. *Foundations of qualitative research: Interpretive and critical approaches*. Thousand Oaks, California: SAGE. 6.

⁵⁹² Fouché, C.B. & Schurink, W. 2011. *Qualitative research designs*. (In De Vos, A.S., Strydom H., Fouché C.B. & Delport C.S.L., eds. *Research at Grass Roots for the social sciences and human service professionals* 4th ed. Pretoria: Van Schaik. p. 307-327). 309.

⁵⁹³ Gephart, R. 1999, Summer. *Paradigms and Research Methods*. http://division.aomonline.org/rm/1999_RMD_Forum_Paradigms_and_Research_Methods.htm Date of access: 13 December 2017. p.5

vital to use an alternative methodology to reach an interpretive understanding and a point of clarification that would make it possible for the social researcher to become cognisant of the subjective meaning of social actions.

Schwandt⁵⁹⁴ states that it is better to interpret reality by using the meanings that people attach to their life world and the only way to discover this meaning is through the use of language, and not exclusively through quantitative analysis. Wisker⁵⁹⁵ and Blumberg et al.⁵⁹⁶ identify the following principles as the basic principles of interpretivism:

- People construct the social world and subjectively give it meaning. The social world is constructed and given meaning subjectively by people;
- The researcher forms part of what is being observed; and
- The driving force behind research is interest.

Interpretivists contend that the complexity of social phenomena cannot be explained by simple fundamental laws.⁵⁹⁷ Interpretivists claim that one cannot have a totally objective observation of the social world, because the social world has meaning only for human beings and the social world is built on deliberate actions and behaviour.⁵⁹⁸ Livesey⁵⁹⁹ describes interpretivism as being a method of research in terms of which the social world is viewed as something that is constantly changing and can be produced and reproduced everyday by people. What is true at the moment may not necessarily hold true tomorrow or within a different social context. The development of knowledge as well as the building of theories occurs through the development of ideas from the observation and interpretation of social constructions. By doing this the researcher attempts to

⁵⁹⁴ Schwandt, T.A. 2007. Dictionary of qualitative inquiry. 3rd ed. London: SAGE. 314-317.

⁵⁹⁵ Wisker, G. 2008. *The Postgraduate Research Handbook*. 2nd ed. Basingstoke, Hampshire: Palgrave Macmillan. 69.

⁵⁹⁶ Blumberg, B., Cooper, D.. & Schindler, P.S. 2011. Business Research Methods. 3rd European ed. Maidenhead, Berkshire: McGraw-Hill Higher Education. 17.

⁵⁹⁷ Blumberg, B., Cooper, D.. & Schindler, P.S. 2011. Business Research Methods. 3rd European ed. Maidenhead, Berkshire: McGraw-Hill Higher Education. 17.

⁵⁹⁸ Livesey, C. 2011b. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies [1]. Notes. <http://www.sociology.org.uk/tmmeth1.pdf> Accessed on: 13 December 2017. 4.

⁵⁹⁹ Livesey, C. 2011b. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies [1]. Notes. <http://www.sociology.org.uk/tmmeth1.pdf> Date of access: 13 December 2017. 2011b:4.

comprehend what is taking place. Rubin and Babbie⁶⁰⁰ suggest that this approach has the potential to generate findings that surpass common scientific knowledge. From this it can be inferred that interpretivists try to make sense of and understand subjective realities, and they try to communicate explanations which can be understood by those participating in the study.

Interpretivists, who support the idea that social conditions and circumstances change continuously, reject the cause-and-effect relationship suggested by positivism. Livesey⁶⁰¹ identifies another principle of interpretivism which deals with how events and experiences relate to each other. The social environment that people find themselves in is perceived differently in various ways and in various situations.⁶⁰² According to Livesey everything in the social world has some kind of link to every other event, as well as every other experience.

Norbat Elias⁶⁰³ argued that the natural scientists that followed positivism believed that the method of natural sciences was the sole legitimate method used to make scientific discoveries. This argument put forward by Elias enjoyed the support of others like Blumberg et al.,⁶⁰⁴ Gephart⁶⁰⁵, and Schwandt⁶⁰⁶. Elias⁶⁰⁷ claims that with the use of methods other than those used by natural scientists, it is possible to make discoveries and improve knowledge in the field of sociology; because it is actually the discovery that legitimizes the research and not the method.

⁶⁰⁰ Rubin, A. & Babbie, E. 2010. *Essential Research Methods for Social Work*. 2nd International ed. Belmont, California: Brooks/Cole, Cengage Learning. 37.

⁶⁰¹ Livesey, C. 2011b. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies [1]. Notes. <http://www.sociology.org.uk/tmmeth1.pdf> Date of access: 13 December 2017. 2011b:4.

⁶⁰² Livesey, C. 2011b. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies[1]. Notes. <http://www.sociology.org.uk/tmmeth1.pdf> Date of access: 13 December 2017. 2011b:4.

⁶⁰³ Elias, N. 1986. Introduction. (In Elias, N. & Dunning N., eds. *Quest for Excitement. Sport and Leisure in the Civilizing Process*. Oxford: Basil Blackwell. p. 19-62). 20.

⁶⁰⁴ Blumberg, B., Cooper, D.. & Schindler, P.S. 2011. *Business Research Methods*. 3rd European ed. Maidenhead, Berkshire: McGraw-Hill Higher Education. 17.

⁶⁰⁵ Gephart, R. 1999, Summer. *Paradigms and Research Methods*. . http://division.aomonline.org/rm/1999_RMD_Forum_Paradigms_and_Research_Methods.htm Date of access: 13 December 2017. 5.

⁶⁰⁶ Schwandt, T.A. 2007. *Dictionary of qualitative inquiry*. 3rd ed. London: SAGE. 314-317.

⁶⁰⁷ Elias, N. 1986. Introduction. (In Elias, N. & Dunning N., eds. *Quest for Excitement. Sport and Leisure in the Civilizing Process*. Oxford: Basil Blackwell. p. 19-62). 20.

Interpretivists dismiss the idea that a study (research) can be value-free, because during the research process the researcher interprets phenomena and this interpretation by the researcher is socially constructed and reflects the motives and beliefs of the researcher. In addition to channelling our thinking, human interests also have an impact on how the world is investigated and how knowledge is constructed.⁶⁰⁸ Taking into consideration the aforementioned, the current study should adopt an approach to social phenomena that reflects the common. By implication, this makes the assumption that a proper understanding of social phenomena is possible only by taking into consideration the actuality of the situation, and that the observation of the social world takes place through seeing what meaning people ascribe to phenomena and by interpreting it from the point of view of the people.

Collecting and analysing facts would not truly reveal the essence of the phenomena of the current study. To achieve this one would need to explore why different presiding offices deal with demeanour and non-verbal communication/behaviour differently and how these differences impact on the social world (court room processes). This would in turn require the researcher to delve deeper into the operations relating to subjective interpretation, beliefs, meaning-making, , values, intentions, reasons, , acknowledging the motivations, interests, and the self-understanding of the persons participating in the study.⁶⁰⁹

With regards to what research methodology is in line with interpretivism, Livesey⁶¹⁰ suggests that the most suitable methodologies are those involving observation and interpretation, because it is imperative that the person carrying out the research understands the manner in which human beings experience and understand the environment they live in. Neuman⁶¹¹ states that transcripts, video-tapes and conversations may be used so that the researcher can acquire a perception of subtle non-verbal communication or the researcher can

⁶⁰⁸ Blumberg, B., Cooper, D.. & Schindler, P.S. 2011. Business Research Methods. 3rd European ed. Maidenhead, Berkshire: McGraw-Hill Higher Education. 18.

⁶⁰⁹ Blumberg, B., Cooper, D. & Schindler, P.S. 2011. Business Research Methods. 3rd European ed. Maidenhead, Berkshire: McGraw-Hill Higher Education. 18.

⁶¹⁰ Livesey, C. 2011b. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies[1]. Notes. <http://www.sociology.org.uk/tmmeth1.pdf> Date of access: 13 December 2017. 2011b:4.

⁶¹¹ Neuman, W.L. 2011. Social research methods: Qualitative and quantitative approaches 7th (International), ed. Boston: Allyn & Bacon. 101.

comprehend the interaction in its actual context. This methodology allows the researcher to actively engage and collaborate with the participants to deal with the real-life issues in a specified (controlled) context. The collaboration is aimed at suggesting and implementing appropriate solutions to the problem being investigated.⁶¹²

Gephart⁶¹³ submits that supporters of interpretivism display an inclination towards research methods that, in addition to producing facts, also provide an analysis and description of the meaning of the social situation (context/world). Gephart further mentions that grounded theory and expansion analysis are amongst the primary analytical methods utilized during interpretative research, alluding to the use of qualitative data-gathering techniques where data is ascertained with the use of interviews and conversations.⁶¹⁴ Considering the views of Gephart, this seems to describe the approach of the current study (cf. Ch.1).

Neuman⁶¹⁵ submits that for a number of years interpretivism and positivism were seen as opposing approaches. In as much as a selection of positivist social researchers found the interpretive approach useful in exploratory research, a small number of them considered it to be a fully scientific method. According to Gephart⁶¹⁶ the supporters of positivism maintained that the emphasis should be on the individual's interpretation of social interaction, whereas the supporters of interpretivism are of the belief that knowledge and meaning are the products of interpretation. Thus, interpretivists believe that objective knowledge cannot exist independently of human thinking and reasoning. Subjectivity forms the central focus of interpretivists, which, in a

⁶¹² Blumberg, B., Cooper, D. & Schindler, P.S. 2011. Business Research Methods. 3rd European ed. Maidenhead, Berkshire: McGraw-Hill Higher Education. 17.

⁶¹³ Gephart, R. 1999, Summer. Paradigms and Research Methods. . http://division.aomonline.org/rm/1999_RMD_Forum_Paradigms_and_Research_Methods.htm Date of access: 13 December 2017. 5.

⁶¹⁴ Gephart, R. 1999, Summer. Paradigms and Research Methods. . http://division.aomonline.org/rm/1999_RMD_Forum_Paradigms_and_Research_Methods.htm Date of access: 13 December 2017. 5.

⁶¹⁵ Neuman, W.L. 2006. Social research methods: Qualitative and quantitative approaches 6th ed. Boston: Allyn & Bacon. 94.

⁶¹⁶ Gephart, R. 1999, Summer. Paradigms and Research Methods. . http://division.aomonline.org/rm/1999_RMD_Forum_Paradigms_and_Research_Methods.htm Date of access: 13 December 2017. 5.

manner of speaking, attempts to show how the differences in human meanings and sense-making give rise to and highlight variations in objective realities, that arise when one becomes disconnected from or oblivious of connections to something that the researcher created.⁶¹⁷

Gephart, amongst other scholars and interpretivists, endorses the idea of subjectivity and the claims that interpretivism forms the foundation of social research techniques that can be described as being mindful of context. He asserts that interpretivism explores the ways in which others view the world and focuses more on achieving a strong understanding instead of testing judicial theories of human behaviour.

From the aforementioned information it can be concluded that qualitative methods of producing data are more appropriate for the approach of interpretivism, whilst the quantitative methodology is more appropriate for the paradigm of positivism.

Another paradigm is that of realism, which also has a significant impact on the comprehension of the world of science, and more especially on the research design as well as the methodology of this very study.

5.3.4 Realism

Blumberg et al⁶¹⁸ describe realism as a research theory that shares the principles of both positivism and interpretivism, and especially accepts that reality exists independently of human behaviour and beliefs. On the other hand, realism recognizes that in order to understand people and their behaviour, there must be acceptance of the subjectivity intrinsic to humans. Realists are of the view that forces and social processes which operate at the macro-level are in existence, and these forces and processes affect the beliefs and behaviour of humans and cannot be controlled by humans.⁶¹⁹ Subjective individual

⁶¹⁷ Neuman, W.L. 2006. Social research methods: Qualitative and quantitative approaches 6th ed. Boston: Allyn & Bacon. 97.

⁶¹⁸ Blumberg, B., Cooper, D.. & Schindler, P.S. 2011. Business Research Methods. 3rd European ed. Maidenhead, Berkshire: McGraw-Hill Higher Education. 19.

⁶¹⁹ Saunders, M., Lewis, P. & Thornhill, A. 2009. Research Methods for Business Students. 5th ed. Harlow, England: FT Prentice Hall. 114.

understandings of reality are imperative for there to be a holistic understanding of what is taking place at the micro-level which is at the level of individual human beings. Subjective interpretations are not unique to each individual because the external factors that exist at the macro-level influence all humans, causing people to share similar interpretations. There is therefore a need for research to investigate the manner in which people interpret and assign meaning to their contexts and to identify the external factors that can be influential.

There are three reciprocally connected philosophical assumptions, which; ontology (what we believe), epistemology (the science of knowing), and methodology (the science of finding out) which support the different paradigms. Livesey defines the social world in relation to these three paradigms.⁶²⁰ Livesey⁶²¹ states that researchers who have a realistic view of the world normally view the basic principles of the social sciences to be like those for the natural sciences. In as much as empirical evidence acts as proof of valid knowledge it does not suffice on its own. The primary goal of realism is therefore to go beyond a mere description of relationships and to reveal how such relationships actually arose. Realists are of the view and are adamant that the social world must be understood in its entirety because each part of the social world is affected by the other. To conclude, where research is conducted in line with the realism paradigm, Livesey recommends that the researcher makes use of focus groups or in-depth interviews in order to gather reliable and valid data for the study.⁶²²

In this study the research problem with its research questions and research aims are multi-faceted, making it necessary for both the qualitative and quantitative approaches to be followed. As a result of this mixed-model

⁶²⁰ Livesey, C. 2011c. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies[2]. Class notes. . <http://www.sociology.org.uk/tmmeth2.pdf> Date of access: 13 December 2017. 2011c: 1-3.

⁶²¹ Livesey, C. 2011c. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies[2]. Class notes. . <http://www.sociology.org.uk/tmmeth2.pdf> Date of access: 13 December 2017. 2011c:1.

⁶²² Livesey, C. 2011c. "A" Level Sociology: A Resource-Based Learning Approach. Theory and Methods. Unit M3: Methodologies[2]. Class notes. . <http://www.sociology.org.uk/tmmeth2.pdf> Date of access: 13 December 2017. 2011c:4.

research a pragmatic research paradigm is adopted.⁶²³ The pragmatic research paradigm is considered “as the philosophic partner of mixed methods research” and as such provides a practical solution to the multi-faceted research problems, as well as practical “middle ground” orientation in relation to interpretivism and post-positivism.⁶²⁴

5.4 Research Design

A research design can be defined as a plan or strategy which transcends from the underlying philosophical assumptions to specifying the selection of respondents, the data gathering techniques to be used and the data analysis to be done.⁶²⁵ The research design selected will rely on the researcher’s assumptions, research skills and research practices, and has an influence on the manner in which data is collected.⁶²⁶ Qualitative research method designs include case study, phenomenology, grounded theory, ethnography, and narrative biography.⁶²⁷

5.4.1 Case Study Research

Literary writings offer various definitions of case study research. Bromley⁶²⁸ describes case study research as a “systematic inquiry into an event or a set of related events which aims to describe and explain the phenomenon of interest”. The key features of a “case study” are its scientific credentials and its evidence base for professional applications.⁶²⁹

⁶²³ Creswell J.W. 2007. *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*. London: SAGE. 22-23.

⁶²⁴ Johnson, R.B. & Onwuegbuzie, A.J. 2004. Mixed methods research: A research paradigm whose time has come. *Educational Researcher*, 33 (7):14-26, Oct. 17, 18.

⁶²⁵ Creswell J.W., Ebersohn I., Eloff R., et al. 2012. *First Steps in Research*. Van Schaik Publishers. 70.

⁶²⁶ Creswell J.W., Ebersohn I., Eloff R., et al. 2012. *First Steps in Research*. Van Schaik Publishers. 70.

⁶²⁷ Creswell J.W. 2007. *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*. London: SAGE.

⁶²⁸ Bromley D.B. 1990. Academic Contributions to Psychological Counselling: I. A Philosophy of Science for the Study of Individual Cases. *Counselling Psychology Quarterly*, 3(3). 299-307. 302

⁶²⁹ Zucker D.M. 2009. “How to do Case Study Research”. *Teaching Research Methods in the Humanities and Social Sciences*. Available at http://scholarHagerstrom.umass.edu/nursing_faculty_pubs/2. 2.

5.4.2 Ethnography

According to White⁶³⁰ this type of research involves interviewing, observation (participant observation), and description of the behaviour of a small number of cases. Describing and interpreting cultural behaviour is one of the more prominent features of ethnographic studies.⁶³¹ Creswell describes ethnography as the study of an intact cultural or social group based primarily on observations that take place while the researcher spends a prolonged period of time in the field observing the subjects. Data obtained during this type of research is usually analysed using the interpretive method, involving descriptions of phenomena.⁶³²

5.4.3 Narrative Biography

This design is based on the assumption that the life world of an individual can best be understood from his/her own account and perspective, and “thus the focus is on the individual subjective definition and experience in life”.⁶³³ The narrative approach seeks to inter-relate the social and cultural world that the individual is a part of. This form of research aims at constructing the history of a life by unfolding an individual’s experiences over time.⁶³⁴ When using this design, the method of data collection is primarily by way of personal narrative interviews and the possible incorporation of personal documents.⁶³⁵ The challenge faced when using this design is formulating a question that will permit a narrative to develop without interruption or obstruction by the interviewer.⁶³⁶

5.4.4 Phenomenology

⁶³⁰ White C.J. 2005. *Research: A Practical Guide*. Pretoria: Nthuthuko Investments Publishing. 104.

⁶³¹ Schwandt T.A. 2007. *The Dictionary of Qualitative Research*. (3rd ed.) Thousand Oaks, CA: Sage Publications.

⁶³² De Vos A.S., Strydom H., Fouche’ C.B., and Delpont C.S.L. 2017. *Research at Grass Roots*. (4th ed.) Van Schaik Publishers. 315.

⁶³³ Schwandt T.A. 2007. *The Dictionary of Qualitative Research*. (3rd ed.) Thousand Oaks, CA: Sage Publications. 22.

⁶³⁴ Creswell J.W. 2007. *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*. London: SAGE.

⁶³⁵ De Vos A.S., Strydom H., Fouche’ C.B., and Delpont C.S.L. 2017. *Research at Grass Roots*. (4th ed.) Van Schaik Publishers. 313.

⁶³⁶ Flick U. 2006. *An Introduction to Qualitative Research*. (3rd ed.) London: Sage Publications.

Phenomenology originated from the work of Alfred Schutz who aimed at explaining how the lived world of subjects is developed and experienced by them.⁶³⁷ Creswell⁶³⁸ defines a phenomenological study as a study that describes the meaning of the lived experiences of a phenomenon for several individuals. Phenomenology emanates “from the existential-phenomenological approach in philosophy which is concerned about human existence and experience, rather than metaphysical reality, and the way in which phenomena are experienced by human beings.”⁶³⁹ Phenomenology, aims at unravelling reality by experiencing life as it is.⁶⁴⁰ On the other hand empirical philosophies lean towards measuring objective reality through rational scientific processes.

5.4.5 Grounded Theory

Strauss and Corbin define a grounded theory that is inductively derived from the study of the phenomenon it represents. That is, it is discovered, developed and provisionally verified through systematic data collection and analysis of data pertaining to that phenomenon. Therefore, data collection, analysis, and theory stand in reciprocal relationship with each other.⁶⁴¹

When using this design, the aim of the research is to develop a substantive theory that is grounded in data.⁶⁴² Grounded theory focuses on generating theory based on the study of social situations. In order to develop theory, grounded theory simultaneously utilizes techniques of induction, deduction, and

⁶³⁷ Schwandt T.A. 2007. The Dictionary of Qualitative Research. (3rd ed.) Thousand Oaks, CA: Sage Publications.

⁶³⁸ Creswell J.W. 2007. Qualitative Inquiry and Research Design: Choosing Among Five Approaches. London: SAGE. 57.

⁶³⁹ Terre Blanche M., Durrheim K. and Painter D. 2006. Research in Practice. University of Cape Town Press. 463.

⁶⁴⁰ Valle R.S., King M, and Halling S. 1989. An Introduction to Existential Phenomenological Thought in Psychology. In R.S. Valle & S Halling eds. Existential-phenomenological Perspectives in Psychology: Exploring the Breadth of Human Experience. New York: Plenum Press. 316.

⁶⁴¹ Strauss A.L. and Corbin J. 1990. Basics of Qualitative Research: Grounded Theory Procedures and Techniques. Newbury Park: Sage Publications.23.

⁶⁴² Schram T.H. 2006. Conceptualizing and Proposing Qualitative Research. (2nd ed.) Upper Saddle River, NJ: Pearson Education Inc.

verification or validation.⁶⁴³ The approach inverts traditional quantitative approaches by grounding theory in accounts and observations of daily life.

Grounded theory uses the method of constant comparison where the new data gathered, actions observed, and perceptions recorded of the subjects is constantly compared with those of the new subjects in order to generate theory.⁶⁴⁴ The collection of data is by way of interviews with individuals who have participated in a process about a central phenomenon in order to “saturate” categories and detail a theory. The data is then analysed through open, axial, and selective coding in an attempt to deliver a theoretical model or theory as the outcome of the research.⁶⁴⁵

Glaser and Strauss⁶⁴⁶ suggest the following steps when generating grounded theory:

- Data collection which is done through social interaction with participants, participant observation and semi-structured interviews (the method adopted for this study).
- Data analysis done through coding and then categorization of the data and ‘the simultaneous conceptualization and assessment of the similarities and differences in social interaction’ in search of a “core idea that could explain variability in interactions”.⁶⁴⁷
- Theory delimitation which occurs once the core idea has been identified and new data on the interaction is sought to “confirm and disconfirm the elaborated concepts and the relationship among them”.⁶⁴⁸

⁶⁴³ Schwandt T.A. 2007. *The Dictionary of Qualitative Research*. (3rd ed.) Thousand Oaks, CA: Sage Publications.

⁶⁴⁴ De Vos A.S., Strydom H., Fouche’ C.B., and Delpont C.S.L. 2017. *Research at Grass Roots*. (4th ed.) Van Schaik Publishers. 318.

⁶⁴⁵ De Vos A.S., Strydom H., Fouche’ C.B., and Delpont C.S.L. 2017. *Research at Grass Roots*. (4th ed.) Van Schaik Publishers. 319.

⁶⁴⁶ Glaser B.G. and Strauss A.L. 1967. *Basics of Grounded Theory Analysis*. Mill Valley: Sociological Press.

⁶⁴⁷ Glaser B.G. and Strauss A.L. 1967. *Basics of Grounded Theory Analysis*. Mill Valley: Sociological Press.

⁶⁴⁸ Glaser B.G. and Strauss A.L. 1967. *Basics of Grounded Theory Analysis*. Mill Valley: Sociological Press.

- Theory definition where the grounded theory is defined and such grounded theory is intended to be a rich and powerful explanation of the investigated phenomenon. This completes the process and the theory need not be tested to confirm that it is validity grounded.⁶⁴⁹

The grounded theory provides the researcher with an initial focus without having to preconceive the eventual theory.⁶⁵⁰

Having discussed the different qualitative research designs the grounded theory is the one that is adopted in this study as the study entails data collection through in-depth, semi-structured interviews of ten participants; the analysis of the data through coding; and the identification of themes, literature review and the formulation of a theory based on the data collected and the findings arising out of the literature review.

5.5 Research Process

According to Leedy and Ormrod ⁶⁵¹research methodology is the general approach that the researcher will adopt when proceeding with the research project. Mouton⁶⁵² is of the view that research methodology focuses on the research process, and the type of tools and methodologies/steps that the researcher will use. For the purpose of this study research methodology refers to the approach that will be followed when collecting data and the methods that will be adopted in analysing the data collected.

The process followed during this research was made up of a literature review (cf. Ch. 2) and non-empirical research (cf. Ch. 1) where interviews were conducted with individuals (presiding officers). In this thesis the researcher made use of the mixed-method approach which was used to evaluate the impact that non-verbal communication/behaviour and demeanour have on the

⁶⁴⁹ Miller S. and Frederick M. 1999. How does Grounded Theory Explain? *Qualitative Health Research*. Vol 9. 538-551.

⁶⁵⁰ Creswell J.W., Ebersohn I., Eloff R., et al. 2012. *First Steps in Research*. Van Schaik Publishers. 78.

⁶⁵¹ Leedy, P.D. & Ormrod, J.E. 2010. *Practical research planning and design*. 9th ed. Upper Saddle River, New Jersey: Pearson Education. 12.

⁶⁵² Mouton, J. 2001. *How to succeed in your Master's and Doctoral Studies. A South African Guide and Resource Book*. Pretoria: Van Schaik. 56.

outcome of a trial. As part of the mixed-method approach, in-depth semi-structured interviews (involving a qualitative method of data collection) were used to collect the data. The data was then analysed using the coding process, leading to the identification of themes and the subsequent evaluation of the findings (cf. Ch. 6).

The following paragraph will deal with the literature review and the role it played in this study to collect information and construct a theoretical and contextual framework for the quantitative and non-empirical section of the study.

5.6 The Literature Review

As part of the literature review, the researcher studied primary and secondary literature resources to accumulate information that would be used to construct the theoretical framework for chapters two, three and four. Chapter two was aimed at establishing the background of the study and creating the context for the study. Chapter three comprises a review of the literature and decided cases on non-verbal communication/behaviour that takes place in the courtroom and how, if at all, it impacts on the outcome of the trial. Chapter four entails a review of the literature and decided cases relating to the impact of courtroom demeanour on the outcome of the trial. Particular attention has been cast on the South African court proceedings.

5.7 Non-empirical Research

A non-empirical investigation was carried out as part of this study, utilizing qualitative and quantitative methods to gather data that would enhance the validity and credibility of the study. This investigation involved the interviewing of ten presiding officers, the transcription of the data gathered during the interviews, and the analysis of the data using a coding system.

The information obtained from the interviews served to support and substantiate the stated problem and research questions. The research problem revolved around the assessment of the impact of courtroom demeanour and non-verbal communication on the outcome of the trial, while the research questions surrounded the ability of presiding officers to effectively deal with evidence of

courtroom demeanour and non-verbal communication when evaluating the evidence presented during the trial.

The following were the research aims:

- To show that the impact and relevance of non-verbal or non- testimonial evidence is often ignored and/or under estimated;
- To highlight some common interpretations of certain types of non-verbal communication/evidence; and
- To try and formulate guidelines on how to interpret evidence of demeanour and non-verbal evidence.

5.8 Specific Design of Mixed-Methods Research

Chapter 1 dealt with various research methods. It was indicated in chapter 1 that the mixed-methods approach will be followed in this study. Creswell identifies three strategies that can be used when mixing qualitative and quantitative research methods.⁶⁵³ These are merging, embedding, and connecting the data gathered.

In this study, the researcher utilised the mixing strategy recommended by Creswell and Plano Clark⁶⁵⁴ to link the qualitative data. The researcher made use of the mixed method exploratory research design which consists of two phases.⁶⁵⁵ In phase one the researcher collected and analysed the qualitative data gathered during the interviews. During the second phase, which is the quantitative phase, the researcher built on the outcomes of the qualitative data by using the already established theoretical structure to identify topic-specific themes and variables that could be investigated further. The inclusion of the quantitative component in phase two is likely to convince quantitative-biased

⁶⁵³ Creswell, J.W. 2009. Research design: Qualitative, Quantitative and Mixed Methods Approaches. 3rd ed. London: SAGE. 207-208.

⁶⁵⁴ Creswell, J.W. & Plano Clarke, V.L. 2011. Designing and conducting mixed research methods. Thousand Oaks, California: SAGE. 67.

⁶⁵⁵ Creswell, J.W. & Plano Clarke, V.L. 2011. Designing and conducting mixed research methods. Thousand Oaks, California: SAGE. 86.

audiences of the advantages and value inherent in the utilisation of mixed methods exploratory research design.⁶⁵⁶

5.9 Reliability and Validity

Gay et al⁶⁵⁷ submit that to ensure the researcher's interpretation of the data gathered is valuable, the measuring instruments used by the researcher to gather the data must be reliable and valid. In all disciplines and research methods used for the collection and analysis of data, the value of such research is directly dependent on the credibility of the research findings.

As discussed in Chapter 1 of this study, when looking at the reliability and validity of the study one should look at credibility, confirmability, dependability, verification and trustworthiness, amongst other criteria. The following are relevant to this study:

- **Credibility:** during this study the data, made up of the recordings, notes, and transcripts of the interviews, was intensively engaged with.
- **Dependability:** care was exercised to make sure that the research process followed a logical sequence, was traceable, properly documented, and clearly set out the research process.
- **Authenticity:** the questions included in the interview schedule were formulated on the theoretical basis set out in chapters two, three, and four.
- **Confirmation:** the data and the interpretations were audited by a peer reviewer and by working back and forth through the research process to ensure that the findings were verified and sound. The purpose of the interpretation process was to identify commonalities and accepted principles related to the research topic.

⁶⁵⁶ Creswell, J.W. & Plano Clarke, V.L. 2011. *Designing and conducting mixed research methods*. Thousand Oaks, California: SAGE. 89.

⁶⁵⁷ Gay L.R., Mill G.E., and Airasian P. 2009. *Educational Research*. (9th ed.) Upper Saddle River, NJ: Pearson Education. 154.

5.9.1 Reliability

According to Creswell⁶⁵⁸ reliability relates to the consistency of measurement, which McMillan and Schumacher⁶⁵⁹ state is the degree to which similar results are obtained over different forms of the same instrument or occasions of data collection. Bell⁶⁶⁰ describes reliability as the extent to which a test or procedure yields similar results under consistent conditions on repeated occasions. Kumar⁶⁶¹ states that reliability can be affected by factors such as ambiguity in the wording of the questions, changes in physical setting especially in interview and laboratory testing, the moods of the interviewer and the participant, and the nature of the interaction between the participant and the interviewer.

Merriam⁶⁶² submits that with regard to qualitative research, assessing reliability in the traditional manner of repeated measures to obtain similar results is difficult because of the involvement of human behaviour in the research. In terms of qualitative research, reliability is assessed according to the results that are consistent with the data collected. Merriam⁶⁶³ and Ary et al⁶⁶⁴ suggest the following strategies that can be used to ensure the reliability of findings:

- Replication logic: this study was carried out using multiple respondents;
- Code-recode strategy: the data gathered was coded over a prolonged period to ensure that the coding strategy was consistent;
- Observation by multiple observers: the researcher consulted peers in the Department of Law to verify the consistency of the researcher's coding strategies;

⁶⁵⁸ Creswell, J.W. 2009. *Research design: Qualitative, Quantitative and Mixed Methods Approaches*. 3rd ed. London: SAGE. 149.

⁶⁵⁹ McMillan, J. H., and Schumacher, S. 2001. *Research in Education. A Conceptual Introduction*. (5th ed.). New York: Longman. 245.

⁶⁶⁰ Bell J. 2010. *Doing Your Research Project*. (5th ed.) Open University Press. McGraw-Hill Education. 119.

⁶⁶¹ Kumar R. 2011. *Research Methodology: A Step-by-Step Guide for Beginners*. (3rd ed.) New Delhi: Sage.182.

⁶⁶² Merriam, S. B. 1998. *Qualitative Research and Case Study Applications in Education*. San Francisco: Jossey-Bass Inc. 204-207. 206.

⁶⁶³ Merriam, S. B. (1998). *Qualitative Research and Case Study Applications in Education*. San Francisco: Jossey-Bass Inc. 204-207.

⁶⁶⁴ Ary, D., Jacobs, L. C., & Razavieh, A. 2002. *Introduction to Research in Education* (6th ed.). Belmont: Wadsworth. 435-436.

- Researcher's position: the researcher's position as such was explained and any biases relating to the data collection was declared;
- Triangulation: the researcher used more than one method to collect data and continuously ensured the understanding of what was presented;
- Audit trail: the researcher explained all the procedures that were followed during this study. The transcripts of the data are available as a dataset in Annexure "C" of this thesis.

In addition to the above strategies, care was taken to ensure that the questions were clearly worded and that the setting of this study was conducive to the process.

5.9.2 Validity

Gay et al⁶⁶⁵ explain that validity is the degree to which qualitative data can accurately evaluate (gauge) what the researcher is attempting to measure. Gray,⁶⁶⁶ submits that an instrument can be considered to be valid if it is able to measure what it was intended to measure.

McMillan and Schumacher⁶⁶⁷ and Ritchie and Lewis⁶⁶⁸ make reference to strategies that can be put in place to increase validity when carrying out qualitative research. These strategies can be used as a combination. Below are the strategies and an explanation as to how the researcher used those strategies to enhance the validity of this research:

- Field work and long-term observation: the interviews, which form part of the qualitative methodology of the research, were conducted in a natural setting to create a relaxed environment in which the participants could be interviewed.

⁶⁶⁵ Gay L.R., Mill G.E., and Airasian P. 2009. Educational Research. (9th ed.) Upper Saddle River, NJ: Pearson Education. 375.

⁶⁶⁶ Gray D.E. 2004. Doing Research in the Real World. Sage Publications. 219.

⁶⁶⁷ McMillan, J. H., and Schumacher, S. 2001. Research in Education. A Conceptual Introduction. (5th ed.). New York: Longman.

⁶⁶⁸ Ritchie, J., & Lewis, J. (2003). Qualitative research practice. A guide for Social Science Students and Researchers. London: Sage Publications.

- Constant comparative method: the researcher constantly compared the data gathered.
- Triangulation: the researcher made use of a variety of literature resources to confirm and enhance the findings.
- Respondent language, verbatim accounts: direct quotes were taken from the interviews of the participants to provide concrete evidence of findings.
- Low-inference descriptors: the data was manually evaluated and coded.
- Record data: interviews were recorded with the use of a digital recording device to ensure accuracy.
- Respondent review: a peer reviewed the transcripts against the actual recording to determine the accuracy of the data.

To ensure the trustworthiness of this research the researcher applied criteria such as authenticity, credibility, confirmation and dependability. The adherence to these criteria as well as the explanation in the qualitative research process of what was done, the method used to do it and the rationale for doing it, assisted the researcher in ensuring that this research was authentic and trustworthy.

5.10 Selection of Participants

Sampling is said to be the process of selecting a subset of persons or things from a wider population (sampling frame),⁶⁶⁹ with the aim of representing the particular population.⁶⁷⁰ For the purpose of this research the researcher used purposeful sampling.

At the point of inception of this study the researcher had intended to delve into the “environment of the presiding officer” and interpret and make sense of how the presiding officers deal with the phenomena of demeanour and non-verbal behaviour/communication when deciding on the outcome of a trial. The

⁶⁶⁹ Scott D., and Morrison M. 2007. *Key Ideas in Educational Research*. A&C Black. 219.

⁶⁷⁰ Neuman, W.L. 2011. *Social research methods: Qualitative and quantitative approaches 7th (International)*, ed. Boston: Allyn & Bacon. 246.

researcher accordingly chose to focus on the interpretivist/phenomenological approach which reveal the “essence of the experience being studied.”⁶⁷¹ This could only be achieved by selecting participants who have had experiences relevant to the subject matter of this study and their contributions and experience could be thoroughly analysed through direct interaction with the participants. The use of surveys or questionnaires would not prove effective in achieving the intended result.

In addition to being a senior lecturer at the University of Zululand, I am a practising attorney registered with the KwaZulu-Natal Law Society. As an attorney I have access to presiding officers in various Magisterial districts and this afforded me the opportunity to identify relevant presiding officers from the different districts. The presiding officers selected fit the criteria for this study because they presided over trials on a daily basis.

According to Merriam⁶⁷² “Purposeful sampling is based on the assumption that the researcher wants to discover, understand, and gain insight and therefore must select a sample from which the most can be learned. The logic and power of purposeful sampling lies in selecting information-rich cases for in-depth study.” Thus, I deliberately selected participants for a specific reason:⁶⁷³ to gather pertinent and meaningful data that would make it possible to answer the research question and formulate grounded arguments that would be used to support the researcher’s findings.⁶⁷⁴

In this study the researcher made use of two types of purposive sampling, namely maximum variation sampling and snowball sampling. When using maximum variation sampling, participants who represent diverse variations of specified characteristics and important common patterns are identified.⁶⁷⁵ In this study participants were selected because they had certain characteristics and

⁶⁷¹ Creswell J.W. 1998. *Qualitative Enquiry and Research Design: Choosing among five traditions*. Thousand Oaks: Sage.

⁶⁷² Merriam, S. B. (1998). *Qualitative Research and Case Study Applications in Education*. San Francisco: Jossey-Bass Inc. 61.

⁶⁷³ McBurney D.H., and Middleton B. 1994. *Research Methods*. (3rd ed.) Brooks/Cole Publishing Co. 203.

⁶⁷⁴ Mason, J. (2002). *Qualitative Researching* (2nd ed.). London: Sage Publications. 121.

⁶⁷⁵ Merriam, S. B. (1998). *Qualitative Research and Case Study Applications in Education*. San Francisco: Jossey-Bass Inc. 63.

experience that will facilitate detailed exploration in this study. Participants were representative of gender, years of experience and race. Snowball sampling was carried out by asking the participants to refer the researcher to other presiding officers that they may know. Babbie and Mouton⁶⁷⁶ describe snowball as the process of accumulation because each participant recommends another subject that they know.

The participants involved in this study were purposefully chosen based on their experience as presiding officers. Hyener⁶⁷⁷ states that a huge amount of data can emerge from a single interview. As this study is primarily qualitative in nature and large amounts of data that would arise out of the in-depth interviews with the participants the researcher decided that the number of participants would be limited to ten.

The number of participants used in this study was deemed to be sufficient. This decision was made based on the fact that data would be collected through in-depth interviews, as well as on the saturation principle of diminishing returns – the concept that each of the participants will furnish less new information than the previous participant, until the amount of new information decreases to nothing.⁶⁷⁸ For the purpose of this study the saturation principle holds true and it can therefore be verified that the number of participants was sufficient and the researcher was able to gather enough information to answer the research question and respond to the aims of this study.

The participants who were selected to participate in this study were from diverse backgrounds and comprised of five males and five females who are active presiding officers in the Zululand area. Upon arrival at the office of each participant the researcher introduced herself to the participant, informed the participant of the purpose of the research, the content and the objectives of the interview process, explained the issues of confidentiality and anonymity, and the manner in which the information would be used. The participants signed the

⁶⁷⁶ Babbie, E., & Mouton, J. (2001). *The Practice of Social Research*. Cape Town: Oxford. 647.

⁶⁷⁷ Hyener R.H. 1985(8). *Some Guidelines for the Phenomenological Analysis of Interview Data*. Human Studies. 279.

⁶⁷⁸ Thiétart, R. ed. 2007. *Doing management research: A comprehensive guide*. London: SAGE. 166.

informed consent form and the interviews were recorded by means of a digital recording device with the consent of the participant. The interviews with the participants lasted between seven to ten minutes each.

5.11 Interviews

As mentioned in Chapter 1 the researcher will collect the qualitative data with the use of interviews. Merriam,⁶⁷⁹ Ritchie and Lewis,⁶⁸⁰ and other scholars, state that interviews are amongst the most common forms of qualitative research methods which incorporate the construction and reconstruction of knowledge.⁶⁸¹ Although the interview is considered to be an intense experience for the participant and the interviewer, it is still an interactive, flexible and useful tool to explore meaning and language in depth.⁶⁸² Interviews have the potential to generate a host of information that can be useful to gain insight into the participants' experiences. Interviewing in terms of qualitative research refers to unstructured, semi-structured, and in-depth interviews where open-ended questions are asked in a natural setting⁶⁸³ so that the researcher can perform analytical comparisons.⁶⁸⁴

For the purpose of this study the researcher made use of in-depth interviews. According to Bogdan and Knopp Biklen⁶⁸⁵ the open-ended nature of research affords participants the opportunity to answer the questions put to them, using their own frame of reference. During in-depth interviews the focus is on the participant, and the researcher has the opportunity to deal with complex experiences and to investigate the personal perspective of each presiding

⁶⁷⁹ Cited in Marshall, C., & Rossman, G. B. (1999). *Designing Qualitative Research* (3rd ed.). London: Sage Publications.

Sage Publications.

⁶⁸⁰ Ritchie, J., & Lewis, J. (2003). *Qualitative research practice. A guide for Social Science Students and Researchers*. London: Sage Publications.

⁶⁸¹ Mason, J. (2002). *Qualitative Researching* (2nd ed.). London: Sage Publications. 63.

⁶⁸² Ritchie, J., & Lewis, J. (2003). *Qualitative research practice. A guide for Social Science Students and Researchers*. London: Sage Publications. 142.

⁶⁸³ Ritchie, J., & Lewis, J. (2003). *Qualitative research practice. A guide for Social Science Students and Researchers*. London: Sage Publications. 141.

⁶⁸⁴ Mason, J. (2002). *Qualitative Researching* (2nd ed.). London: Sage Publications. 65.

⁶⁸⁵ Bogdan, R. C., & Knopp Biklen, S. 1992. *Qualitative Research for Education. An Introduction to Theories and Methods* (2nd ed.). Boston: Pearson. 3.

officer by making use of probing and a variety of other methods to gain an in-depth perspective of the personal context within which the research phenomenon is situated.⁶⁸⁶ The use of this method to collect data produces data that positively enhances the study with depth and richness. The interaction between the researcher and the presiding officer was such that it allowed for clarification and substantiations for decisions and in-depth coverage of the subject, thereby generating useful knowledge.

The structure of the interviews was blended with flexibility and the data was recorded with the use of a digital recording device to ensure accurate transcription and analysis. The researcher also made hand-written notes as a backup measure. The main features of the interviews are depicted in the Table 5.1.

⁶⁸⁶McMillan, J. H., and Schumacher, S. 2001. Research in Education. A Conceptual Introduction. (5th ed.). New York: Longman. 273-274.

Table 5.1 Main features of in-depth interviews*

Features	Description
Naturalistic	Interview is conducted in natural setting and data is captured in its natural form
Researcher	<ul style="list-style-type: none">• Plays a primary role in development of data and assigning meaning• Focuses more on the process than on the outcome• Captures perspectives accurately
Structure	<ul style="list-style-type: none">• Structure is flexible• Utilizes different techniques, strategies and procedures• Responses are probed and explored to achieve depth of answer in terms of penetration, exploration and explanation• Researcher responsive to relevant issues raised spontaneously• Interview guide /schedule sets out the key topics and points to be covered
Data	<ul style="list-style-type: none">• Data is descriptive and is in the form of words• Includes field notes• Theory is grounded in data• Direction of research is determined after data is gathered
Interactive	<ul style="list-style-type: none">• Material is generated as a result of the interaction and collaboration between researcher and interviewee• Encourages the participant to speak freely when answering questions

Generative	<ul style="list-style-type: none"> • Creates new knowledge and encourages clear thinking
------------	---

* Adapted from Bogdan and Knopp Biklen⁶⁸⁷ ; McMillan and Schumacher,⁶⁸⁸ and Ritchie and Lewis⁶⁸⁹

5.11.1 Advantages of In-depth Interviews

Ritchie and Lewis,⁶⁹⁰ Ary, Jacobs and Razavieh⁶⁹¹ identify the following as advantages of collecting data using in-depth interview:

- It provides exclusive focus on the participants
- It provides an opportunity for intensive investigation of participants' perspectives and experiences
- It allows for in-depth understanding of the personal and research context
- It allows for detailed coverage of the subject
- It allows the researcher to seek clarity and obtain a detailed understanding of participants' motivations and decisions
- It allows the structured interview some flexibility
- It encourages the participant to speak freely thereby giving the researcher the opportunity to explore the impacts and outcomes
- It makes it possible to generate information through interaction between the researcher and participant
- It generates new knowledge and fresh thoughts
- Data can be captured in its natural form
- It allows for a lot of data to be gathered in a short space of time

⁶⁸⁷ Bogdan, R. C., & Knopp Biklen, S. 2006. *Qualitative Research for Education. An Introduction to Theories and Methods* (5th ed.). Boston: Pearson.

⁶⁸⁸ McMillan, J. H., and Schumacher, S. 2001. *Research in Education. A Conceptual Introduction*. (5th ed.). New York: Longman.

⁶⁸⁹ Ritchie, J., & Lewis, J. (2003). *Qualitative research practice. A guide for Social Science Students and Researchers*. London: Sage Publications.

⁶⁹⁰ Ritchie, J., & Lewis, J. (2003). *Qualitative research practice. A guide for Social Science Students and Researchers*. London: Sage Publications.

⁶⁹¹ Ary, D., Jacobs, L. C., & Razavieh, A. (2002). *Introduction to Research in Education* (6th ed.). Belmont: Wadsworth.

- It allows the respondents to ask for follow-up questions immediately in order to clarify issues

In as much as Ritchie and Lewis identify the above advantages of using in-depth interviews, there are also disadvantages of this method. The following is a list of some of the disadvantages and the ways in which the researcher counteracted the disadvantages during the study:

- Interviews are prone to bias and subjectivity on the part of the interviewer, so the researcher avoided assigning particular terms of reference to the respondent's responses and took a neutral position by encouraging expression without shaping responses.
- Participants sometimes feel uneasy and display avoidance tactics, so the interviews were carried out in a relaxed environment that the participants were comfortable in. Interviews in this study were conducted in the office of the presiding officers.
- Participants are sometimes reluctant to be interviewed because it is time consuming, so the interviews in this study were conducted when the courts were adjourned.
- Participants do not easily trust researchers, but due to the pre-existing professional relationship between the researcher and the participants trust was not an issue.
- Participants are sometimes reluctant to have the interview recorded so participants were informed in advance and their permission obtained. The relaxed environment also assisted with this.
- It is sometimes difficult to establish credibility, so meaningful questions were posed based on the researcher's own knowledge and understanding of the topic.
- Researchers are sometimes over-hasty in interpreting the responses, so the researcher listened intently, paid careful attention and gave suitable responses.

- Poor quality questions can be a problem. To avoid this, leading questions were avoided.
- Reliability is sometimes an issue, so audio recordings of the interviews were made with a digital recording device. The recordings were transcribed by a professional. The transcripts were then verified.
- Validity is difficult to establish, so the researcher paid attention to detail during data collection and data analysis to ensure trustworthiness of the research process.

The current study is both investigative and descriptive, and neither derives theory from data nor tests a hypothesis or theory. The researcher accordingly utilized semi-structured interviews as it followed a pre-determined set of questions contained in the interview schedule filed as Annexure “B” in this thesis. All the participants were asked the same questions in the same order.

On the basis that the purpose of utilizing interviews was to gather qualitative data, the researcher allowed the participants to discuss other factors that might have been relevant to the questions posed. This was possible because interviews, unlike questionnaires, allow the interviewer to probe responses, ask follow-up questions, and investigate motives and feelings. Probing proved useful because it assisted with clarifying issues that were not really clear during the interview. Semi-structured interviews were found to be the appropriate method because they allowed for the repetition of the interview process with numerous participants, thereby helping to standardize the questioning process.

5.12 Data Analysis

In order to deduce meaningful insights from the data gathered during the research process, it was essential for that data to be analysed and interpreted. The data gathered during this study was analysed using the qualitative data and interpretive analysis approach. According to the interpretive analysis approach meaning is derived from the “explanation, understanding or interpretation from

the qualitative data collected from the people and situations being investigated.”⁶⁹²

5.12.1 Analysis of the Qualitative Data

The qualitative data was gathered through interviews that were audio-recorded. The recording was then transcribed verbatim immediately after the interviews so that proper coding of the data could take place. The data consisted of a large volume of words, therefore the data was organized into categories and each participant was allocated a folder and a label (e.g. Participant 1) which facilitated more convenient identification of common characteristics and themes. This will become clearer in the next chapter where the data is presented, analysed and interpreted.

The researcher was cognizant of the importance of knowing and understanding the data, therefore the recordings were listened to repeatedly and the transcripts read repeatedly. This exercise helped the researcher gain a sense of the whole collection of data and facilitated interpretation of the data into smaller segments and categories.⁶⁹³ The data analysis process commenced with coding each incident into as many categories as possible and, as the research continued, the data was then placed in existing categories, or existing categories were modified and new categories emerged.⁶⁹⁴ Merriam⁶⁹⁵ states that: “The analysis usually results in the identification of recurring patterns that cut through the data or into the delineation of a process.”

Richards⁶⁹⁶ states that the majority of qualitative researchers code data primarily because coding generates fresh (new) ideas and helps to collect material by topic; more especially purposive coding facilitates the use of the results to develop fresh ideas and take the enquiry further. The coding process

⁶⁹² Creswell J.W. et al. 2010. *First Steps in Research*. Pretoria: Van Schaik Publishers. 99.

⁶⁹³ McMillan, J. H., and Schumacher, S. 2001. *Research in Education. A Conceptual Introduction*. (5th ed.). New York: Longman. 464.

⁶⁹⁴ Marshall, C., & Rossman, G. B. (1999). *Designing Qualitative Research* (3rd ed.). London: Sage Publications. 151.

⁶⁹⁵ Marshall, C., & Rossman, G. B. (1999). *Designing Qualitative Research* (3rd ed.). London: Sage Publications. 11.

⁶⁹⁶ Richards L. 2005. *Handling Qualitative Data: A Practical Guide*. London: Sage Publications. 85.

proved very helpful because it enabled the researcher to go back and forth between data without confusing and mixing up the participants' data.

Namey et al⁶⁹⁷ submits that in qualitative research, data analysis falls into two categories; namely content and theme. Content analysis takes place when the researcher assesses the frequency and prominence of certain phrases or words from the data text. This is done in order to identify keywords or repeated ideas. Kumar⁶⁹⁸ states that content analysis is the analysis of the content of the interviews with the aim of identifying the main themes that emanate from the participants' responses. Content analysis involves the following steps:

- Identifying the main themes.
- Assigning codes to these main themes.
- Classifying the responses under these main themes.
- Incorporating themes and responses into the text of the report.

In this study the identification of the themes was guided by the principal research question.

Once the coding was completed the researcher continued to modify the codes. This process assisted with the formulation of themes, patterns and eventually conclusions. The researcher remained mindful of the importance of comparing the analysed data with the existing theories so that the researcher could make contributions to the existing body on knowledge. Considering the profile of the participants and the nature of the data gathered, it was important for the researcher to consider ethical issues throughout the research process.

5.12.2 Analysis of Quantitative Data

Quantitative data was sourced primarily from the transcripts of the interviews. The answers given by the participants to the questions asked were then

⁶⁹⁷ Namey E., Guest G., Thairu L, and Johnson L. 2008. Data Reduction Techniques for Large Qualitative Data Sets. In: *Handbook for team-based qualitative research*. Rowman Altamira. 138.

⁶⁹⁸ Kumar R. 2011. Research Methodology: A Step-by-Step Guide for Beginners. New Delhi: Sage. 278-279.

analysed to quantify the number of answers that fell into each theme or category. The quantitative analysis is depicted in Chapter 6 through the use of the tables and pie charts.

5.13 Ethical Considerations

Ethics is said to be a philosophical term derived from the Greek word *ethos*, meaning character or custom and denotes a social code that transmits moral integrity and consistent values.⁶⁹⁹ All researchers are under an obligation to adhere to certain ethical standards, norms, and considerations, irrespective of the research designs, sampling, techniques and choice of methods therefore a strict code of ethics was adhered to during this study. Strydom⁷⁰⁰ describes ethics as follows:

“Ethics is defined as a set of widely accepted moral principles that offer rules for, and behavioural expectations of, the most correct conduct towards experimental subjects and respondents, employers, sponsors, other researchers, assistants, and students.”

When carrying out a study that involves humans the subjects are real people and by agreeing to participate in the study the participants are doing the researcher a huge favour. It is therefore vital to respect people, especially their rights, as well as their personal rights.⁷⁰¹

During both the planning stage and the conducting of this study by the researcher the following ethical guidelines were adhered to:

- Consent to carry out the research was obtained from the Research Ethics Committee of the University of Zululand. A copy thereof is submitted with this thesis as Annexure “D”.

⁶⁹⁹ Partington, D. ed. 2003. Essential skills for management research. London: SAGE. 22.

⁷⁰⁰ Strydom H. 2005. Ethical Aspects of Research in Social Sciences and Human Services Professions In De Vos A.S. ed. Research at Grass Roots: For the Social Sciences and Human Services Professions. (3rd ed.)Pretoria: Van Schaik. 69.

⁷⁰¹ Pickard A.J. 2007. Research Methods in Information. London: Facet Publishing.123.

- Permission was sought and obtained from the relevant court personnel permitting the researcher to carry out the interviews with the presiding officers. A copy of the letter is submitted with this thesis as Annexure “A”.
- Prior to commencing with the interviews, the purpose of the research and the process to be followed in respect of the interviews was explained to the participants and the written informed consent form was signed by each participant. An information sheet explaining the details of the research formed part of the informed consent form. A copy of the informed consent form is submitted with this thesis as Annexure “B”.
- Participants were at no stage exposed to any risk of undue stress, embarrassment or diminishing of self-esteem.
- Participants were informed that they could withdraw from the interview at any stage and that they had a right not to answer any question that they did not want to answer.
- Participants were informed that the interviews would be recorded with the use of a digital recording device and they consented thereto.
- The researcher was, at all times, mindful of and sensitive to the rights, values, traditions, practices, and professional circumstances of the participant.
- Participants were assured of confidentiality and anonymity.
- The researcher conducted the research in line with the ethical requirements to report the findings in a completely comprehensive and honest manner.
- Anonymity as well as confidentiality were ensured during the coding process as well.

5.14 Conclusion

In this chapter the researcher described the broader research methodologies available, as well as the specific research method adopted in this study, namely

in-depth interviews. The qualitative methodology was the primary methodology followed during this study. This methodology served the purpose of description and interpretation. For any study to be successful there must be a clear method of research, and in this study it was in-depth interviews. This method was discussed in detail in this chapter, with brief reference to other available methods.

The chapter also dealt with the process of sampling and that participants were selected by means of purposive sampling. The procedure followed during the interviews was also discussed in this chapter. The issues of reliability and validity of the chosen method was also dealt with. The researcher also dealt with the data analysis process that was followed and the ethical considerations taken into account. The research method used during this study enabled the researcher to gain insight into the views of the participants regarding the research question, as well suggestions on how to achieve the research purpose. The participants made significant contributions through their responses, and this would enable the researcher to develop the contribution to the body of knowledge relating to non-verbal testimony and demeanour and the impact they have on the outcome of the trial. The following chapter deals with the analysis of the data and evaluation of the findings.

CHAPTER 6 - DATA ANALYSIS, FINDINGS AND EVALUATION

6.1 Introduction

This chapter discusses the data analysis and findings of the study. The transcripts of the interviews used in this retrospective study were carefully analysed to ensure that the data gathered was presented clearly with the aid of tables, percentages and graphs, where possible. A retrospective chart analysis was conducted to capture the data essential to accomplish the research objectives. In this chapter the researcher explains the procedure followed in the analysis of the data, presents the main categories and themes that emerged from the data, and offer a discursive analysis and interpretation of the findings.

In addition, chapter six explores the results of the investigation into the participants' conscious experiences/challenges within the context of their legal environment. As previously alluded to, the transcribed data was coded by the researcher, where after the researcher searched for common themes whilst organizing the data. The codes that were identified by the researcher were looked at again and the themes that emerged repeatedly from the data were then highlighted.

The researcher then categorised the common themes and placed these common themes into easily identifiable categories. Codes that could not be placed into any of the categories were put aside. The transcripts were perused on repeated occasions to ensure that all essential information was recorded and placed into the respective categories. After analysing the data inductively, it became necessary to interpret the data. This important stage of the study, in the researcher's view, determines the relevance of the study in that it is now possible to establish the findings and results which will hopefully provide new insights into the research area.

According to Nieuwenhuis, the process of organising words into themes or patterns and then arranging them into coherent categories, enables the researcher to establish meaning.⁷⁰²

Prior to embarking on a discussion of the common and contrasting themes and patterns that emerged from an analysis of the transcribed data, the researcher finds it prudent to provide a brief description of the participants. In order to adhere to the ethical code that was agreed on between the parties, none of the participants' true names will be disclosed, and the participants will be referred to as participants one ("1") to ten ("10").

6.2 A Brief Description of the Participants

There were ten participants in this study, all of whom were magistrates currently presiding in the criminal courts at district and regional court levels. Their experience on the bench ranged from four years to thirty years. The participant pool was made up of male and female magistrates from different race groups presiding in courts in the Zululand region. They were interviewed within the confines of their offices and requested that they remain anonymous due to the nature of the positions they hold. The participants had no objections to the interviews being mechanically recorded with the use of a recording device. Prior to the commencement of the interviews all the participants signed the informed consent forms and were fully aware that the responses received would be used in this study.

- **Participant one** was an African male who has been presiding over civil and criminal trials in the district court for seventeen years. He obtained his LLB degree through UNISA and studied part-time while working at a magistrate's court as a clerk and an interpreter. Prior to being appointed to the bench participant one was a prosecutor in the district court, and prior to that he was an administrative clerk at a magistrate's court in the region. Participant one has always had a passion for the law and has

⁷⁰² Nieuwenhuis J. 2010. Analysing qualitative data in Creswell J.W. *et al.* First Steps in Research. Van Schaik Publishers: Pretoria. p.99

presided over criminal trials both in the district court and the regional court.

- **Participant two** is an African male who has been presiding over criminal trials for the past four years. Prior to becoming a magistrate participant two was a practicing attorney in a law firm, specializing in criminal work. Participant two holds an LLB degree from the University of KwaZulu-Natal and has indicated that he would be pursuing a Masters in Law in the near future.
- **Participant three** is an African female who has been presiding over matters in both the criminal and the civil court for the past seven years. Participant three obtained her LLB from the University of KwaZulu-Natal, served as a candidate attorney at a Justice Centre under Legal Aid South Africa and then went on to become an admitted attorney. She practiced as an attorney until she was appointed to the bench. Participant three indicated that the only training she received as a magistrate was through attending a six weeks training course facilitated by the Magistrates Commission in Pretoria.
- **Participant four** is an Indian female who has been a presiding officer for fifteen years. She presided in the district court for eleven years, thereafter she was appointed to the regional court bench and where she is currently seated. As a district court magistrate she presided over civil and criminal matters. After being appointed to the Regional court bench she has presided primarily over criminal matters, but has also dealt with a few civil and divorce matters. Prior to being appointed to the bench she was a prosecutor in the commercial court. Participant four is also an admitted advocate.
- **Participant five** is an African female who holds an LLB degree obtained from the University of Kwa-Zulu Natal and has four years of experience as a magistrate in the district court. She presides primarily over criminal matters. Prior to becoming a magistrate she was a practicing attorney specializing in criminal law.

- **Participant six** is an African male presiding officer with more than ten years of experience as a magistrate. He was initially a magistrate in the district court and is now seated in the regional court. He holds an LLB degree obtained from the University of Fort Hare. Prior to becoming a magistrate he was a practicing advocate. Participant six deals mainly with criminal matters but has experience in civil and labour matters, which he obtained whilst in private practice.
- **Participant seven** is an African female magistrate who is currently sitting as a presiding officer in the regional court. She has more than eight years of experience as a regional court magistrate. Prior to being appointed to the bench she was employed by the National Prosecuting Authority and was based in the Office of the Director of Public Prosecutions in Pietermaritzburg. She was appointed to the bench rather early in her career and claims that her training as a magistrate is limited to attending a three months training course facilitated by the Magistrates Commission. Participant seven deals with criminal, civil, and divorce matters in the regional court.
- **Participant eight** is a white male who has more than thirty years of experience as a magistrate seated on the district court bench. He has a B-Proc degree which he obtained from the University of Pretoria decades ago. Prior to being appointed to the bench he was a public prosecutor employed by the National Prosecuting Authority (then Department of Justice). He has vast experience in presiding over criminal matters but has dealt with civil and family law matters as well. Participant eight has presided over matters in the regional court but only as a relief magistrate. He is about to retire but wishes to serve as a relief magistrate thereafter.
- **Participant nine** is an African male magistrate who presides over matters in the regional court. He has been a magistrate for the past twenty-one years. He started off as a public prosecutor and then practiced as an advocate before being appointed to the bench. He has been a regional court magistrate for the better part of the twenty-one years on the bench and has dealt primarily with criminal matters. He has occasionally presided over matters in the civil and divorce court.

- **Participant ten** is an African male who has ten years of experience as a magistrate. This participant was a prosecutor in the regional court prior to being appointed to the bench. He claims that he always wanted to work in the field of law and cannot see himself changing his career path. Participant ten presides over criminal matters in the district court, and occasionally deals with civil matters, and domestic violence and maintenance matters. He expressed the view that presiding officers needed more intensive training to develop their skills pertaining to the evaluation of evidence, and that this should take place even before an individual presides over their first trial.

6.3 Common Themes

From the synopsis of the data, the researcher was able to identify the following themes:

- 6.3.1 Credibility
- 6.3.2 Reliability
- 6.3.3 Trustworthiness
- 6.3.4 Honesty
- 6.3.5 Demeanour
- 6.3.6 Totality of Evidence
- 6.3.7 Cultural Differences
- 6.3.8 Non-verbal Communication
- 6.3.9 Training Required

THEMES



Figure A: shows the themes that were identified during the analysis of the responses as contained in the transcripts.

6.4 Results and Findings

As mentioned in Chapter 1, there has been little study on the impact of demeanour and non-verbal or non-testimonial evidence and communication on the verdict in a trial. This study has a dual purpose to, on the one hand, show that the impact and relevance of demeanour and non-verbal or non-testimonial evidence is often ignored and/or underestimated. And, on the other hand, to highlight some common interpretations of certain types of demeanour and non-verbal communication/evidence, and to try and formulate guidelines on how to interpret this demeanour and non-verbal evidence. To ensure the substantial correctness of the study one would have to delve into the principles of legal realism and its impact on jurisprudence.

The findings arising out of in-depth interviews constitute an integral part of this study which is an effort by the researcher to measure the importance and relevance of demeanour and non-verbal communication in a trial and the legal fraternity in general. This study has the potential to greatly improve the practical legal skills of young presiding officers, prosecutors, and attorneys and enhance and strengthen the reputation of the judiciary and the criminal justice system in South Africa. Perhaps this study will also establish some guidelines that can be followed by persons who need to interpret or analyse non-verbal evidence/testimony.

6.5 Findings from the Interview Stage

It is efficient to predict accurately other people's behaviour as well as our own. In a legal sense, it may be important for trial judges to develop efficient means for deciding cases given their heavy caseloads. Enormous pressure is placed upon trial judges by an ever increasing number of criminal dockets and by a demand for speedier trials of criminal accuseds.

Semi-structured interviews were conducted with the different role players (who were presiding officers) in a courtroom from different levels and ethnic groups in the Lower Umfolozi, Mthunzini and Hlabisa Districts. The interviews entailed open ended questions being put to the participants. The aim of the questions, as set out in the interview schedule, was to establish the impact, if any, of demeanour and non-verbal/non-testimonial evidence on the verdict and the findings. The questions described the demeanour of the role players in the courtroom and called for comment by the observer of that demeanour as to how he/she perceives such demeanour in relation to the case itself.

During the analysis of the participants' experiences of their interactions with accused persons and witnesses the researcher identified common themes. The researcher ensured that the distinctive features of each experience in its social context were accurately recorded. In as much as the distinctive nature of each experience was noted, due consideration was afforded to them in relation to each other and not as independent entities. The table labelled Figure "A" above sets out the themes extracted by the researcher from the recorded experiences of the participants. These themes arose out of the interviews with the

participants. The themes divided by the total number of participants reflects the percentages arrived at in the summary below.

This study attempted to answer the following questions:

- If presiding officers consciously or unconsciously consider the accused's non-testimonial demeanour and appearance in court, should there be specific instructions on how they should treat such information?
- Are such instructions likely to be effective?
- Should we allow legal representatives to comment on that demeanour or appearance so that the court's attention can be drawn to considering such information during their truth finding mission?
- How would the ability to perceive, read and analyse the non-verbal behaviour enhance the probative value of the verdict and add value to the legal fraternity in general?
- How does the functional approach to non-verbal testimony/communication impact on the current assumptions and procedures in the study of non-verbal communication?

6.6 Analysis of the Participants' Interviews

Categorisation	Themes	Sub-Themes	Participants in Agreement										Total %
			1	2	3	4	5	6	7	8	9	10	
Factors conducive to the trustworthiness of the witness	➤ Credibility	➤ Trustworthiness ➤ Expertise ➤ Source Dynamism ➤ Physical Attractiveness	√	√	√	√	√	√	√	√	√	√	100
	➤ Reliability	-	√	√	√	√	√	√	√	√	-	√	90
	➤ Trustworthiness	-	√	√	√	√	√	√	√	√	-	√	90
	➤ Honesty	-	√	√	√	√	√	√	√	√	-	√	90
Non-verbal cues given by the witness while testifying	➤ Demeanour	➤ Facial Expressions ➤ Tone of Voice ➤ Body Language ➤ Attitude (positive or negative) ➤ Manner of Testifying (evasive or direct)	√	√	√	√	√	√	√	√	√	√	100

Is there a probable or reasonable cause?	➤ Totality of Evidence	➤ Accuracy of Verdict ➤ Credibility of Witness 1.	√	√	√	√	√	√	√	√	√	√	√	100
Background and upbringing of accused	➤ Cultural Differences	➤ Background/Education ➤ Cultural Upbringing	-	-	-	√	√	√	√	√	-	√	√	60
Each of our gestures carries the weight of a commitment	➤ Non-verbal Testimony/Communication	➤ Body Language ➤ Facial Expressions ➤ Voice, Pitch and Tone ➤ Personal Space	√	√	√	√	√	√	√	√	√	√	√	100
Presiding oversees training	➤ Training Required	➤ Effective & Accurate Evaluations ➤ Conclusive Verdicts	√	√	√	√	√	√	√	√	√	√	√	100

Figure B: shows the outcome of the participants' interviews and their views on what should be given priority in a trial

6.7 Evaluation of Participants' Responses Arising Out of the Interview Process

All of the participants in this study said that they experienced working as a magistrate/presiding officer highly challenging. It became apparent that the various components of their line of work, especially in a trial, caused the greatest difficulty for them. These areas of difficulty appeared to contribute to a general feeling of inadequacy and low morale amongst many of them.

6.7.1 Credibility

All participants indicated that the credibility of a witness was paramount in reaching a true verdict. A credible witness is "competent to give evidence, and is worthy of belief." Generally, a witness is deemed to be credible if they are recognized (or can be recognized) as a source of reliable information about someone, an event, or a phenomenon.

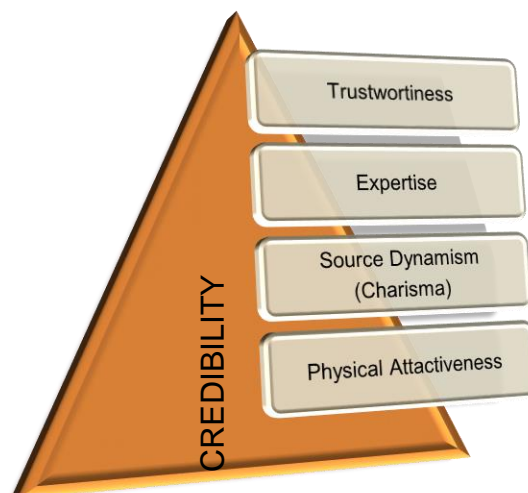


Figure C: shows factors that determine the credibility of a witness

The following factors, such as trustworthiness, expertise, source dynamism (charisma) and physical attractiveness, should be taken into consideration to ensure that the credibility of the case is not compromised and that the witness is indeed credible. Participant 5 stated: *"I look at the credibility and reliability of the witness; the manner in which the evidence was presented to assess credibility..."*

6.7.1.1 Reliability, trustworthiness and honesty

90% of the participants concurred that in relation to credibility, it was just as important for the factors of reliability, trustworthiness and honesty to be considered.

Participant four mentioned that: “in evaluating evidence [one should] take into account [the] credibility of [a] witness, reliability, honesty, demeanour, probabilities and improbability.”

6.7.2 Demeanour

Demeanour is the outward physical behaviour and appearance of a person. All of the participants were of the opinion that demeanour may impact on the outcome of a trial. Participant ten, an African male with ten years experience, had the following to say about demeanour: *“The demeanour of a witness can say a lot about whether the witness is being truthful or not.”*

Demeanour is not merely what someone says but the manner in which it is said. Factors that contribute to an individual's demeanour include tone of voice, facial expressions, gestures, and carriage. The term demeanour is most often applied to a witness during a trial. Demeanour evidence is quite valuable in shedding light on the credibility of a witness, which is one of the reasons why the presence of a witness at trial is considered to be of paramount importance and has great significance concerning the hearsay rule. To aid a jury in its determination of whether or not it should believe or disbelieve particular testimony, the jury should be provided with the opportunity to hear statements directly from a witness in court whenever possible.



Picture 1 - shows various facial expressions

6.7.3 Totality of Evidence

In the law, the totality of the circumstances test refers to a method of analysis where decisions are based on all available information rather than bright-line rules. Under the totality of the circumstances test, courts focus “on all the circumstances of a particular case, rather than any one factor”. All the participants agreed that all information should be taken into account before a verdict can be reached. Participant seven is an African female magistrate with more than eight years of experience, and she stated: *“non-verbal testimony does impact on the outcome because evidence must be evaluated in totality and context...”*

6.7.4 Cultural Differences

Sixty percent (60%) of the participants highlighted that cultural differences do have a negative impact on the verdict. A participant, with over thirty years of experience made the following observation: *“Example: in Zulu culture you do not look a person in the face but one can look at it as lying.”* The problem here is that a proliferation of different standards against which to judge the reasonableness or otherwise of a person's

behaviour in the criminal law context is undesirable. To apply different standards to different cultural groups would lessen the protection afforded to all by the criminal law and also by the constitutional requirement of equality before the law.⁷⁰³

6.7.5 Non-verbal Testimony/Communication

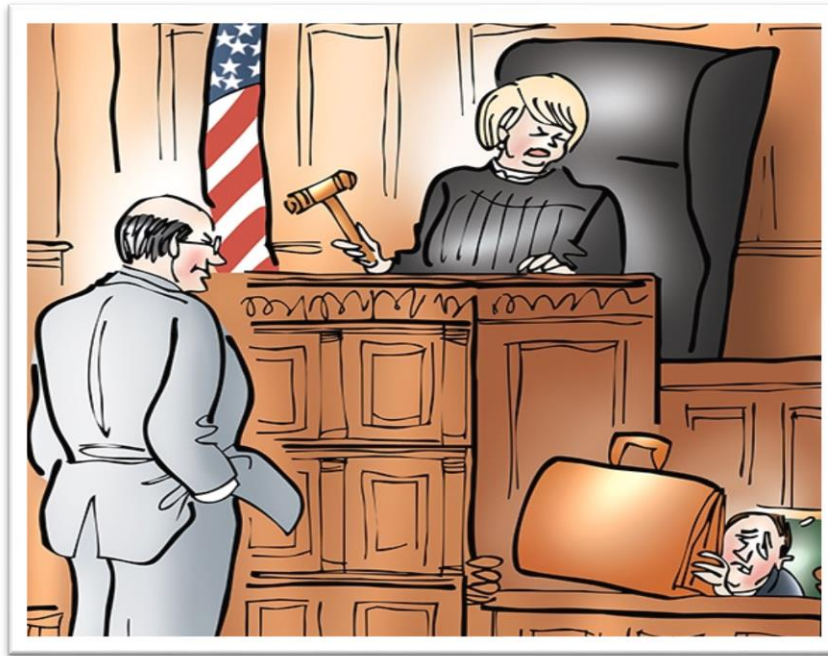
All participants concurred that non-verbal testimony played a major role in reaching the correct verdict. In many cases, we communicate information in non-verbal ways using groups of behaviours. For example, we might combine a frown with crossed arms and unblinking eye gaze to indicate disapproval. Some factors of non-verbal testimony/communication are: posture, facial expression, eye gaze, gestures, and tone of voice.

In discussing verbal and non-verbal cues many have concluded that when there is a conflict or contradiction in the mind of the observer, non-verbal communications far outweigh whether a certain witness should be credited. In fact, a witness who has some measure of control over his or her non-verbal communications will appear to be more credible than a witness who does not exhibit that control. This is especially true when the witness is faced with cross-examination and most often is under stress. *This control is perceived as eliminating ambiguous communication cues.*⁷⁰⁴ Ambiguity in communication tends to create cognitive dissonance in the listener, thereby cancelling the credibility of the speaker. Participant 6 says: *“yes demeanour and non-verbal testimony has an impact on the outcome...”*

Participant 3 stated: “Each case depends on its own merits. In most instances it does. For instance where a witness fails to answer simple questions, fails to explain contradictions in his or her evidence, confuses the evidence, does not answer questions and looks down – one can draw an adverse inference...”

⁷⁰³ See also the Promotion of Equality and Unfair Discrimination Act 4 of 2000, which gives effect to section 9 of the Constitution and is guided by the principles of both equality and equity.

⁷⁰⁴ Smith F.C. and Gurley Bace R. 2002. A Guide to Forensic Training: The Art and Practice of Presenting Testimony. Addison-Wesley Professional.



Picture 2⁷⁰⁵ - shows a shy witness



Picture 3⁷⁰⁶ - shows a confident, outspoken, somewhat assertive witness

⁷⁰⁵ Picture 2 taken off: <https://markarmstrongillustrations.files.wordpress.com/2012/08/shy-witness-detail1.jpg>. Accessed on 30 November 2017.

⁷⁰⁶ Picture 3 taken off: <https://s3.amazonaws.com/lowres.cartoonstock.com/law-order-unregistered-weapon-cross-examination-perjury-courtroom-mband45-law.jpg>. Accessed on 30 November 2017.

6.7.6 Training Required

It appeared that a lack of training, amongst other factors, hindered the judgment of the majority of participants in evaluating a trial to the best of their ability, as far as the legal system was concerned.

As indicated in Chapter 1, the lack of formal training has given rise to a lack of knowledge and ability to properly understand and appreciate the impact of non-verbal communication/non-testimonial evidence on the verdict. Participant seven said the following: *“training will help me to evaluate this type of evidence [the type of evaluation the participant was being interviewed about] properly and important aspects of demeanour won’t be excluded because of lack of understanding especially in rape matters...”*. Participant four indicated that *“yes, training in respect of demeanour will clearly be of assistance, especially in South Africa where we have diversity of cultures. We need to understand the cultures and be more attentive so that one does not misinterpret demeanour...”*

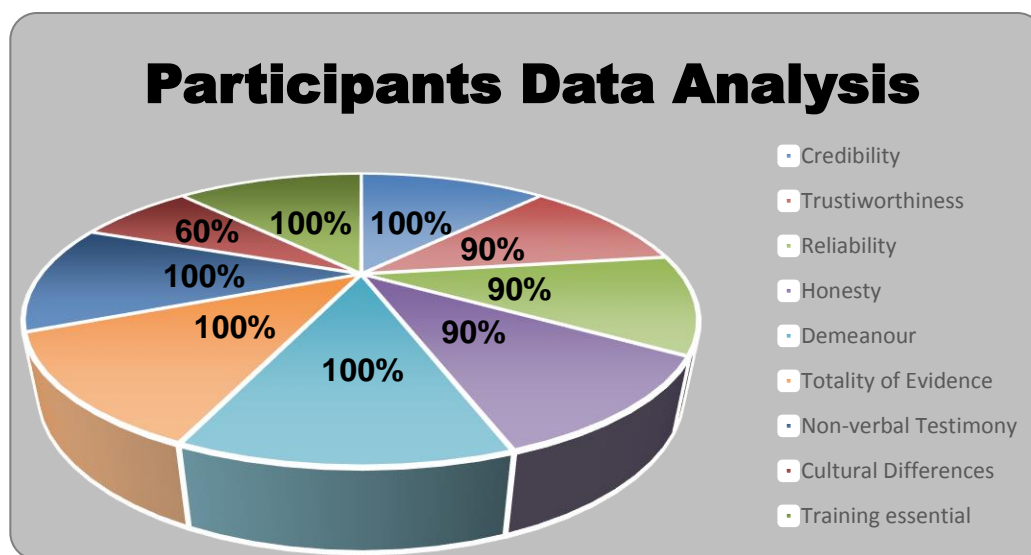


Figure D: shows the percentage of agreement amongst the participants as factors that were conducive to a proper and fair trial.

6.9 Reliability of the Coding Process

The data gathered during the in-depth interviews with the participants were electronically recorded and the recordings were then transcribed. The transcripts were then evaluated extensively and repeatedly, and out of this, numerous themes and issues emerged. The researcher utilised inductive codes which emanated from the data that had been evaluated. Upon finalising the coding process, the researcher searched for new and fresh information and the data was then summarised. The codes that emerged from the coding process were then arranged into clearly labelled themes and categories. To ensure the “trustworthiness” of the data, the researcher compared the transcripts with the handwritten notes that the researcher made during the interviews. The credibility of the coding was also checked by a peer reviewer who verified that the correct codes were extracted from the data contained in the transcripts. This verification process enhanced the reliability of the coding process carried out.

6.10 Findings from the Literature Review

Chapters two, three and four of this study entailed an in-depth review of the literature available on demeanour and non-verbal communication/behaviour as they relate to the verdict in trial proceedings. A review of the relevant literature revealed that demeanour and non-verbal communication do have an impact on the outcome of a trial. It is also apparent from the literature that demeanour and non-verbal communication come into play from the time the matter is before court for the very first appearance. The first impressions created form the platform from which the court will view the various role players, as well as how the role players view the presiding officer. It is imperative that the presiding officer set the “stage” for a fair trial right from the outset of the proceedings.

Demeanour in the form of physical appearance, attire and behaviour; and non-verbal communication arising out of body language, facial expressions, posture, inflection of the voice/vocal cues, and proximity/personal space play a significant role as evidence on their own. These aspects also play a fundamental role in combination with the testimonial evidence of witnesses being evaluated to determine the outcome of a trial.

What emerged from the literature that was reviewed for the purpose of this study is that it is the demeanour and non-verbal communication of all the role players in a trial that impact on the outcome of the proceedings. The right to confrontation during a trial and the right to a fair trial and due process are the fundamentals of our criminal justice system. It is therefore imperative that all role players not only have a clear understanding of how to deal with and interpret non-testimonial evidence in the form of demeanour and non-verbal communication/behaviour, but also the impact that demeanour and non-verbal behaviour have on the outcome of a trial.

Choosing to adopt a realistic approach towards the legal process is vital in “laying the building blocks” for the path to elevating and building the skills of the role players on how to properly deal with the evidence of demeanour and non-verbal communication during a trial. This study shows that adopting a functionalist and realist legal approach to analysing and understanding evidence of demeanour and non-verbal communication would form the foundation of the process of enhancing the competencies of presiding officers when it comes to the evaluation of evidence in deciding on the outcome of a trial. It is also important in ensuring that judgments give life to the requirement that “justice should be seen to be done.” A functionalist approach is crucial to analysing and understanding the non-testimonial evidence that may intentionally or unintentionally find its way into a trial. Like realism, the functional investigation is primarily made up of observations and reasoning. Sign systems form the framework for non-verbal communication and if the signs are correctly understood and analysed then the correct meaning will be conveyed to the role players in a trial.

When witnesses testify, as well as when the role players communicate during the trial proceedings, these processes are populated with verbal and non-verbal signs that create meaning resulting in “the creation of new evidence.” The literature reviewed for the purpose of this study has highlighted the actual impact that demeanour and non-verbal behaviour/communication have on the outcome of the trial. The literature reviewed, especially the decided cases, also revealed the importance of the presiding officers taking note of the demeanour and non-verbal communication, and more importantly, of the importance of the demeanour and non-verbal communication being

made part of the record of the proceedings, especially when the trial is heard by the trial court.

The literature review also revealed the need for the training of presiding officers in order to develop their skills on how to deal with demeanour and non-verbal communication as a type of evidence that has an impact on the credibility of a witness and the probative value of the evidence. It has also emerged from the literature study that being a competent legal practitioner, be it an attorney, prosecutor or presiding officer, is an important graduate attribute that will only be enhanced by the skills of legal professionals to effectively deal with all types of evidence in practice. The decided cases dealt with in the literature review make it clear that the proper handling of evidence of demeanour and non-verbal behaviour is crucial in ensuring the judgments are factually and legally sound.

The literature review made it clear that non-verbal communication is absolutely vital for effective human interaction.⁷⁰⁷ The work of Remland is extremely relevant to this study. Remland⁷⁰⁸ states that even though non-verbal communication is important in most communicative contexts “little has been done to synthesise what we know about the impact of non-verbal communication in the courtroom environment.” According to Remland this position is rather unfortunate because “few contexts depend more on the use of both the spoken and unspoken discourse”⁷⁰⁹ than the courtroom context.

6.11 Concluding Remarks In Respect of the Literature Review and the Qualitative Data Analysis

The literature review revealed that there is a lack of scholarly guidance on how evidence of demeanour and non-verbal behaviour/communication should be dealt with during a trial. The remarks of high court judges dealing with matters taken on appeal

⁷⁰⁷ Duke C.R. 1974(25). Nonverbal Behaviour and the Communication Process. *College Composition and Communication*. 397-404.

⁷⁰⁸ Remland T.S. 1993. The Importance of Nonverbal Communication in the Courtroom. (Paper presented at the 84th Annual Meeting of the Eastern Cape Communication Association. New Haven, Cape Town. Information Analyses- Speech Conference Papers.

⁷⁰⁹ Ibid.

clearly highlight the significance of the correct handling of evidence of demeanour and non-verbal behaviour/communication by the trial court presiding officers, especially since appeals are generally decided on by perusal of the transcripts of the trial. The judge on appeal does not have the benefit of observing the witnesses and role players. Fuller and Quesada⁷¹⁰ highlight the importance of the communicative process and maintain that “...in the practice of any profession in which one seeks to solve the problems of another, the nature of communication between them is an important factor influencing whether either or both will define the results as successful.” Milford⁷¹¹ states that not much has been done to better lawyer communication in the legal circle.

All the participants interviewed concurred that demeanour and non-verbal communication is indeed taken into account when arriving at a verdict. All participants also indicated that they received no formal training, either during the years of study at university in pursuit of their law degrees, or during training as presiding officers, on how to deal with evidence of demeanour and non-verbal communication when evaluating evidence, and that more extensive training on this aspect is needed. This information raises concern because it is these very individuals who are tasked with protecting society, upholding the law, taking away the liberty of accuseds, releasing accuseds and creating precedents.

The presiding officers revealed no obvious specialised knowledge of demeanour and non-verbal communication but they unanimously said that they would want training on how to deal with evidence of demeanour and non-verbal behaviour/communication. One of the participants went so far as to say that the demeanour of a witness/accused can make or break the case. The participants also mentioned that cultural backgrounds also play a role with regards to the demeanour and behaviour of witnesses. Training aimed at understanding the cultural diversity of the South African community will also enhance the manner in which courts and presiding officers deal with evidence of demeanour and non-verbal communication. By improving the ability to skilfully and correctly deal with

⁷¹⁰ Fuller F. and Quesada J. 1973 (23). Communication in Medical Therapeutics 1973 (23). J. Comm. 361.

⁷¹¹ Milford L.S. 2000(27). Nonverbal Communication. *Litigation*. 32.

evidence of demeanour and non-verbal behaviour/communication, we increase the quality of judgments handed down, thereby moving closer to making sure that “justice is seen to be done” and reducing the number judgments set aside.

6.12 Evaluation of the Study

To ensure the credibility of this study it is important for the researcher to evaluate the strengths and weaknesses/limitations of this study, and to make recommendations and suggestions for future research in the field.

6.12.1 Strengths of the Study

The first section (cf. Ch. 2, 3 and 4) of this study was based on a theoretical overview of the available literature on demeanour and non-verbal behaviour/communication. The researcher dealt with the South African context as well as, to a limited extent, with the American context. The literature on demeanour and non-verbal communication revealed that they play a pivotal role when evidence is being evaluated, especially in relation to credibility, and when the outcome of the trial is being decided on.

The research focused on a relatively untraversed form of evidence and field of legal communication. Granted, a limited amount of work done has been done regarding the impact of demeanour and non-verbal behaviour/communication in the legal arena, and more especially in the context of the courtroom. The literature review revealed that both demeanour and non-verbal communication have an undocumented and noticeable impact on the outcome of the trial in many court systems. This gap in the literary coverage of the impact of demeanour and non-verbal communication/behaviour has created a path for contributions aimed at the growth of theory-building practices in the legal arena.

The research methodology adopted by the researcher in this study was a qualitative interpretivist/phenomenological approach which expanded the researcher’s knowledge and understanding of the participants’ experience. The researcher was privy to what the participants’ perspectives and interpretations were of demeanour and non-verbal

communication/behaviour and how these concepts were dealt with in the performance of their judicial functions. The process of electronically recording and transcribing the responses of the participants afforded the researcher useful insight into the tasks of and the challenges faced by judicial officers in the performance of their duties. From the analysis of the participants' experience distinct themes emerged and these were then formulated into theoretical experience.

The selection of the participants was done using the "purposive sampling" approach and this allowed the researcher to select a specific sample group (presiding officers with different levels of experience) which in turn facilitated a broader understanding of the participants' outlook regarding the relevance and significance of demeanour and non-verbal communication/behaviour when adjudicating over a trial and determining the outcome of a trial. Having had the opportunity to gain insight into the experiences of the presiding officers whilst performing their judicial functions, the researcher was able to achieve a reasonable number of the aims and objectives of this study. The selection of the interviews as the method to be used in gathering the qualitative data instead of using the survey or questionnaire methods, made it possible for the true and immediate experiences of the participants to emerge.

The aim of this study, as set out in chapter one, was to assess the impact of demeanour and non-verbal communication/behaviour on the outcome of the trial. The literature review and the data gathered using the in-depth interviews have assisted the researcher achieve this aim. The study has revealed the importance of demeanour and non-verbal communication when judicial officers determine any given verdict. This outcome gives substance to the claim made by Gass and Seiter⁷¹² that non-verbal communication can be utilised by an individual to develop positive and negative impressions of himself/herself. It fashions perceptions as well as behaviours.⁷¹³ The fact

⁷¹² Gass R.H. and Seiter J.S. 2003. *Persuasion, Social Influence and Compliance Gaining*. United States of America: Pearsons.

⁷¹³ Gass R.H. and Seiter J.S. 2003. *Persuasion, Social Influence and Compliance Gaining*. United States of America: Pearsons.

that non-verbal communication can be unintentional and unconscious makes it the ideal skill for the lawyer to master.⁷¹⁴

The literature study, especially that pertaining to the decided cases, demonstrates that there is a possible lack of consistency in the way different presiding officers deal with evidence of demeanour and non-verbal communication when deciding on a verdict. This could imply that the way in which demeanour evidence and non-verbal communication are dealt with needs standardisation. This view was substantiated by the responses of the participants that training would be beneficial.

6.12.2 Limitations of the study

Considering the modest size of the research sample, it would be improper to generalise the findings across all members of the judiciary. The subjects of this research were human beings which by their very nature might have inhibiting factors. Merriam⁷¹⁵ states that “the human instrument is as fallible as any other research instrument.” The researcher, who is also a human instrument, is limited by being human – mistakes are made, opportunities missed and personal bias interferes. The researcher is a practicing attorney and has presided in the regional court, and the experience that the researcher has could possibly have had an influence on the outcomes of this study. Phenomenologists, however, view the element of subjectivity as a “stepping stone” to attaining actual objectivity and maintain that it is impossible to eradicate the subjective influence of the researcher in its entirety. In terms of the phenomenological/interpretivist approach, true objectivity requires the use of every possible measure to be as true to the phenomenon as possible. To deal with this the researcher made use of processes such as coding, electronic recording, transcription of the recording done by a professional, verification that the transcripts were a true reflection of the recordings by repeatedly comparing the recordings and the transcripts, and a peer reviewer to verify the outcomes of the coding process and the correct identification of the themes.

⁷¹⁴ Gass R.H. and Seiter J.S. 2003. Persuasion, Social Influence and Compliance Gaining. United States of America: Pearsons.

⁷¹⁵ Merriam, S. B. (1998). Qualitative Research and Case Study Applications in Education. San Francisco: Jossey-Bass Inc. 20.

6.12.3 Suggestions for Future Research

This research identified a gap in the legal arena and made suggestions for going forward. The most significant recommendation that emerged from this research is the participants' responses that they think that training on how to deal with demeanour and non-verbal communication is needed.

The findings arising out of this study clearly advocate that for future work on the subject matter to be done by legal scholars and academics. Such future work could elevate the value of the findings of this study by:

- Conducting an investigation into the extent of the current training programmes available to presiding officers.
- Identifying the gaps in the training of and what programmes or modules can be incorporated into the LLB curriculum and the magistrates' training programme.
- Understanding what rationale presiding officers adopt when evaluating evidence of demeanour and non-verbal communication.
- Publishing more resources on the topic.

6.12.4 Conclusion

The review of the literature and the analysis of the responses from the participants who participated in the semi-structured interviews clearly indicate that demeanour and non-verbal testimony have an impact on the outcome of the trial. The decided cases analysed strengthen the response from the participants that training is needed on how to deal with evidence of demeanour and non-verbal evidence because the cases illustrate that quite often decisions are set aside on appeal because the presiding officer in the trial court misdirected himself/herself when interpreting evidence of demeanour and non-verbal testimony, especially when evaluating the credibility of witnesses.

CHAPTER 7 – CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The rules of evidence and the rules of procedure prescribe to role players in a trial how the court processes should be dealt with. Despite the existence of these rules, the courtroom still remains a theatre where the accused/accused and witnesses are the lead actors whose performance is watched by the presiding officer, the prosecutor and the attorney. The verbal testimony of the accused/accused and the witnesses is not delivered in a vacuum but in the social context of the courtroom. This social context within which testimony is given has its own ethos that undoubtedly affects the way in which the witness gives his/her testimony. The act of testifying in an open court, where the other role players are given the opportunity to observe the accused/accused or witness while they deliver their verbal testimony, has its own consequences.

This study has shown that it is not simply what a witness says that is considered to be evidence but other factors, such as the demeanour and the non-verbal communication/behaviour of the person testifying, are also taken into account. The cases reviewed clearly indicate the extent to which demeanour and non-verbal communication/behaviour influence the outcome of a trial, more especially how it impacts on the credibility findings that presiding officers make in respect of witnesses. Scholars like Schwikkard and Zeffert, amongst others, acknowledge that demeanour is taken into account as evidence. At this point it is important to assess the results of this study.

7.2 The Research Questions

The focus of this study was the impact of demeanour and non-verbal communication on the outcome of the trial. This study accordingly attempted to answer the following research questions, as set out in paragraph 1.3 in Chapter one:

- Do presiding officers consciously or unconsciously consider the non-verbal communication/behaviour and demeanour of witnesses when deciding on a verdict?

Once the answer to the above question was established the following questions were also considered in an attempt to establish a contribution that this study could make to the body of theoretical knowledge:

- Do role players in a trial have the requisite training to equip them with the skill to adequately evaluate the evidential value of demeanour and non-verbal behaviour?
- How would the proper skill to perceive, read and analyse the non-verbal behaviour and demeanour evidence add probative value to the verdict and add value to the legal fraternity in general?

As set out in paragraph 1.4 of Chapter one, the aim of this study was, on the one hand, to show that the impact and relevance of non-verbal or non-testimonial evidence is often ignored and/or underestimated and, on the other hand, to highlight some common interpretations of certain types of non-verbal communication/evidence and to try and formulate guidelines on how to interpret this non-verbal evidence.

What needs to be considered now is whether the research carried out during this study was able to answer the research questions set out in this study. To this end, it would be more convenient to look at each of the research questions that this study set out to answer.

The first question asked was whether presiding officers take evidence of demeanour and non-verbal communication/behaviour into account when deciding what the verdict should be. Both the findings arising out of the literature review set out in Chapters two, three and four of this study, and the findings arising out of the qualitative data gathered by means of the in-depth interviews set out in Chapter six of this study emphatically answer this research question in the affirmative. This study revealed that the demeanour and non-verbal communication/behaviour of the accused/accused,

witnesses, attorneys, prosecutors and the presiding officer contribute towards the outcome of the trial and the fairness of the proceedings.

Having answered the first research question in the affirmative, the second research question needs to be looked at. The second research question asks whether the respective role players in a trial have the requisite skill to adequately deal with, and evaluate evidence of demeanour and non-verbal communication/behaviour. Studies conducted in the South African context on the evidential value of demeanour and non-verbal communication are rather limited, but in the United States the impact of demeanour and non-verbal communication has received a noticeable amount of attention from scholars and researchers.⁷¹⁶ The reviews of scholarly writings on demeanour and non-verbal communication/behaviour, as well as codes of conduct for legal practitioners and judicial officers say very little on how evidence of demeanour and non-verbal communication/behaviour should be dealt with or evaluated during a trial. The data gathered from the participants, as analysed in chapter six, unanimously indicate that there is no specific training on how to deal with evidence of demeanour and non-verbal communication/behaviour in trial proceedings.

The third research question is how the proper skill to perceive, read and analyse the non-verbal behaviour and demeanour evidence could add value to the verdict and the legal fraternity in general. The literature review highlighted the need for “justice to be seen to be done.” In the cases reviewed as part of the literature study, especially those that were taken on appeal, the judges on appeal almost always made reference to the fact that the trial court had the benefit of observing the witness while he/she testified, and it is for this reason that the appeal court would be reluctant to interfere with the trial court’s finding regarding the credibility of the witness. The literature review highlighted that when making a finding regarding the credibility of a witness, the court will take into account the demeanour and non-verbal behaviour/communication of the witness during

⁷¹⁶ Blanck P.D, Rosenthal R., and Cordell L.D.H. 1985. *The Appearance of Justice: Judges’ Verbal and Nonverbal Behaviour in Criminal Jury Trials*; Levenson L.L. 2007. *Courtroom Demeanor: Theater of the Courtroom*. Social Science Research Network (SSRN) electronic library at <http://ssrn.com/abstract=999471>.; Timony J.P. 2000. *Demeanour Credibility*. Catholic University Law Review Vol 49(4).903-943.

his/her testimony in the trial proceedings. The judges on appeal in the cases referred to in the literature review highlight how important it is for the presiding officer in the trial court to verbally record the demeanour and non-verbal behaviour of the witness as it happens during the trial. In answering the third research question it can confidently be said that the skill to perceive, read and analyse the demeanour and non-verbal behaviour/communication would add value to the judgment, improve the litigation skills of practitioners and overall, perhaps even strengthen the faith the community has in the justice system.

Conclusion

Taking into account the information arising out of the literature review and the data gathered during the in-depth interviews there can be no doubt that evidence of demeanour and non-verbal behaviour/communication have an impact on the outcome of the trial. The study has also identified that there is somewhat of a deficiency in the literature as to how evidence of demeanour and non-verbal behaviour/communication should be dealt with. The participants who were interviewed by a clear majority stated that training on how to deal with evidence of demeanour and non-verbal behaviour/communication will be beneficial to presiding officers. As mentioned in Chapter 4 the research revealed that the misdirection of presiding officers when dealing with evidence of demeanour and non-verbal testimony can have a serious impact on the delivery of justice and the legal and substantive soundness and justiciability of the verdicts. The inability of presiding officers to correctly interpret and evaluate evidence of demeanour and non-verbal testimony often leads to the setting aside of verdicts when matters are taken on appeal.

Having regard to the aforementioned, the researcher firmly believes that incorporating the in-depth study of demeanour and non-verbal behaviour/communication as a specific form of evidence into the LLB curriculum (perhaps as part of the module on the Law of Evidence) as well as making it a module to be taken by presiding officers during their training will certainly be in the interest of justice. This would also enhance the skills of all

role players that take part in the court proceedings (in the theatre of the courtroom), and improve the overall quality and strength of initial judgments.

7.3 Recommendations

Section 210 of the Criminal Procedure Act⁷¹⁷ and section 2 of the Civil Proceedings Evidence Act⁷¹⁸ provide that no evidence as to any fact, matter or thing shall be admissible if irrelevant or immaterial and if it cannot conduce to prove or disprove any point or fact at issue⁷¹⁹ in the trial proceedings (criminal or civil). An interpretation of these sections and strict application thereof might make it rather difficult to argue that evidence of demeanour and non-verbal behaviour/communication be taken into account when the court is arriving at a verdict. This is so because evidence of demeanour and non-verbal communication is not necessarily aimed at proving or disproving a fact or issue in dispute, but rather at proving the probative or evidential value of the witness's verbal testimony. However, considering it is almost impossible to separate verbal communication from the non-verbal communication, the evidence will inevitably be weighed taking into account both the verbal and non-verbal aspects of the witness's testimony.

Prof Levenson,⁷²⁰ the Director of the Centre for Ethical Advocacy, Loyola Law School, Los Angeles, states that if an accused's courtroom demeanour is going to be considered by the jury, there may be need for clarity on the definition of "relevant" evidence in evidence codes. Rule 401 of the Federal Rules of Evidence of the United States of America defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neither section

⁷¹⁷ Act 51 of 1977, as amended.

⁷¹⁸ Act 25 of 1965.

⁷¹⁹ Schwikkard P.J, and Van der Merwe S. 2009. Principles of Evidence. (3rd ed.). Juta and Company. 45.

⁷²⁰ Levenson L.L. 2007. Courtroom Demeanor: Theater of the Courtroom. Social Science Research Network (SSRN) electronic library at <http://ssrn.com/abstract=999471>. 56.

210⁷²¹ nor Rule 401⁷²² addresses the issue of whether the courtroom demeanour and non-verbal communication/behaviour of a participant⁷²³ may be considered as evidence.

In order to make sure that evidence of demeanour and non-verbal behaviour/communication are properly dealt with and indeed taken into account as evidence, even if only as evidence relating to credibility or reliability, it is also in accordance with the rules of evidence and does not violate the right to a fair trial⁷²⁴. This might make it necessary to clarify specifically what qualifies as “relevant” evidence. In *S v Zuma*⁷²⁵ Van der Merwe J said “[T]he question of relevancy can never be divorced from the facts of a particular case before court.” Further in *S v Mayo*⁷²⁶ the court held as follows

“It is not in the interest of justice that relevant material should be excluded from the Court, whether it is relevant to the issue or to issues which are themselves relevant to the issue but strictly speaking not in issue themselves, and this includes the credibility of witnesses, provided that their credibility is in some way related to the issues of the matter...”

The dynamics of criminal courts change continuously. Therefore we need to be realistic in the way we deal with the theatre of the courtroom. Evidence of demeanour and non-verbal behaviour/communication is the new frontier⁷²⁷ which poses risks but also has the potential to infuse emotive due process into our adversarial system by guiding presiding officers on how to use their subjective evaluations of a witness’s character in arriving at the outcome of the case. In order to avoid the misuse of evidence of demeanour and non-verbal behaviour it is recommended that we develop consistent

⁷²¹ Act 51 of 1977.

⁷²² Federal Rules of Evidence of the United States of America.

⁷²³ Participant can include the presiding officer, the prosecutor, the attorney, the accused, and the witnesses and in the American courts the jurors.

⁷²⁴ Section 35 of Act 108 of 1996.

⁷²⁵ 2006 2 SACR 191 (W) 199 f-g.

⁷²⁶ 1990 1 SACR 659 (E) 661f-662e.

⁷²⁷ Levenson L.L. 2007. Courtroom Demeanor: Theater of the Courtroom. Social Science Research Network (SSRN) electronic library at <http://ssrn.com/abstract=999471>. 56.

and principled rules and guidelines prescribing the use of non-testimonial evidence like demeanour and non-verbal behaviour.

Taking into account the unanimous response from all the participants who were interviewed that training on how to deal with evidence of demeanour and non-verbal behaviour/communication would be beneficial, it is recommended that training courses for presiding officers include a course on effective courtroom communication.⁷²⁸

Presiding officers who make findings, especially relating to credibility, based on the demeanour and/or non-verbal behaviour/communication of a witness should exercise extreme caution when making such findings, and should avoid conclusory remarks such as “from the witness’s demeanour it is concluded that the testimony cannot be believed.”⁷²⁹ Where the court makes findings based on the demeanour and/or non-verbal behaviour/communication of the witness the presiding officer should ensure that such findings can be supported by specific conduct or observations and that reference is made to the observed behaviour such as evasiveness, shifty eyes, hesitation, irritation, emotional breakdown, nervousness, and discomfort when asked specific questions, amongst others.

The evaluation of evidence is a skill that legal practitioners, presiding officers, prosecutors, and role players in a trial acquire with experience. However due to the fact that often courts are dealing with the life and liberty of individuals, the courtroom cannot be a teaching forum on how to evaluate evidence of demeanour and non-verbal testimony. The knowledge on how to deal with and evaluate evidence of demeanour and non-verbal testimony should be imparted to legal practitioners, presiding officers, prosecutors, and role players in a trial from the onset of their training, and as early as when the individual commences his/her law degree. All South African LLB (Bachelor of Laws) have the Law of Evidence as a compulsory module in the curriculum, thus making it possible for students to be taught, in greater detail, how to evaluate evidence of demeanour and non-verbal testimony. Further all LLB students do some form Clinical

⁷²⁸ Perhaps our Judicial Commission can look at the course offered by the California Center for Judicial Education and Research (CJER).

⁷²⁹ Mullins M.E. 1993. Manual for Administrative Law Judges. (3rd ed.) 111-112.

Legal education module as part of the curriculum where they are required to consult with real life witnesses, and participate in moot and mock trials. This forms another forum in which the skill on how to evaluate evidence of demeanour and non-verbal testimony can be taught. Further, all legal practioners, be it during their articles of clerkship or as part of the continuous development programme attend courses presented by the South African Law Society through the Legal Education and Development Programme (LEAD). This presents another forum in which practioners can be taught how to evaluate and deal with evidence of demeanour and non-verbal testimony.

7.4 Final Conclusion

This study has answered the research questions that formed part of the study and has also identified a relative gap in the field, specifically the law of evidence and training programmes for judicial officers. From this study arises a need for the development of legal theory that will assist all role players involved in a trial to better deal with evidence of demeanour and non-verbal behaviour as it does have an impact on the outcome of the trial.

REFERENCES

Legislation

Code of Conduct for Magistrates (Regulation 54A promulgated in terms of s 16 Magistrates Act 90 of 1993).

Code of Conduct for United States Judges. 2000. (uscourts.gov.)

The Constitution of the Republic of South Africa, Act 108 of 1996. ("The Constitution")

The Civil Proceedings Evidence Act 25 of 1965 ("the CPEA").

The Constitution of the United States of America. (constitutingamerica.org.)

The Criminal Procedure Act, Act no. 51 of 1977, as amended.

The Criminal Procedure and Evidence Act 56 of 1955.

Textbooks

Andersen M.L. & Taylor H.F. 2002. Sociology: *Understanding a diverse society*, 2nd edn. Thompson Learning: Wadsworth.

Ary, D., Jacobs, L. C., & Razavieh, A. 2002. *Introduction to research in education*, 6th edn. Thompson Learning: Wadsworth.

Atieno, O.P. 2009. 'An analysis of the strengths and limitation of qualitative and quantitative research paradigms.' *Problems of education in the 21st century*, vol.13. Pp.13-38. Kenya

Babbie E. 2010. *The practice of social research*. Wadsworth Cengage Learning, London.

Babbie E. 2011. *Introduction to social research*, 5th edn. Wadsworth: Cengage Learning, London.

Babbie E. & Mouton J. 2001. *The practice of social research*. UCT Press, Cape Town.

Babbie, E. & Mouton, J. 2008. *The Practice of social research*, South African edn. Vasco, Boulevard, Goodwood (eds.). Oxford University Press, Cape Town.

Basdeo M., Geldenhuys T., Karels K. G., Kemp G.P., Swanepoel J.P., Terblanche S.S. & Van der Merwe S.E. 2017. *Criminal procedure handbook*, 12th edn. Joubert J.J. (ed.) Juta and Company (Pty) Ltd, Claremont.

Bell J. 2010. *Doing your research project*. 5th edn. Open University Press, McGraw-Hill.

Bellengere A., Palmer R., Theophilopoulos C., Whithcher B., Roberts L., Melville N., Picarra E., Illsley T., Nkutha M., Naude' B., Van der Merwe A & Reddy S. 2014. *The law of evidence in South Africa: basic principles*. Oxford University Press, Cape Town, Southern Africa.

Bennet W.L., and Feldman M.S. 1981. *Reconstructing Reality in the Courtroom – Justice and Judgment in American Culture*. Rutgers University Press – USA.

Birdwhistell, R. 1970. *Kinesics and context*. University of Pennsylvania Press, Philadelphia.

Blumberg B., Cooper, D.R., & Schindler, P.S. 2011. *Business research methods*. McGraw-Hill Higher Education, UK.

Bogdan, R. C., & Knopp Biklen, S. 2006. *Qualitative research for education*. 5th edn. Pearson, Boston.

Bryman A. & Teevan J.J. 2005. *Social research methods*. 4th edn. Oxford University Press, Canada.

Burgoon J.K. and Saine T. 1978. *The unspoken dialogue: an introduction to non-verbal communication*. Houghton Mifflin Company, USA.

Burgoon, J.K., Buller, D.B. & Woodall, J.B. 1989. *Non-verbal communication: the unspoken dialogue*. Harper and Row, New York.

Carter S.M. & Little M. 2007. *Justifying knowledge, justifying method, taking action: epistemologies, methodologies, and methods in qualitative research*. Sage Publications, Sydney, Australia.

Cleary S. 2003. *Communication handbook: a student guide to effective communication*, 2nd edn. Juta, Cape Town.

Collis J. and Hussey R. 2009. *Business research: a practical guide for undergraduate and postgraduate students*. 3rd edn. Palgrave Macmillan, UK.

Cooper, D. R. & Schindler, P. S. 2011. *Business research methods*, 11th edn. McGraw-Hill/Irwin, New York.

Crabtree, B.F. and W. L. Miller. 1992. *A template approach to text analysis: 1990*. Sage Publications, Newbury Park, CA.

Creswell J.W. 2007. *Qualitative inquiry and research design: choosing among five approaches*. SAGE, London.

Creswell J.W. & Plano Clark V.L. 2007. *Designing and conducting mixed research methods*, 3rd edn. Sage Publications Inc., Thousand Oaks, California.

Creswell J.W., Ebersohn J., Eloff I., Ferreira R., Ivankova N.V., Plano Clark V.L. & Van der Westhuizen C. 2012. *First steps in research*. Van Schaik Publishers, Pretoria.

Davies M.B. 2007. *Doing a successful research project*. Palgrave MacMillan, New York and U.K.

De Groot M. and Vrielink M.O. 1998. Legal theory and sociological facts. vol.17 no.(3). Law and Philosophy. Anmol Publications' New Delhi.

De Vos A.S., Strydom H., Fouche' C.B., and Delport C.S.L. 2011. *Research at grass roots*. Van Schaik Publishers, Pretoria.

De Vos A.S., Strydom H., Fouche C.B., & Delport C.S.L. 2017. *Research at Grass Roots*. (4th ed.) Van Schaik Publishers, Pretoria.

Deflem M. 2008. *Sociology of law: visions of a scholarly tradition*. Cambridge University Press, Cambridge. 278-286.

Denscombe M., 2008. *Ground rules for good research: A 10-point guide for social researchers*. Open University Press, London.

DeCuir-Gunby J.T, Marshall P.L. & McCulloch W. 2010. *Developing and using codebooks. Doing qualitative research*. Sage Publications, Newbury Park, CA.

Druckman D. 2005. *Doing research: methods of inquiry for conflict analysis*. Sage, London.

Duncombe, J., Harrison, K. & D. Marsden (eds.), *The State of Affairs*. Erlbaum, Mahwah, NJ.

Eco U. A. 1977. *Theory of semiotics*. Macmillan, London.

Eco U. A. 1978. *The role of the reader*. Macmillan, London.

Egolf D.B. & Chester S.L. 2013. *The non-verbal factor: exploring the other side of communication*, 3rd edn. universe LLC, Bloomington.

Ekman, P., Friesen W.V. & Ellsworth P. 1972. *Emotion on the Human Face*. Pregamon Press, New York.

Elias, N. & Dunning N., eds. *Quest for excitement, Sport and leisure in the civilizing process*. Basil Blackwell, Oxford.

Ellis A. and Beatie G. 1986. *The Psychology of language and communication*. Weidenfield and Nicolsen, London.

Field J. 2004. *Psycholinguistics: The Key Concepts*. Routledge, London.

Flick U. (ed.) 2007. *Designing qualitative research. The qualitative research kit*. Sage, Thousand Oaks, CA.

Flick U. 2006. *An introduction to qualitative research*, 3rd edn. Sage Publications, London.

- Freeman M.D.A. 1994. *Lloyd's Introduction to Jurisprudence*, 6th edn. Sweet and Maxwell Ltd, London.
- Frost R., Vos H & Dreyer M. 1993. *Communication dynamics*. Lexicon Publishers, Johannesburg.
- Gass R.H. & Seiter J.S. 2003. *Persuasion, social influence and compliance gaining*. 4th edn. Pearsons, Boston MA, United States of America.
- Gay L.R., Mill G.E., & Airasian P. 2009. *Educational research*, 9th edn. Pearson Education, Upper Saddle River, NJ.
- Glaser B.G. and Strauss A.L. 1967. *Basics of grounded theory analysis*. Sociological Press, Mill Valley.
- Glicken, M.D. 2003. *Social research: A simple guide*. Allyn & Bacon, Boston, Massachusetts.
- Goffman E. 1967. The nature of deference and demeanour: Interaction ritual. Doubleday and Company, Garden City, New York.
- Gorman G.E. & Clayton P. 2005. Qualitative research for the information professional: A practical handbook, 2nd edn. Facet Publishing, London.
- Gratton, C. & Jones, I. 2010. *Research methods for sport studies*, 2nd edn. Routledge, London.
- Gray D.E. 2004. *Doing research in the real world*. 2nd edn. Sage Publications, Los Angeles.
- Halloran J. 1983. *Applied human relations: An organisational approach*, 2nd edn. Prentice Hall, Inc., New Jersey.
- Harrison R. 1965. 'Non-verbal Communication: Exploration into Time, Space, Action and Object', in Campbell, J.H. & Helper, H.W. (eds.), *Dimensions in Communication*, Wadsworth Publishing Company, Inc., Belmont, California.

Hatfield E., Cacioppo J.T. & Rapson R.L. 1994. *Emotional Contagion*. Cambridge University Press, Cambridge, United Kingdom.

Hatfield, E., & Sprecher, S. 1986. *Mirror, mirror: The importance of looks in everyday life*. State University of New York Press, Albany, NY.

Henning E. 2004. *Finding your way in qualitative research*. Van Schaik, Pretoria.

Henning E. 2011. *Finding your way in qualitative research*. Van Schaik, Pretoria.

Hickson M. Stacks D.W. & Moore N. 2003. *Non-verbal communication: studies and applications*. Roxbury, Los Angeles, CA.

Hosten, W.J., Edwards A.B., Bosan F. and Church J. 1995. *Introduction to South African Law and Legal Theory*, Butterworths, Durban.

Jackson, B. *Semiotics and legal theory*. 1985. Routledge and Keagan Paul Inc., Manchester.

Johnson, D.; Pete, S. & Du Plessis, M. (2001): *Jurisprudence: A South African perspective*. Butterworths, Durban, South Africa.

Kendon, A. 1985. *Some uses of gesture* in O. Tannen & M. Saville-Troike (eds.) *Perspectives on silence*. Norwood, N.J., Ablex Publishers, Kendon. 215-314.

Kevelson, R. 1988. *The law as a system of signs*. Plenum Press, Spring Street, New York.

Kevelson, R. 1989. *The Law as a System of Signs*. Plenum Press, New York.

Kevelson, R. 1995. 'Semiotics and Human Sciences', *Conscience, Consensus, & Crossroads in Law*, vol. 8, 163-180.

Knapp, M. & Hall, J. 2002. *Non-verbal communication in human interaction*, 5th edn. Wadsworth, London.

Knapp, M.L. 1978. *Non-verbal communication in human interaction*. Holt, Rinehart and Winston, New York.

- Kumar, R. 2011. *Research methodology: A step-by-step guide for beginners*, 3rd edn. Sage, New Dehli.
- Leedy, P.D. & Ormrod, J.E. 2010. *Practical research: Planning and design*, 9th edn. Pearson, Upper Saddle River, N. p12.
- Leedy, P.D. & Ormrod, J.E. 2005. *Practical research: planning and design*, 8th edn. Prentice Hall, Upper Saddle River.
- Levi, J.N. & Walker, A.G. 1990. *Language in the judicial process*. Plenum Press, New York and London.
- Llewellyn, Karl N. 1986. *Karl N. Llewellyn on Legal Realism*. Legal Classics Library, Birmingham, AL.
- Mason, J. 2002. *Qualitative researching*, 2nd edn. Sage Publications, London.
- McCarthy T. 1978. *The Critical Theory of Jürgen Habermas*, MIT Press. MIT Press, USA.
- McBurney, D.H. & Middleton, B. 1994. *Research methods*. 3rd edn. Brooks/Cole Publishing Co., California.
- McMillan, J. H., & Schumacher, S. 2001. *Research in education. A conceptual introduction*, 5th edn. Longman, New York.
- Merriam, S. B. 1998. *Qualitative research and case study applications in education*. Jossey Bass Inc., San Francisco.
- Morris, T. 2006. *Social work research methods: four alternative paradigms*. Sage, London.
- Mouton, J. 1996. *Understanding social research*. Van Schaik, Pretoria.
- Mullins, E.M. 1993. *Manual for administrative law judges*, 3rd edn. U.S. Government Printing, Washington DC.

- Myers, G. T, & Meyers, M.T. 1992. *The dynamics of human communication: A laboratory approach*, 6th edn. McGraw Hill Inc., New York.
- Namey, E., Guest, G., Thairu, L, & Johnson, L. 2008. 'Data reduction techniques for large qualitative data sets', *Handbook for team-based qualitative research*. Rowman Altamira. pp. 137-161.
- Neuman, W.L. 2003. *Social research methods: qualitative and quantitative approaches*, 5th edn. Allan and Bacon, Boston.
- Neuman, W.L. 2006. *Social research methods: qualitative and quantitative approaches*, 6th edn. Pearson Education Inc., Boston.
- Neuman, W.L. 2011. *Social research methods: qualitative and quantitative approaches*, 7th edn. Pearson, University of Wisconsin, Whitewater.
- Neuman, W.L. 2011. *Social research methods: qualitative and quantitative approaches*, 7th edn. (international edition). Allyn & Bacon, Boston.
- Oxford Advanced Learner's Dictionary. 2006. 7th edition. Oxford University Press.
- Paton G.W. & Derham D.P. (eds). 1972. *A textbook of jurisprudence*. 4th edn. Clarendon Press.
- Pickard, A.J. 2007. *Research methods in information*. Facet Publishing, London.
- Powell, R.R. & Connaway, L.S. 2004. *Basic research methods for librarians*. Libraries Unlimited, ABC-CLIO...
- Richards, L. 2005. *Handling qualitative data: a practical guide*. Sage Publications, London.
- Ritchie, J., & Lewis, J. 2003. *Qualitative research practice. A guide for Social Science students and researchers*. Sage Publications, London.
- Rubin, A. & Babbie, E. 2010. *Essential research methods for social work*, 2nd edn. (International edition). Brooks/Cole, Cengage Learning, Belmont, California.

- Salkind, N.J. 2006. *Exploring Research*, 6th edn. Pearson Education, New Jersey.
- Sannito, T. & McGovern, J.D. 1985. *Courtroom psychology for trial lawyers*. John Wiley and Sons, New York.
- Saunders, M., Lewis P., & Thornhill A. 2009. *Research methods for business students*, 5th edn. Prentice Hall, New York.
- Saunders, M., Lewis, P. & Thornhill, A. 2009. *Research methods for business students*, 5th edn. FT Prentice Hall, Harlow, England.
- Schmidt, C.W.H. and Rademeyer, H. 2006. *Bewysreg*. Butterworths, Durban.
- Schram, T.H. 2006. *Conceptualizing and proposing qualitative research*, 2nd edn. Pearson Education Inc., Upper Saddle River, NJ.
- Schutz, A. 1962. 'The Stranger', in Natanson, M. (ed.), *Collected Papers*, The Hague, vol. ii.
- Schwandt, T.A. 2007. *The dictionary of qualitative research*, 3rd edn. Sage Publications, Thousand Oaks, CA.
- Schwikaard, P.J. 1999. *Presumptions of innocence*. Juta Legal and Academic Publishers, Cape Town.
- Schwikkard, P.J. and Van der Merwe, S.E. 2009. *Principles of evidence*, 3rd edn. Juta and Co., Cape Town.
- Scott, D., and Morrison, M. 2007. *Key ideas in educational research*. Bloomsbury Academic, London.
- Scott, D., and Usher, R. 2011. *Researching education: data methods and theory in education enquiry*. 2nd edn. Bloomsbury Academic, London.
- Scott, D. and Usher, R. 2011. *Researching education: data methods and theory in education enquiry*, 2nd ed. Continuum, London.

Shakespeare, W. 1963. 'As you like it' in *The works of William Shakespeare gathered into one volume*, Sir Paul Harvey edn. Oxford University Press, New York. Pp 611, 622.

Shank G., and Brown L. 2007. *Exploring educational research literacy*. 1st edn. Routledge, New York.

Shiner R.A.1990. 'Philosophy of law', in *Cambridge dictionary of philosophy*. Cambridge University Press, New York.

Sillars, S. 1988. *Success in communication*. Murray Limited, New York.

Solomon, R.C. 1990. *A Passion for justice: emotions and the origins of social contract*. Rowman and Littlefield Publishers.

Strauss, A.L. and Corbin, J. 1990. *Basics of qualitative research: grounded theory procedures and techniques*. Sage Publications, Newbury Park.

Struwig, F.W., and Stead, G.B. 2001. *Planning, designing and reporting research*. Pearson Education, Cape Town, South Africa.

Tapper C. 2001. Cross and Tapper on Evidence. 11th edn. Oxford University Press p.1.

Teddlie, C. & Johnson, B. 2009. 'Methodological thought since the 20th century' in Teddlie, C. & Tashakkori A., (eds). *Foundations of Mixed Methods Research*. SAGE, London. pp. 62-82.

Terre Blanche, M., Durrheim, K. and Painter, D. 2006. *Research in practice: applied methods for social sciences*. UCT Press, Cape Town.

Thiétart, R. (ed.) 2007. *Doing management research: a comprehensive guide*. SAGE, London.

Thornton, H. 1995. *Hung jury: The diary of a Menendez Juror*. Harper and Row, New York.

Twining, W. 1973. *Karl Llewellyn and the realist movement*. Cambridge University Press, Cambridge.

- Valle, R.S. and Halling, S. (eds.) 1993. *Existential-phenomenological perspectives in psychology: exploring the breadth of human experience*. Plenum Press, New York.
- Van Blerk, A. 1996. *Jurisprudence: An introduction*. Butterworths, Durban, South Africa.
- VanderVoort, L.A., & Duck, S.W. 2003. 'In appropriate relationships and out of them: The social paradoxes of normative and non-normative relational forms', in Allan, G.A.,
- Van Shoor, M. 1986. *Wat is Kommunikasie?* J.L. van Schaik (Edms) Bpk, Pretoria.
- Welman, C., Kruger, F. & Mitchell, B. 2009. *Research methodology*, 3rd edn. Oxford University Press, Cape Town.
- White, C.J. 2005. *Research: a practical guide*. Nthuthuko Investments Publishing, Pretoria.
- Willis, J. 2007. *Foundations of qualitative research: interpretive and critical approaches*. SAGE, Thousand Oaks, California.
- Wisker, G. 2008. *The postgraduate research handbook*, 2nd edn. Palgrave MacMillan, Basingstoke, Hampshire.
- Yin, R.K. 2011. *Qualitative research from start to finish*. Guilford Press, New York and London.
- Zeffert, D.T. & Paizes A.P. 2007. *The South African law of evidence*, 2nd edn. LexisNexis, Durban.

Articles

- Banakar, S. June 2000. Reflections on the methodological issues of the sociology of law. *Journal of Law and Society*, vol. 27, no. 2, pp 273-295.
- Barge, K., Schlueter, D.W., & Pritchard, A. 1989. 'The effects of non-verbal communication and gender on impression formation in opening statements', *Southern Communication Journal*, vol. 54, no. 4, pp. 330-349.

- Berger, C.R., & Calabrese, J. 1975. 'Some explorations in initial interaction and beyond: toward a developmental theory of interpersonal communication', *Human Communication Research Journal*, vol. 1, no. 2, pp. 99-112.
- Blanck, P.D. 1991. 'What empirical research tells us: studying judges' and juries' behaviour. *American University Law Review*, Winter, vol. 40, no. 2. pp. 775-804.
- Blanck, P.D., Rosenthal, R., & Cordell L.H. 1985. 'The appearance of justice: judges' verbal and non-verbal behaviour in criminal jury trials', *Stanford Law Review*, vol. 38, no. 1, pp 89-164.
- Bothwell, R.K. & Jalil, M. 1992. 'The credibility of nervous witnesses', *Social Behaviour and Personality*. Vol 7, no. 4, pp. 581-586.
- Bromley, D.B. 1990. 'Academic contributions to psychological counselling: a philosophy of science for the study of individual cases', *Counselling Psychology Quarterly*, vol. 3, no. 3, pp. 299-307.
- Browning, P.L. 1976. *Rehabilitation and the retarded accused*. Charles C. Thomas Publisher, Springfield IL., USA.
- Carter J.C. 1890. 'The provinces of the written and unwritten law', *AM Law Review*, vol. 24.
- Condon, W.S. & Ogston, W.D. 1966. 'Sound film analysis of normal and pathological behaviour patterns', *Journal of Nervous and Mental Disease*, vol. 143, pp. 338-347.
- Cotterrell, R. 1986. 'Law and society: notes on the constitutions and confrontations of disciplines', *Journal of Law and Society*, vol. 13, pp.9-34.
- Cotterrell, R. 1998. 'Why must legal ideas be interpreted sociologically?' *Journal of Law and Society*, vol. 25, no. 2, pp.171-192.
- Council on Higher Education. 2015. *Higher Education Qualifications Sub-Framework: Qualification Standard for Bachelor of Laws (LLB)*.

Crossman, A. 2017. Qualitative Research; Definitions and Methods. Available at <https://www.thoughtco.com/qualitative-research-methods-3026555>.

Deitz, S.R, & Byrnes, L.E. 1981. 'Attribution of responsibility for sexual assault: The influence of observer empathy and accused occupation and attractiveness', *The Journal of Psychology*, vol. 108, pp. 17-29.

"Demeanour evidence as the backbone of the adversarial process" available at www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-837/demeanour-evidence-as-the-backbone-of-the-adversarial-pr. March 2014. Accessed on 22 March 2018.

Department of Correctional Services, RSA. 2005. White Paper on Corrections in South Africa.

Duke, C.R. 1974. 'Non-verbal behaviour and the communication process', *College Composition and Communication*, vol. 25, no. 5, pp397-404.

Duncan, S. 1969. 'Non-verbal communication', *Psychological Bulletin*, vol. 72, pp.118-137.

Efran, M.G. 1974. 'The effect of physical appearance on the judgment of guilt, interpersonal attraction and severity of recommended punishment in a simulated jury task', *Journal of Experimental Research in Personality*, vol. 8, no. 1, pp.45-54.

Ekman, P., Friesen, W.V. and O'Sullivan, M. 1988. 'Smiles When Lying', *Journal of Personality and Social Psychology*, vol. 54, no. 3, pp.414-420.

Ellis, A and Beattie, G, 1986. *The Psychology of Language and Communication*. Weidenfield and Nicolsen, London.

Fisher R. 2013. The Demeanour Fallacy. Available at www.robertfisher.co.nz/wp-content/uploads/2013/05/TDF.docx.

Fatt, J.P.T. 1999. 'It's not what you say, it's how you say it', *Communication World*, vol. 16, no. 6, pp.37-41.

Fiedler, D. 2001. 'Acting effectively in court: using dramatic techniques, B25 Champion Magazine, vol. 18, pp.42-46.

Franco J. 2014. 'Ethical Issues for Magistrates: Manual for Trainers', *Directory of Open Education Resources*, viewed 18 November 2017. <http://doer.col.org/handle/123456789/2299>

Fuller, F. and Quesada J. 1973. 'Communication in medical therapeutics', *Journal of Communication*, vol. 23, pp.361-370.

Galloway C.M. 1971. The challenge of non-verbal research. *Theory into Practice*. vol. 10, no. 4. p. 310-314. <http://dx.doi.org/10.1080.0040505847109542348>. Washington DC.

Hallahan, T. 1996. 'An overview of trial techniques', *Practical. Litigator*, vol. 5.

Halverson, A.M., Hallahan, M., Hart, A.J., & Rosenthal, R. 1997. 'Reducing the biasing effects of judge's non-verbal behaviour with simplified jury instruction', *Journal of Applied Psychology*, vol. 82, no. 4, pp. 590-598.

Hans, A. & Hans, E. 2015. 'Kinesics, haptics and proxemics: aspects of non-verbal communication', *IOSR Journal of Humanities and Social Science (IOSR –JHSS)*, vol. 20, issue 2, ver. IV, pp47-52.

Hemsley, G.D. & Doob, A.N. 1978. 'The effect of looking behaviour on perceptions of a communicator's credibility', *Journal of Applied Social Psychology*, vol. 8, pp.136-144.

Hyener, R.H. 1985. 'Some Guidelines for the Phenomenological Analysis of Interview Data', *Human Studies*, vol. 8, no. 3, pp.279-303.

Imwinkelried E.J. 1985. *Demeanour impeachment: Law and tactics*, 9 AM. J. Trial Advocacy. pp183, 186.

Jackson, B.S. 1968. 'Evolution and Foreign Influence in Ancient Law', *The American Journal of Comparative Law*, vol. 16, no. 3, pp.372-373.

Jacobson, M.B. 1981. 'Effects of victim's and accused's physical attractiveness on subjects judgments in a rape case', *Sex Roles*, vol. 7, no. 3, pp.247-255.

Johnson, R.B., and Onwuegbuzie, A.J. 2004. 'Mixed methods research: a research paradigm whose time has come', *Educational Researcher*, vol.33, no7, pp.14-26.

John Wayne and Lorena Bobbitt Trials: 1993 & 1994. Great American Trials. Retrieved 12 December 2017, from <http://www.encyclopedia.com/law-magazines/john-wayne-and-lorena-bobbitt-trials-1993-1994>..

Kennedy, D. 1994. 'A Semiotics of Legal Argument', *Academy of European Law*, vol. iii, no. 2, pp 309-365.

Kessler, M. 1995. 'Lawyers and social change in the postmodern world', *Law and Society Review*, vol. 29, pp. 769-789.

Kijurna, N. 2001. 'Lilly v Virginia: the confrontation clause and hearsay - "oh what a tangled web we weave"', *DePaul Law Review*, vol. 50 no. 4, pp.1133-1190.

Kulka, R.A. & Kessler, J.B. 1978. 'Is justice really blind? The influence of litigant physical attractiveness on judicial judgment', *Journal of Applied Social Psychology*, vol. 8, no. 4, pp.366-381.

Lefkowitz, M., Blake, R.R., & Mouton, J.S. 1955. 'Status factors in pedestrian violations of traffic signals', *Journal of Abnormal and Social Psychology*, vol. 51, no. 3, pp.704-706.

Leiter, B. 1999. 'Positivism, Formalism, Realism', *Columbia Law Review*, vol. 99, no.5, pp. 1138-1147.

LeVan, E.A. 1984. 'Non-verbal Communication in the Courtroom: Attorney Beware', *Law and Psychology Review*, vol. 8, pp.83-104.

Levenson, L. L. 2007. *Courtroom Demeanour: The Theatre of the Courtroom*, Accessed 21 March 2017. <http://ssrn.com/abstract=999471>

Livesey, C. 2011. "A" level sociology: a resource-based learning approach. Theory and methods' *Unit M3: Methodologies* [2]. Class notes, viewed 13 December 2017, <http://www.sociology.org.uk/tmmeth2.pdf>

Milford, L.S. 2001. 'Non-verbal communication', *Litigation*, vol. 27, no. 4, pp.2-9.

Miller S. & Frederick M. 1999. 'How does grounded theory explain?' *Qualitative Health Research*, vol. 9, pp.538-541.

Mouton, J. 2001. *How to succeed in your Master's and Doctoral Studies. A South African Guide and Resource Book*. Van Schaik, Pretoria.

Murphy, C.M. 1997. 'Justice Scalia and the confrontation clause: a case study in originalist adjudication of individual rights', *American Criminal Law Review*, pp.1243 - 1251.

Murphy, P.W. 2002. 'There's No Business Like...? Some Thoughts on the Ethics of Acting in the Courtroom, 44 S', *Texas Law Review*, vol. 111.

Nau, D. S. 1995. 'Mixing methodologies: can bimodal research be a viable post-positivist tool?' *The Qualitative Report*, vol. 2, no. 3, pp1-6. Accessed on 20 November 2017. <http://nsuworks.nova.edu/tqr/vol2/iss3/3>.

Nelken, D. 1993. 'The truth about law's truth', *European Yearbook of the Sociology of Law*, pp.87-163.

Phillip, J. 2011. 'Attorney eye contact and control in the courtroom: Act 1', *Communication Law Review*, Aust Kennesaw State University. Pp.80-96. Accessed 15 November 2017. commmlawreview.org/Archives/v5i1/Attorney%20Eye%20Contact.pdf.

Pollitt, D.H. 1959. 'The right of confrontation: its history and modern dress', *Journal of Public Law*, vol. 381, pp388-389.

Remland, M.S. 1984. 'The implicit ad hominem fallacy: non-verbal displays of status in argumentative discourse', *Journal of American Forensics Association*, vol. 19, pp.79-86.

Remland, M.S. 1994. 'The importance of non-verbal communication in the courtroom', *Atlantic Journal of Communication*, vol. 2, no. 2, pp.124-145.

Riege, A.M. 2003 'Validity and reliability tests in case study research: a literature review with "hands-on" applications for each research phase', *Qualitative Market Research: An International Journal*, vol. 6, no. 2, pp.75-86, accessed 25 November 2017. <https://doi.org/10.1108/13522750310470055>.

Rieke, R. D. and Stutman R.K. 1990. *Communication in legal advocacy*. University of South Carolina Press, Columbia, SC.

Rockwell, P. & Hubbard, A.E. 1999. 'The effect of attorney's non-verbal communication on perceived credibility', *The Journal of Credibility Assessment & Witness Psychology*, vol. 2, no. 1, p. 1-13.

Rubenstein, A.M. 2006. 'Verdicts of Conscience: Nullification and the Modern Jury Trial', *Columbia Law Review*, vol. 106, pp.959-993.

Shaver, K. 1999. 'If Looks Could Convict, Clark's Presence May Sway Jurors', *Washington Post*, at B1.

Shuster, M.L. & Proven, A.D. 2011b. 'Victim Advocacy in the Courtroom: Persuasive Practices in Domestic Violence and Child Protection Cases'. Boston Mass, Northern University Press.

Singer, J.W. 1988. 'Legal Realism Now', *California Law Review*, vol. 76, pp. 465-544.

Tharenou, P., Saks, A.M., & Moore, C. 2007. 'A review and critique of research on training and organisational-level outcomes', *Human Resource Management Review*, vol. 17, pp.251-273.

Timasheff, N S. 1937. 'What is "Sociology of Law"?' *American Journal of Sociology*, vol. 43, no. 2, pp. 225-235.

Timony, J.P. 2000. 'Demeanour credibility', *Catholic University Law Review*, vol. 49, pp. 903-943.

Tobin, G.A. & Begley, C.M. 2004. 'Methodological rigour within a qualitative framework', *Journal of Advanced Nursing*, vol. 48, no.4, pp. 388–396.

Twining, W. 1973. *Karl Llewellyn and the Realist Movement*, p. 74. Weidenfield & Nicolson, London.

Twining W. 1973. *Karl Llewellyn and the Realist Movement*. Willmer Brothers Limited, Birkenhead, Great Britain.

UK essays November 2013. *Advantages and disadvantages of quantitative research psychology* essay, viewed: 12 December 2017, <https://www.ukessays.com/essays/psychology/advantages-and-disadvantages-of-quantitative-research-psychology-essay.php?cref=1>.

Walker A. 2014. 'Methods'. Unit M3: Methodologies[1]. Class notes. Accessed 21 October 2017. <http://www.sociology.org.uk/tmmeth1.pdf>.

Weber, M. 2012. 'Sociology of law', *Sociologia*, vol. 44 no.5, pp 621-637.

Weinstein, J.B. 1957. 'The laws attempt to obtain useful testimony', *Journal of Social Issues*, vol. 13, no. 2.

Wigmore, J.H. 1979. *Evidence*, vol. 274, no. 2, pp.119-120.

Wilkins, D.B. 1990. 'Legal realism for lawyers', *Harvard Law Review*, vol. 4, p 471.

Wizner, S. 1998. 'Is learning to think like a lawyer enough?' *Yale Law and Policy Review*, vol. 17, p. 583.

Zucker, D.M. 2009. 'How to do case study research". *Teaching Research Methods in the Humanities and Social Sciences*. Accessed 16 November 2017. <http://scholarworks.umass.edu/nursing_faculty_pubs/2>

Cases

Body Corporate of Dumbarton Oaks v Faiga 1999 (1) SA 975 SCA.

Cele v The State (AR191/13) [2016] ZAKZPHC 4; [2016] 2 All SA 75 (KZP). (12 January 2016).

Central News Agency, Ltd. v Schocher 1943 TPD 355.

City of Johannesburg Metropolitan Council v Patrick Ngobeni (314/11) [2012] ZASCA 55 (30 March 2012).

Cloete NO and Others v Birch R and another 1193 (2) PH F17 E at 51 quoted in *S v Shaw* ZAKZPHC 32: AR 342/10 (1 August 2011).

Commonwealth v Smith, 444 N.E.2d 374, 380 (Massachusetts 1983).

Director of Public Prosecutions, Gauteng v Pistorius (96/2015)[2015] ZASCA 204 (3 December 2015).

Estate Kaluzar v Braeuer 1926 AD 243.

Ferreira v Van Heerden and Others (3253/2009) [2014] ZAECGHC 29 (20 February 2014).

Government of Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46.

Hillen v Department of the Army, 35 M.S.P.B. 453, 458 (1987)

In re Murchinson, 349 U.S. 133,136 (1955)

Jafta v Schoeman and Others; Van Rooyen v Stoltz and Others 2005(2) SA 140

Johnson v Metz, 609 F.2d 1052, 1057 (2d Cir. 1979).

Kayamandi Town Committee v Mkhwaso 1991 (2) SA 630 (C).

Knox D'Arcy AG v Land and Agricultural Development Bank of SA (654/12) [2013] ZASCA 93 (05 June 2013).

Lee v Illinois 476 US 530, 540 (1986).

M v Vallabh (44326/13) [2017] ZAGPJHC 397 (24 November 2017).

M v H Ngada v S Supreme Court of Appeal 75/98. Judgment delivered on 9 March 2000.

Mattox v United States 156 US 237, 1895.

Medscheme Holdings (Pty) Ltd and Another v Bhamjee 2005 (5) SA 339 (SCA)

Menendez v. Superior Court (People) (1992) 3 Cal.4th 435, 11 Cal.Rptr.2d 92; 834 P.2d 786. [No. S017206. Aug 27, 1992.]

Miranda v State of Arizona 384 U.S. 436 (1966).

Modiga v The State (20738/14) [2015] ZASCA 94 (01 June 2015).

Mofokeng v The State (A170/2013) [2015] ZAFSHC 13 (5 February 2015).

Motor Vehicle Insurance Fund v Kenny 1984 (4) SA 432.

Munyai v The State (A109/2016) [2017] ZAGPJHC 121; [2017] 3 All SA 23 (GJ); 2017 (2) SACR 168 (GJ) (22 March 2017).

Ngada v S (CA 379/08) [2008] ECHC (16 March 2009) (unreported).

Ngema v S (AR 140/2006) [2006] KZNPD (2 February 2010). Unreported.

NLRB v Dinion Coil Co., 201 F 2d 484, 488 (2d Cir. 1952).

Nyamakazi v President of Bophuthatswana 1992 (4) SA 540 BGD at 5501.

People v Bizzell 2005 WL 2842055, at (Cal. Ct. App. 2005)

People v Franklin, 56 Cal. App. 3d 18,128 Cal Rptr. 94 (1976).

People v Hefner, 127 Cal. App. 3d 88, 91-92, 179, Cal. Rptr. 336, 337-338 (1981).

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC).

Prince v President of the Law Society of the Cape of Good Hope and Others 2002 (2) SA 794 (CC).

R v Abels 1948 1 SA 706 (O).

R v Haefele 1938 SWA 21.

R v Masemung 1950 2 SA 488 (A).

R v Mokeona 1932 OPD 79.

R v Mokwena 1940 OPD 130.

R v Momokela 1936 OPD 23, 24.

Ramokolo v The State (251/10) [2011] ZASCA 77 (26 May 2011).

S v Brown 2015 (1) SACR 211 (SCA).

S v Civa 1974 3 SA 844 (T).

S v Du Plessis 2012 (2) SACR 247 (GSJ).

S v Herbst 1980 (3) SA 1026 E.

S v Kelly 1980 (3) SA 301 (AD).

S v Mahlangu and Another (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012) p. 11.

S v Makhudu 2003(1) SACR 500 (SCA).

S v Martinez 1991 (4) SA 741 (NM). 758.

S v Mayo 1990 1 SACR 659 (E).

S v Minnies 1991 (3) SA 364 (NM). 376.

S v Motlala 1975 1 SA 814 TPD.

S v Mseleku 2006 (2) SACR 237 (N).

S v Nnasolu 2010 (1) SACR 561 (KZP).

S v Pretorius 1991 2 SACR 601 (A).

S v Rall 1982 (1) SA 828 (A).

S v Robiyana and Others (CC 55/2001) [2008] ZAECHC 107; 2009 (1) SACR 104 (Ck) (27 June 2008).

S v Shaw [2011] ZAKZPHC 32; AR 342/10 (01 August 2011)

S v Thebus Another [2003] ZACC 12; 2003 (6) SA 505 (CC).

S v Trainor 2003 (1) SACR 35 (SCA).

S v Zuma 2006 2 SACR 191 (W).

Santam Beperk and Vincent Biddulph 2004 (5) SA 586 (SCA).

Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA).

Steven Malcolm Musiker v The State (272/12) [2012] ZASCA 198 (30 November 2012).

The President of the Republic of South Africa v South African Football Union 2000 1 SA 1 (CC).

United States of America, Plaintiff-Appellee, v. Timothy James McVeigh, Accused-Appellant. No. 97-1287. United States Court of Appeals, Tenth Circuit.

Untermeyer v Freund 37 F. 342, 343 (S.D.N.Y. 1889).

Van Wyk v S (A417/2007) [2007] OFSPD (16 October 2008) unreported.

Vilakazi v The State (636/2015) [2015] ZASCA 103 (10 June 2016).

ANNEXURE A

ANNEXURE "A"



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE MAGISTRATE EMPANGENI
Private Bag X 20023, Empangeni, 3880
TEL : (035) 772 1711
FAX : (035) 792 2527

Ref: 2/1/5

RE: PERMISSION TO CONDUCT INTERVIEWS

This letter serves as permission for Kanagie Naidoo to carry out interviews at Empangeni Magistrate's court with Magistrate's and Prosecutors for the purpose of Research.

I trust you find this in order.

Kind regards

BG EHRENS
COURT MANAGER
EMPANGENI



ANNEXURE B

Information Sheet

Purpose of the Study: As part of the requirements for the LLD at the University of Zululand, I have to carry out a research study. The study is concerned with the Impact of demeanour and non-verbal communication/evidence on the verdict in a trial.

What will the study involve? The study will involve questions as to whether the role players in a trial actually do take demeanour and non-verbal evidence into account when arriving at the verdict, if so, to what extent and what guidelines, if any, exist to guide the interpretation of this type of evidence.

Why have you been asked to take part? You have been asked because you are a key role player in a trial.

Do you have to take part? You do not have to take part in the research. Your participation is totally voluntary. You will be asked to sign a consent form and you will get to keep the information sheet and a copy of the consent form. You have the option of withdrawing before the study commences (even if you have agreed to participate) or you may discontinue after data collection has started. Where data are identifiable (e.g. from interviews yielding qualitative data) you have the option to withdraw your contribution within two weeks of participation and you may ask to have the data destroyed.

Will your participation in the study be kept confidential? Yes. I will ensure that no clues to your identity appear in the thesis. Any extracts from what you say that are quoted in the thesis will be entirely anonymous.

What will happen to the information which you give? The data will be kept confidential for the duration of the study. On completion of the thesis, they will be retained for a limited period and then destroyed.

What will happen to the results? The results will be presented in the thesis. They will be seen by my supervisor, a second marker and the external examiners. The thesis

may be read by future students on the course. The study may be published in a research journal.

What are the possible disadvantages of taking part? I don't envisage any negative consequences for you in taking part. It is possible that talking about your experience in this way may cause some distress.

What if there is a problem? At the end of the interview, I will discuss with you how you found the experience and how you are feeling and if at that point you wish to withdraw your submissions then you may do so.

Who has reviewed this study? The Faculty Ethics Committee and the University Research Ethics Committee have reviewed this study.

Any further queries? If you need any further information, you can contact me: KANAGIE NAIDOO, student number 200906150, on 082 927 8749 or via email on naidooka@unizulu.ac.za

Consent Form to Participate in an Interview

I.....agree to participate in KANAGIE NAIDOO'S
(Student Number 200906150), University of Zululand) research study.

The purpose and nature of the study has been explained to me in writing.

I am participating voluntarily.

I give permission for my interview with Kanagie Naidoo to be recorded with the use of
an electronic device.

I understand that I can withdraw from the study, without repercussions, at any time,
whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data within two weeks of the
interview, in which case the material will be deleted.

I understand that anonymity will be ensured in the write-up by disguising my identity.

I understand that disguised extracts from my interview may be quoted in the thesis and
any subsequent publications if I give permission below:

(Please tick one box:)

I agree to quotation/publication of extracts from my interview ☐

I do not agree to quotation/publication of extracts from my interview ☐

Signed.....

Date.....

ANNEXURE C

QUESTIONS FOR PRESIDING OFFICERS

1. How many years of experience do you have as a Presiding officer?
2. During the trial what are the key aspects that you focus on and take note of?
3. What do you take into account when deciding on what the judgment/verdict should be?
4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses? Explain.
5. Does the demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Explain.
6. If so, to what extent and how do you evaluate demeanour and non-verbal testimony?
7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?
8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

9. Do you think that training in this aspect will improve the quality of the judgments/verdicts and justice as a whole?

ANNEXURE D

UNIVERSITY RESEARCH ETHICS COMMITTEE

(Reg No: UZREC 171110-30)



UNIVERSITY OF ZULULAND

Website: <http://www.unizulu.ac.za>

Private Bag X1001
KwaDlangezwa 3886

Tel: 035 902 6645

Fax: 035 902 6222

Email: UzrecD@unizulu.ac.za

ETHICAL CLEARANCE CERTIFICATE

Certificate Number	UZREC 171110-030 PGD 2013/18					
Project Title	The impact of demeanor and non-verbal communication on the verdict					
Principal Researcher/ Investigator	K Naidoo					
Supervisor and Co- supervisor	Dr. WJ Ndaba			Prof. NC van den Bergh		
Department	Criminal Law and Evidence					
Nature of Project	Honours/4 th Year		Master's		Doctoral	x Departmental

The University of Zululand's Research Ethics Committee (UZREC) hereby gives ethical approval in respect of the undertakings contained in the above-mentioned project proposal and the documents listed on page 2 of this Certificate. Special conditions, if any, are also listed on page 2.

The Researcher may therefore commence with the research as from the date of this Certificate, using the reference number indicated above, but may not conduct any data collection using research instruments that are yet to be approved.

Please note that the UZREC must be informed immediately of

- Any material change in the conditions or undertakings mentioned in the documents that were presented to the UZREC
- Any material breaches of ethical undertakings or events that impact upon the ethical conduct of the research

The Principal Researcher must report to the UZREC in the prescribe format, where applicable, annually and at the end of the project, in respect of ethical compliance.

ANNEXURE E

Transcripts of Interviews with Participants 1 – 10

INTERVIEW 1

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 07/09/2017 and you are my first interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase *“Justice should be seen to be done”* is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview; whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 1:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 1:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 1:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 1:

17 years

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 1:

The credibility, reliability and trustworthiness of each and every witness that testifies before me.

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 1:

The totality of evidence probabilities and improbabilities on either party's case or final picture painted by evidence.

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 1:

Yes I do. The demeanour and non-verbal testimony is a very wild horse to ride. One has to approach and deal with it with utmost caution as there are a number of factors to

be considered. The golden rule is that whilst demeanour and non-verbal testimony maybe indicative of a fact, it is not decisive.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain,

Participant 1:

It does, but it is not decisive, it is only a factor among others that need to be taken into consideration in reaching the final decision.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 1:

Firstly one has to understand the demeanour before one can evaluate it. Moreover one has to be convinced whether in the given scenario is there a need for verbal/oral testimony before one can draw inferences following the rules pertaining to inferences drawing.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 1:

This again depends on a number of factors given the fact that the right to remain is entirely in the constitution. Accused has no duty to assist the state to prove his guilty otherwise the right to silent will be meaningless.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 1:

Not really but experience one the years of presiding and trying to understand the different cultures in our midst.

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 1:

I am sure it will! Precisely because one need to understand this kind of testimony before one can interpret it or even draw inferences or conclusions from it.

Even more so because of the provisions of the constitution and the rules of natural justice.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription

INTERVIEW 2

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 09/09/2017 and you are my second interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview; whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 2:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 2:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 2:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 2:

4 years

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 2:

APO should where possible record everything that is said/happens during trial. The *inaudible* is also referred to as *inaudible* of record. So record keeping is essential.

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 2:

Crucial question in criminal cases is whether or not the state has proved its case beyond a reasonable doubt.

In *inaudible* this one has to take into account all factors as per Singh's 1975 case and other cases.

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 2:

Yes – we've to observe the demeanour of witnesses – sometimes their demeanour makes/breaks their case.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain,

Participant 2:

Yes – but it depends on the extent of the non-verbal responses and demeanour. You can't decide on demeanour alone.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 2:

No comment...

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 2:

The accused has a right to remain silent, but it should be exercised with caution and if there is sufficient evidence against him/her and such evidence proves his/her guilt beyond a reasonable doubt and he/she remains silent – we'll be found guilty.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 2:

No comment...

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 2:

Yes

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription

INTERVIEW 3

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 11/09/2017 and you are my third interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview; whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 3:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 3:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 3:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 3:

7 years' experience

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 3:

Testimony of a witness/accused – whether it is clear, straightforward, vague.

Demeanour of the witness, in whether witness is confident or hesitant

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 3:

The evidence in its totality, corroboration, credibility, probabilities, improbabilities, strengths and weaknesses or both sides as well as demeanour of witness

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 3:

Yes for example if a witness takes long to answer simple questions or does not provide an answer to questions.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain,

Participant 3:

Each case depends on its own merits. In most instances it does. For instance where a witness fails to answer simple questions, fails to explain contradictions in his or her evidence confuses the evidence, does not answer questions and looks down - *inaudible* can draw an adverse inference

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 3:

Similar comments as in Question 5

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 3:

The failure to testify does not relieve the prosecution of its duty to prove guilt of the accused beyond a reasonable doubt. It's a risk that the accused takes that absent any rebuttal. The prosecution case may be sufficient to prove the elements of the offence.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 3:

Not really...

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 3:

It would most definitely be of value and will certainly improve the quality of the judgments that are presented presently.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription

INTERVIEW 4

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 12/09/2017 and you are my fourth interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview; whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 4:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 4:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 4:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 4:

15 years' experience – 11 years District Court and 4 years Regional Court

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 4:

1. Elements of the crime whether witnesses called by the state prove the elements of the offence
2. Credibility, reliability, trustworthiness, honesty and demeanour of witnesses i.e. both state and Defence
3. Correct procedures in respect of legal aspects raised by the state and Defence

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 4:

1. In a criminal trial, whether the state has proved its case beyond a reasonable doubt and if no whether the accused version is reasonably possibly true.
2. In evaluation evidence, take into account the credibility of witnesses, reliability, honesty, demeanour, probabilities and improbabilities. Look at the totality of the evidence in light of the witness testimony

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 4:

Yes

1. Demeanour will be taken into account, but I will look at it very carefully in light of the evidence presented. Also must take note of cultural differences as well when it comes to demeanour.
2. Non-verbal testimony of accused, will depend on the nature of the evidence presented.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain

Participant 4:

Yes, if one is dealing with a rape victim who is emotional and tearful, when one looks at the totality of the evidence this demeanour of the witness will play an important role. If an accused person is deliberately being arrogant refusing to answer questions, this demeanour can also be taken into consideration. If an accused person fails to give evidence where there is a *prima facie* case for him to meet, it may be to his detriment.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 4:

Demeanour is something the court will be very careful in taking into consideration. One must look at it in the context of the trial as well as cultural differences.

Non-verbal testimony of the accused, *inaudible* will look at the state case, to determine whether there is indeed a case for the accused to answer or not.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 4:

Where there is sufficient evidence (prima facie case) for the accused to, answer and in the face of this chooses to remain silent, it would be to his detriment. The accused should take the stand and give evidence.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 4:

Yes, in respect of non-verbal testimony of accused. In respect of demeanour very little training was received.

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 4:

Yes, training in respect of demeanour will clearly be of assistance, especially in South Africa where we have, diversity of cultures. We need to understand the cultures and be more attentive so that one does not misinterpret demeanour.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription

INTERVIEW 5

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 25/09/2017 and you are my fifth interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview, whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 5:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 5:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 5:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 5:

5 years

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 5:

1. Facts of the case
2. Admissibility of evidence presented
3. Law applicable

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 5:

1. Totality of evidence before court.
2. Credibility of the various factual witnesses, their reliability and the probabilities

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 5:

Yes. For the court's findings on the credibility of a witness will depend on its impression about the *inaudible* of the witness.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain

Participant 5:

To a certain extent. Each case must be decided on its merits. Different people act differently under the same circumstances.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 5:

Not every action/act made by a witness affects his credibility. In each case *inaudible* of fact has to take into account the type and/or background of the particular witness and other subsidiary factors such as the witness candour, his bias, latent and *inaudible*.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 5:

The accused is under no obligation to testify. It is the accused's right to remain silent but when the state's evidence strongly points to the guilty of the accused, the accused is expected to give evidence in rebuttal.

If the accused chooses to remain silent in the face of strong or such evidence, the court may be entitled to conclude that the evidence is sufficient to prove the guilt of the accused.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 5:

No

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 5:

Yes, one always learn more on training. Training is always essential to improve one's knowledge.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription**

INTERVIEW 6

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 27/09/2017 and you are my sixth interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview, whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 6:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 6:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 6:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 6:

+/- 10 years

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 6:

4. What is offence is
5. What evidence was led
6. How the witness behaved
7. How credible and reliable the witnesses were

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 6:

3. I take into account whether the state proved its case
4. How did the witnesses behave and react when they are questioned
5. When making my decision I will look at how honestly the witness testified, was he/she nervous etc.

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 6:

Yes, I take note of both the demeanour and the non-verbal testimony because I can see it and it forms part of the witness evidence and testimony.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain

Participant 6:

Yes demeanour and non-verbal testimony has an impact on the outcome but when taking it into account I have to consider the age, social status and cultural background of the witness.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 6:

Demeanour and non-verbal testimony cannot be evaluated on its own. It must be considered in the whole context of the trial together with other evidence and the behaviour of the legal representatives. Sometimes attorneys can intimidate witnesses.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 6:

The accused has a right to remain silent but if there is a case for him to answer to and he remains silent this cannot be ignored.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 6:

No, I didn't receive any formal training.

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 6:

Yes, it will help me to understand demeanour and non-verbal behaviour better and improve my ability to evaluate evidence,

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription**

INTERVIEW 7

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 28/09/2017 and you are my seventh interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview, whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 7:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 7:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 7:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 7:

More than 8 years in the Regional court.

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 7:

1. Whether the evidence led was sufficient to prove the elements of the offence
2. Was proper procedures followed?
3. The evidence of witnesses and their credibility and reliability.

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 7:

I look at whether the state proved its case. Also what witnesses said, how they testified. The behaviour of the witness during evidence in chief and cross – examination. Did the witness appear honest and is the evidence sufficient.

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 7:

Yes I do. As I said behaviour of the witness important. It is not only what they say but how they say it. Demeanour can show if the witness is lying or not.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain

Participant 7:

You were a prosecutor so you know that demeanour and non-verbal testimony does impact on the outcome because evidence must be evaluated in totality and in context.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 7:

When I deal with evidence of demeanour and non-verbal testimony, I am cautious because I have to consider aspects of cultural differences and socio-economic levels, age and intellect of the witness.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 7:

The accused has a right to remain silent but if there is enough evidence against him this can be detrimental to his case and he can be convicted.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 7:

No, I did not have formal training.

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 7:

Yes, because it will help me to evaluate this type of evidence properly and important aspects of demeanour won't be excluded because of lack of understanding, especially in rape matters.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription**

INTERVIEW 8

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 28/09/2017 and you are my eighth interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview, whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 8:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 8:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 8:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 8:

More than 30 years

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 8:

1. The key aspects are what evidence was presented during the trial to prove the elements
2. The manner in which the evidence was presented to assess credibility
3. Whether the proper procedures have been followed

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 8:

1. I take into account whether all the evidence was led and whether all the elements have been proven.
2. When evaluating the evidence I look at what the witness has said, how it was said and how he/she behaved during her or his testimony.
3. I look at the credibility and reliability of the witness

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 8:

Yes I take both into account but I have to be mindful of the context in which it takes place.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain

Participant 8:

Yes it does impact on the outcome of the trial because evidence must be considered in totality. Therefore when the witness is testifying I cannot observe his behaviour, expressions and reactions.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 8:

I am very cautious when taking demeanour and non-verbal behaviour into account because of diverse cultural and social and socio-economic issues that each witness comes into court with. Example: in Zulu culture you do not look a person in the face but one can look at it as lying.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 8:

It will depend on the amount of evidence that has been led against the accused. Because the accused has a right to remain silent, it will only have a negative impact if there is overwhelming evidence against him.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 8:

No. All I have is my practical experience.

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 8:

Yes. It most definitely will because it will enable presiding officers to more accurately evaluate this type of evidence will can demeanour and non-verbal communication. We can also be taught about certain cultural issues that might affect the behaviour and demeanour of a witness.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription**

INTERVIEW 9

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 01/10/2017 and you are my ninth interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview, whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 9:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 9:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 9:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 9:

+/- 21 years

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 9:

The elements of the offence(s), contradictions, corroborations, inconsistencies and demeanour.

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 9:

Evidence is very important so I take into account how strong the evidence is and what kind of witness the witness was and how they behave.

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 9:

Yes I do.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain

Participant 9:

Yes but to a certain extent. If witness takes unusually long time to answer clear questions it shows evasiveness and if he is argumentative.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 9:

It requires social context training to evaluate demeanour and non-verbal testimony of a witness.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 9:

If the accused elects to remain silent in the face of overwhelming evidence against him that may be a factor to be taken against him that he has no answers to the state's case.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 9:

To a certain extent yes – social context training

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 9:

Yes.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription**

INTERVIEW 10

Interviewer:

Good day. My name is Kanagie Naidoo and I am a Senior Lecturer and a Doctoral student at the University of Zululand. Today is the 02/10/2017 and you are my tenth interview.

The research topic I have chosen deals with the **Impact of nonverbal communication and demeanour on the verdict**. As an experienced practising attorney and as a lecturer in the Law of Evidence I have realised that the value of nonverbal communication and demeanour during a trial is often overlooked and sometimes misinterpreted in terms of its evidential value and it is for this reason that I have chosen it as a topic for my research.

The significance of the phrase "*Justice should be seen to be done*" is fast losing its place in trials and I am hoping that my research will force the role players in a trial to ensure that justice is indeed seen to be done.

My research scrutinizes cases and literature where the demeanour and non-verbal communication such as facial expressions, eye movements, physical appearance, body movements, etc., are exhibited by witnesses, attorneys, the accused and the presiding officer, during trial proceedings. A lot of the research indicates that nonverbal communication and demeanour is taken into account however there appears to be a lack of consistency in the way nonverbal communication and demeanour is dealt with by the courts.

Hopefully by the end of my research there will be enough information to formulate guidelines on how nonverbal communication and demeanour should be dealt with when evaluating evidence.

Taking into consideration that your function is to determine the outcomes of trials, I thought it would be appropriate to interview you as part of my research.

I would like to emphasise that the purpose of this interview is to ascertain your point of view on the **impact of nonverbal communication and demeanour on the verdict** and how this impacts on your evaluation of evidence.

I am hopeful that the results of my research will help formulate some guidelines on how lawyers and presiding officers deal with this type of evidential matter.

This interview should take no longer than 7 to 10 minutes. I just would like to put you at ease with regards to the privacy aspect of this interview, whatever is discussed will remain confidential and will only be used to advance research outputs.

Do you have time for me to interview you?

Participant 10:

Yes I do

Interviewer:

May I have your permission to record the interview mechanically to assist me with proper transcription later on?

Participant 10:

Yes you may

Interviewer:

Before we proceed can you please sign the informed consent form so I can use your responses in my research?

Participant 10:

Yes I will.

Interviewer:

Now that that aspect has been dealt with let's proceed to the questions?

Considering your position, I will not ask any personal questions but will simply get straight into the questions relating to my research.

1. How many years of experience do you have as a Presiding Officer?

Participant 10:

I have more than 10 years' experience

Interviewer:

2. During the trial what are the key aspects that you focus on and take note of?

Participant 10:

1. Did the state prove the case beyond reasonable doubt,
2. But how did the witness testify,
3. Were they good and honest witnesses,
4. The credibility and reliability of the witnesses

Interviewer:

3. What do you take into account when deciding on what the judgment/verdict should be?

Participant 10:

I look at the evidence as a whole, in other words, how did the witness behave or react when questioned, how did he testify? Was evidence spontaneous or was there hesitation and so forth.

Interviewer:

4. Do you take note of the demeanour and non-verbal testimony of the accused and witnesses?

Participant 10:

Yes I do. I know when I was a prosecutor I used to pay attention to this and use it in my argument. The demeanour of the witness can say a lot about whether the witness is being truthful or not.

Interviewer:

5. Does demeanour and non-verbal testimony of the accused and witness have an impact on the outcome of the trial? Kindly explain

Participant 10:

Yes it most definitely impacts on the outcome. You cannot ignore how the witness behaves while he is testifying. You know evidence must be considered in totality.

Interviewer:

6. If so, to what extent and how does one evaluate demeanour and non-verbal?

Participant 10:

The extent to which demeanour and non-verbal testimony impacts on the outcome depends on the cultural background of the witness, his socio-economic status, his age and also how the prosecutor or attorney treated the witness.

Interviewer:

7. What is your view on the accused remaining silent when arriving at a verdict where there is sufficient evidence against the accused?

Participant 10:

Choosing to remain silent when there is sufficient evidence against him is a bad choice for the accused because by doing this the only evidence is the state's evidence. Also his silence sometimes means that he has no explanation for what is being said.

Interviewer:

8. Did you receive any formal training that will assist you to understand the demeanour and non-verbal testimony?

Participant 10:

No I did not get any formal training, I use my experience.

Interviewer:

9. Do you think that training in this aspect will improve the quality of the judgments, verdicts and justice as a whole?

Participant 10:

Yes, most definitely because I will be able to do the evaluation correctly and appropriately.

Interviewer:

I would like to thank you for your time and I assure you that your details will be confidential. I hope that with your input and my research we can elevate the quality of our justice system. Thank you and have a pleasant day further.

End of Interview and Transcription**

ANNEXURE F



Transcribers Report

This report serves to verify that I, **Deshnee Chetty-Sherief**, MD of Mi-PA (Pty) Ltd – The Professional Office Assistant, Company Registration Number: **2013/223784/07**, have scripted the 10 transcriptions derived from the 10 interviews that Ms Kanagie Naidoo had conducted.

I assure you that they were written with accuracy and attention to detail.

I can be contacted for further information or clarity.

Regards



Deshnee Chetty-Sherief

Date: 18th November 2017