

Dignity in the Digital Age: Broadcasting the Oscar Pistorius trial

SECTION 1: INTRODUCTION

In the very early morning of 14 February 2013 Oscar Pistorius fired four hollow tipped ‘black talon’ bullets from a high-calibre weapon through a bathroom door in his house, killing his girlfriend Reeva Steenkamp. He would later say that he feared an intruder was inside his house, and he did not intend to kill Reeva. He was charged with murder and several firearms offences arising from unrelated incidents. Pistorius was an athlete, a gold-medal winning Paralympian and double-leg amputee. He also participated in non-disabled events including the 2011 World Championships and the 2012 Summer Olympics. Steenkamp was a law graduate who had an emerging career as a model and television personality. Whilst she was not well-known prior to her death, the identity of her killer and the tawdry nature of her death brought her posthumous celebrity. The facts of the case motivated an appellate judge to open his judgment with the statement: ‘This case involves a human tragedy of Shakespearean proportions’ (*Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204: [1]). The trial was broadcast across multiple media platforms, much of it live, generating intense public scrutiny and attention. Following the trial, Pistorius was convicted of the lesser offence of culpable homicide and sentenced to five years imprisonment (*S v Pistorius* [2014] ZAGPPHC 924).¹ On appeal, the verdict was replaced with a conviction for murder (*Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204), and he was sentenced to six years imprisonment (*S v Pistorius* [2016] ZAGPPHC 724). After another appeal, his sentence was increased to 13 years and five months (*Director of Public Prosecutions, Gauteng v Pistorius* [2017] ZASCA 158).

This article makes a contribution to cultural criminology, and the visual turn identified by Carrabine (2012, 2014, 2016), demanding critical engagement with manufactured spectacles of criminal justice. It draws upon the scholarship of Sherwin (2000, 2011), who points to the convergence of law and popular culture, their mutual reliance and their common tools and aspirations. Specifically, this article examines the live broadcast of the Pistorius trial to draw attention to the fragility of South Africa’s aspirations to both open justice and human dignity.

¹ He was also found guilty of a separate firearms offence, for which he received a wholly suspended sentence. Prosecutors lodged an appeal against both the verdict and the sentence. Whilst awaiting the appeal, and after having served only one year in prison, the South African parole authority ruled that Pistorius would spend the remainder of his sentence under correctional supervision, or house arrest, in his uncle’s home (BBC News, 2015).

As constitutional ideals driving South Africa's post-apartheid democratisation, both were challenged by the decision to broadcast the trial in a moment of old and new media transition, compounded by the trial's entanglement of race, privilege, disability, gendered violence and celebrity. The trial won the 2014 Newsmaker of the Year Award (see Section 4, below), and this article points to the difficulty of sustaining both open justice and human dignity in criminal proceedings in the digital age. Although audio and visual recording of 'notorious' criminal trials is not new (Sherwin, 2000), the live broadcast of the Pistorius trial raised unique considerations. As the Supreme Court of Appeal of South Africa stated recently: 'The *Pistorius* trial [...] changed irreversibly the manner in which the media and the justice system of our country converge' (*The NDPP v Media 24 Limited & others and HC van Breda v Media 24 Limited & others* [2017] ZASCA 97: [41]).

To date, the Pistorius trial and its broadcast has generated scholarship about new media (Knight, 2017; Scott, 2016; Van der Vyver, 2017), old media (Johnson, 2016; Maraise et al., 2014; Ndlovu, 2016), public trials (James, 2017), journalistic 'groupthink' (Phelps and Glenn, 2016), media portrayals of criminal trials (Johnson, 2016; Maraise et al., 2014; Ndlovu, 2016; Obbard and Cork, 2016; Phelps and Glenn 2016; Scott 2016; Van der Vyver, 2017), spectacles of gendered violence (Gunne, 2017), and media representations of disability (Bansel and Davies, 2014; Harvey, 2015; Ellis and Goggin, 2015; Swartz, 2013). The trial was said to represent a 'godsend' to the South African mainstream media which had experienced a severe contraction, generating jobs and revenue across the media spectrum (Chuma, 2016. See also Green, 2014).

This article draws this media scholarship into the context of law, specifically law's aspirations to open justice and human dignity, and particularly how in the digital age these might be achieved through specific media practices. Open justice requires that justice be seen to be done. Whilst conceptually this means that judicial practices and proceedings should be open to the public, in reality open justice largely serves media corporations, for whom courtroom events are valuable commodities. The Pistorius case unfolded in the specific context of South Africa, a nation still building its democratic institutions following its history of apartheid.² The post-apartheid Constitution provides a framework for achieving social transformation, and open justice plays an important role in it. Whilst transparency and accountability – both vital

2 For a detailed examination of open justice in South Africa and internationally, see *The NDPP v Media 24 Limited & others and HC van Breda v Media 24 Limited & others* [2017] ZASCA 97.

principles for open justice – are important attributes of post-apartheid governance, so too are human dignity, equality and freedom. All of these values together have constitutional force, and the decision to broadcast the Pistorius trial demanded that they somehow survive concurrently. Amid concerns about sensationalism and voyeurism, the broadcast of the Pistorius trial functioned as a constitutional experiment, testing the role of open justice in national transformation. This article shows how these ideals, in the ensuing media spectacles generated by the broadcast of the trial, instead of surviving and flourishing, became hopelessly tangled.

South Africa's history of racial inequality has been deeply embedded within its criminal justice system. Further, its criminal justice system has been incapable of addressing its epidemic of gendered violence, and South Africa has the world's highest rates of rape and spousal homicide (Goldblatt 2018; see also Smythe 2015). Given this backdrop, the live broadcast of a sensational trial provided an opportunity to shine a light on how criminal justice was really administered in contemporary South Africa. With both Pistorius and Steenkamp occupying racially privileged positions, with their white Afrikaner heritage, the principles of open justice would enable the public to assess the post-apartheid achievement of equality before the law.

In large part, the decision to broadcast the trial was supported by claims upon the new South African Constitution, which came into effect in 1997, and which had the aim of dismantling apartheid and achieving democracy through the restoration of dignity. As expressed by Arthur Chaskalson (2000: 199) in a lecture shortly before he became Chief Justice of South Africa, the Constitution demands that 'our society be transformed from the closed, repressive, racial oligarchy of the past, to an open and democratic society based on human dignity, equality and freedom'. Dignity, in South Africa, is not only a value but 'a justiciable and enforceable *right* that must be respected and protected' (*Dawood & Another v Minister of Home Affairs & Others, Shalabi & Another v Minister of Home Affairs & Others, Thomas & Another v Minister of Home Affairs & Others* [2000] ZACC 8: [35]; see also Cornell, 2008:18).³ The South African jurisprudence of dignity contains repeated resolute statements, demanding that dignity be deployed to 'contradict our past', 'to inform the future', and to demand 'respect for the intrinsic worth of all human beings' (*Dawood & Another v Minister of Home Affairs & Others, Shalabi*

³ Human dignity, the achievement of equality and the advancement of rights and freedoms are expressed in section 1 of the Constitution of the Republic of South Africa and reaffirmed in its Bill of Rights: Constitution of the Republic of South Africa, 1996 ss. 1, 7, 10.

& Another v Minister of Home Affairs & Others, Thomas & Another v Minister of Home Affairs & Others, [2000] ZACC 8: [35])

In post-apartheid South Africa, human dignity has a unique and inalienable status, although there is debate over what it means and how to ensure it is given its fullest expression. The law reformer and judge sitting on the first Constitutional Court, Yvonne Mokgoro (1997), identified a distinctive South African jurisprudence of dignity connected to indigenous law. She explained how *ubuntu*, a humanistic philosophy of Southern Africa, embraced the values at the heart of the Constitution, including ‘human dignity itself, respect, inclusivity, compassion, concern for others, honesty and conformity’ (Mokgoro, 1997: 7). *Ubuntu* appeared as a foundational principle in the interim Constitution in 1993, but does not appear in the text of the final Constitution. As expressed by the anti-apartheid activist and judge Albie Sachs (2007: 705), *ubuntu* means ‘I am a person because you are a person’. *Ubuntu* requires respect for the humanity of all people and, in the context of legal proceedings, aims to achieve the restoration of harmony and dignity, and to sensitise a wrong-doer to the hurtful impact of their actions (*Dikoko v Mokhatla* [2006] ZACC 10: [68]). *Ubuntu* requires case-by-case analysis, and attention to social relationships and practices examined in context (Mokgoro, 1997: 4). *Ubuntu* has also been critiqued as a ‘nationalist ideology’, the glorification of ‘an imagined past’, and as essentialising African cultures and communities; it has also been implicated as an expedient tool in the ‘colonial project’ (see Chasi and Rodny-Gumede, 2016).

The digital age, abetted by new media technologies, poses new and rapidly-shifting challenges to existing debates about cameras in courtrooms, media portrayals of criminal justice, voyeurism, sensationalism and misinformation (Sherwin 2000, 2011; Jewkes 2015; Jewkes and Linnemann 2018). In an exploding field of scholarship, this article focuses closely on the interplay between the contemporary mediascape and South Africa’s constitutional aspirations, through its analysis of the broadcast of the Pistorius trial. In this case, the media was held up as a promising conduit for freedom, equality and dignity, although this view had critics from the outset. According to the South African columnist Danielle Bowler (2014),

Reeva Steenkamp's death has been turned into something that has market value. The proliferation of books on the trial, from journalists to ex-girlfriend's mothers and now Steenkamp's own mother, raises a question about the limits of journalistic ethics, the influence of capitalism, our supposed right to see it all, and concern for how to give Steenkamp a voice and maintain her dignity.

The Oscar Pistorius case unfolded in a complex cultural, legal and technological environment, entangling constitutional ideals with commercial media imperatives, compounded by the seemingly limitless affordances of the digital age. These were further tested by a concatenation of intersecting themes: race, gender, disability, privilege, violence, celebrity, sport, fear, guns and national identity (see Chari, 2017: 837-840). In this article, the jurisprudence underlying the decision to broadcast the trial is examined alongside an analysis of the broadcast itself. Focusing on specific events in the trial, the manner in which they were broadcast, and the media reportage of them, the article evaluates these events against the constitutional aspirations that justified the broadcast in the first place. Section 2 sets out the pre-trial processes, and the careful judicial consideration of whether and how to broadcast the trial in order to enhance open justice and human dignity. Section 3 analyses the trial itself, and particular events during the trial which demanded specific media management in order to preserve open justice and dignity. In section 4, the article evaluates the legacy of the trial, its contributions to broader public understanding of criminal justice in South Africa, and the lessons learned from the difficulties in reconciling open justice and human dignity.

SECTION 2: PRE-TRIAL

Before the murder trial could begin, the High Court of South Africa in Pretoria was asked to rule on whether media agencies could access all of the evidence as it was presented in the courtroom, in order to broadcast the trial live across various media platforms. Whilst it was not the first time that South African courts were asked to broadcast their proceedings (*Afri-Forum & Another v Malema & Others* [2011] ZAEQC 2; *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO and Others* 2000(4) SA 973 (C); *Midi Television (Pty) Ltd t/a e-TV v Downer and Others* [2004] ZAKZHC 15; *SA Broadcasting Corporation Ltd v Thatcher and Others* [2005] ZAWCHC 63), this application resulted in a 24-hour news channel, and multiple online sites, providing around-the-clock access, coverage and commentary on the trial as it unfolded. The decision confirmed Sherwin's assessment that, in the digital age 'law is a co-producer of popular culture' (2000: 5).

The media application was adjudicated in *Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37, with other applicants including Combined Artistic Productions CC, Primedia Broadcasting (a division of Primedia (Pty) Ltd), Media 24 Limited, Times Media Group Limited, and Independent News and Media

Limited. Together, the applicants represented corporations across the media spectrum: radio, newspapers, magazines, news production, television production, pay-television, internet subscription platforms and digital content publishers.

The media application was articulated through constitutional arguments asserting the right to freedom of expression. The South African Constitution guarantees freedom of expression, which includes the freedom of the press and other media, and also the freedom to receive and disseminate ideas and information (Constitution of the Republic of South Africa, 1996 s. 16; *Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [6]). The Constitutional Court has given wide scope to the right to freedom of expression, finding that it ‘lies at the heart of a democracy’, and is ‘a guarantor of democracy’ (*South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC): [7]). The freedom is implicit in recognising and protecting ‘the moral agency of individuals’ and in facilitating ‘the search for truth’; it enables citizens to ‘hear, form and express views freely on a wide range of matters’ (*South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) [7]). Recent jurisprudence gives rise to legitimate concerns, however, that freedom of expression has come to dominate other principles, including dignity and privacy, with the effect that commercial media interests will inevitably, constitutionally, outstrip matters of humanity, compassion, respect and integrity. As a recent South African court stated, ‘the right of the public to be informed is one of the rights underpinned by the value of human dignity’ (*The NDPP v Media 24 Limited and others and HC van Breda v Media 24 Limited and others* [2017] ZASCA 97: [16]). The tethering of human dignity to commercial media agencies might explain why South African courts now regard the demands made by open justice as ‘uncharted constitutional territory’ (*The NDPP v Media 24 Limited and others and HC van Breda v Media 24 Limited and others* [2017] ZASCA 97: [8]).

In opposing the media application to broadcast his trial, Oscar Pistorius argued that the live broadcasting in any medium would infringe his right to a fair trial. The right to a fair trial is constitutionally guaranteed, and demands that every accused person be granted the ‘foundational values of dignity, freedom and equality which are central to a fair trial’ (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [13]). The Constitutional Court has regarded the right to a fair trial as ‘a comprehensive right’, demanding ‘substantive fairness’, and requiring ‘justice to be done and also to be seen to be done’ (*S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC): [9], [11]). Superior courts in South Africa have, in the past, balanced freedom of expression

arguments advanced by media agencies against the right to a fair trial (*South African Broadcasting Corporation Limited v Downer NO and Shaik* [2006] ZASCA 90; *South African Broadcasting Corporation Ltd v The National Director of Public Prosecutions* [2006] ZACC 15; *SA Broadcasting Corporation Ltd v Thatcher and Others* [2005] 4 ALL SA 353 (C)).⁴

In articulating his right to a fair trial, Pistorius further argued that ‘the mere knowledge of the presence of audio visual equipment’ in the courtroom would inhibit him, his witnesses and his counsel (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [12]). He also expressed concerns that, through the broadcasts, witnesses who had not yet been called to testify would be able to hear the evidence already presented, and ‘fabricate and adapt their evidence’ with this knowledge (14).

The judge presiding over the media application was Judge President Dunstan Mlambo. In *Multichoice*, Mlambo made clear from the opening paragraph of his judgment that his decision would be guided by foundational constitutional principles: the various rights of the accused person, the obligations of the prosecution, the rights of the media, and the principles of open justice. He described these as ‘critical constitutional rights that are seemingly on a collision course with one another’ (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [1]).

Judge President Mlambo’s judgment contained important remarks about the role of the media in achieving the objectives of open justice, and particularly the role of the media in a society with stark inequalities. He took judicial notice of the way most South Africans felt about the criminal justice system; that is, he accepted without evidence the fact that ‘the justice system is still perceived as treating the rich and famous with kid gloves whilst being harsh on the poor and vulnerable’ ([27]). Judge President Mlambo found merit in the arguments made by the media organisations that live broadcasting had the effect of democratising the proceedings, and access to information about the trial.

Whereas the prevailing media access rules permitted journalists to use Twitter from within the courtroom, Judge President Mlambo described this as a tool with ‘minority access’, serving only a ‘small segment’ of the community ([21]). Instead, he argued, ‘the community at large’

⁴ One of these cases resulted in limited coverage of the trial being permitted by media agencies (*SA Broadcasting Corporation Ltd v Thatcher and Others* [2005] ZAWCHC 63); in the other, the court refused the media application in its entirety (*South African Broadcasting Corporation Limited v Downer NO and Shaik* [2006] ZASCA 90). This decision was upheld on appeal to the Constitutional Court (*South African Broadcasting Corporation Ltd v The National Director of Public Prosecutions* [2006] ZACC 15).

relies upon the work of journalists, which he described as producing ‘summarised versions’ of the proceedings ([21]). He went on to describe the profession of court journalism as producing ‘second hand’ accounts of proceedings, ‘liable to be inaccurate’, and dependent upon the ‘understanding and views’ of the reporter ([21]). Instead, he preferred that members of the public should have a ‘first-hand account’ of proceedings, by which he meant a live broadcast of either audio or video or both ([27]). He did so because, ‘in a country like ours where democracy is still somewhat young’, the poor majority perceive that that the justice system favours the rich ([27]). Since the Pistorius trial would involve ‘a local and international icon’ and ‘celebrity’, a live broadcast of the trial would counteract these widespread ‘negative and unfounded perceptions about the judicial system’ ([27]).

Significantly, the objectives of open justice, according to Judge President Mlambo, would be best achieved by broadcasting the trial live and *un*-mediated. That is, he felt that the poor majority which held the criminal justice system in disrepute ought to see and hear for themselves what was happening within the courtroom, and form their own views about it. Second-hand and inaccurate interpositions of journalists and reporters would stand between citizens and accurate court information. He wrote:

it has come to my attention that there are media houses that intend to establish 24 hour channels dedicated to the trial only and that panels of legal experts and retired judges may be assembled to discuss and analyse proceedings as they unfold. Because of these intentions, it behoves me to reiterate that there is only one court that will have the duty to analyse and pass judgment in this matter. The so-called trial by media inclinations cannot be in the interest of justice as required in this matter and have the potential to seriously undermine the court proceedings that will soon start as well as the administration of justice in general ([28]).

Judge President Mlambo ordered that audio and video recording equipment be installed in the courtroom; his judgment included annexures that showed small photographs of the approved cameras (Annexure A) and diagrams showing where they were to be positioned within the courtroom and control room (Annexure B). His judgment included technical specifications about the cameras and how they were to be installed (‘unobtrusive’), controlled (‘remotely controlled’) and focused (‘no extreme close-ups’; ‘only by way of a ‘wide shot’’) (Orders 2.1–2.4, 6.3). There would be no ‘movie lights’, no flashes, and they were not to emit any visible or audible lights or signals (Order 2.7). The presiding judicial officers and court managers

could visit the control room to satisfy themselves that the images met the objectives of the judgment (Order 2.9). He permitted that the entire trial could be live broadcast in audio only, but that live audio-visual broadcasting was limited to specific events during the trial.⁵ Still photography would be permitted during the trial, in a manner ‘as unobtrusive as possible’, with cameras controlled by photographers ‘who will at all times remain behind the cameras while court is in process’; no extreme close-ups, no flashes, no cabling on the floor, no lens or film changes during proceedings, and the equipment and its operators’ clothing were not to bear any names, marks, logos or symbols (Order 5). They would be permitted to take still photographs during the entire trial, excluding photographs of the accused or his defence witnesses during their testimony (Order 5.10). Any other witnesses, except experts testifying for the state, or police officers, could object to being photographed whilst testifying, or else they could place reasonable conditions upon any photography, including having their face obscured or only permitting wide-angle photographs to be taken (Order 5.10–5.12).

These detailed requirements and prohibitions, whilst necessary and pragmatic, also had the effect of turning Judge President Mlambo into a de facto media producer and content manager. He attended to the aesthetics, visuality, acoustics and technologies of media production, and to the movements and appearance of the personnel who facilitated it. It gave the impression that he was implicitly choreographing a complex performance. Sherwin described this as ‘the jurisprudence of appearances’, in which the courts of law and the courts of public opinion collaborate to produce spectacles of justice (2000, 12). This offers a valuable insight into the workings of open justice, where the jurisprudence of transparency achieves its objectives through a multidisciplinary collaboration. It sees commercial media agencies, motivated by the profits attached to audiences, espousing principles of accountability in supporting their applications. At the same time, it demands that judicial officers overlook the reality that their

5 Order 4 reads: MultiChoice and Primedia are permitted to broadcast the audio-visual recording of the following portions of the trial only, in live transmissions, delayed broadcasts and/or extracts from the proceedings:

- 4.1 Opening argument of the state and accused;
- 4.2 Any interlocutory applications during the trial;
- 4.3 The evidence of all experts called to give evidence for the state, excluding evidence of the accused and his witnesses;
- 4.4 The evidence of any police officer or former police officer in relation to the crime scene;
- 4.5 The evidence of all other witnesses for the state unless such a witness does not consent to such recording and broadcasting and the presiding judge rules that no such recording and broadcasting can take place;
- 4.6 Closing argument of the state and the accused;
- 4.7 Delivery of the judgment on the merits; and
- 4.8 Delivery of the judgment on sentence, if applicable.

courtroom is a lucrative commodity. The administration of *open* justice – as happened here – is not the same thing as the proper administration of justice, which is a foundational requirement of a society founded upon the rule of law. Whilst the media applicants sought to fill the courtroom with broadcasting equipment and personnel, it was never actually demonstrated that these would facilitate the constitutional aspirations of accountability and transformation. Certainly once the trial commenced, Judge President Mlambo’s concerns about the danger of a ‘trial by media’ became well-founded.

Attempting to anticipate these dangers, Judge President Mlambo ruled that if at any time the presiding judge determined that the presence of the equipment, or the recording, transmission or broadcasting interfered with a witness’s right to privacy or dignity, or to the accused’s right to a fair trial, the judge could order that the media agencies cease recording, photographing, transmitting or broadcasting (Order 8).

Setting the tone for a media sensation, Judge President Mlambo’s judgment noted that Pistorius and Steenkamp had a ‘romantic relationship’ and that Steenkamp ‘lost her life’ on a date ‘recognized by many as Valentine’s Day’ ([2]). Again, he demonstrated his realisation that, in defending the constitutional principle of open justice, he was also complicit in preparing the scene for a televisual tragedy to unfold. He knew that he was delivering to media agencies a captive audience, eager to witness the spectacle of the wheels of justice turning in real-time. He recalled that, during Pistorius’ bail application, the Magistrates Court experienced a ‘near chaotic situation’ when members of the press and the public could not be accommodated within the courtroom, and foresaw that ‘scores of journalists’ from around the world would be covering the trial ([5]). He noted that the media applicants were relying, in their application, upon the status of Pistorius as ‘a local and international icon’ and Steenkamp as ‘similarly placed’ ([4]). Summarising the position of the media agencies, he said that the criminal proceedings to date had ‘captured the attention and imagination of both the South African and international communities’, and so they sought permission to ‘record and inform’ the public ‘as exhaustively as possible’ ([4]).

Having identified ‘a clear contestation’ of constitutional rights ([14]), fundamental rights ‘seemingly on a collision course with one another’ ([1]), Judge President Mlambo explained that section 173 of the Constitution demanded that he undertake a balancing exercise to resolve the conflict, ensuring that the interests of justice are upheld ([14]–[15]). The interests of justice embrace an accused person’s right to a fair trial, but would also encompass the rights and

obligations of the prosecution, and any other interested party ([17]). The balancing exercise inevitably results in the amplification of one right and the attenuation of another. South African courts have stated that it is not a matter of one right trumping another, but rather that they be reconciled, as ‘all protected rights have equal value’ (*Midi Television (Pty) Ltd t/a e-TV v Director of Public Prosecution (Western Cape)* [2007] ZASCA 56: [9]). Pistorius argued that his right to a fair trial demanded the constriction of both the freedom of expression rights asserted by the media agencies, and also of the principle of open justice (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37 [18]). Judge President Mlambo, however, took the view that all of the rights needed to find ‘proper expression’ and that none of them should be ‘unduly limited’ ([19]). He stated: ‘My task is to look at each right at stake and permit its enjoyment to achieve the objective for which it is asserted’ ([19]).

For Judge President Mlambo, the key issue for determination was not whether or how to permit specific forms of recording or broadcasting, but how best to facilitate public information and education about the functioning of the courts (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [20]). Reasoning in this way, Pistorius’ position that no media equipment be permitted in the courtroom would have the effect that the majority of the community would not have access to accurate information about the trial, as they would be reliant upon the ‘summarised’, ‘second hand’ ‘accounts’ that, for centuries, we have accepted as journalism ([21]). Put another way, Pistorius’ objections to the media application would ‘surely jettison the noble objectives of the principle of open justice’; Judge President Mlambo was unable to countenance ‘a stance that seeks to entrench the workings of the justice system away from the public domain’ ([22]).

The Constitutional Court had earlier ruled that the role of the Constitution was to ‘establish a society based on human dignity, equality and freedom and institutions of government which are open, transparent and accountable to the people whom they serve’ (*Geldenhuis v Minister of Safety and Security and Another* [2002] ZAWCHC 2: [45]). The Court had said that the publicity and openness of the courts provided not only knowledge and information about proceedings, but ensured that ‘the people can discuss, endorse, criticize, applaud or castigate the conduct of their courts’ (*S v Mamabolo* 2001 (3) SA 409 (CC): [29]). Whilst Judge President Mlambo no doubt had in mind sober civic discourse, he was also describing practices that could give rise to an atmosphere of sensationalism and voyeurism. Acknowledging that Oscar Pistorius himself, and also his witnesses, would be impacted by giving evidence in the

knowledge that they were being recorded or photographed, Judge President Mlambo ordered that their testimony not be recorded or broadcast in any visual medium, but that their testimony be audio recorded and broadcast on radio (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [25]–[26]).

SECTION 3: THE TRIAL

Following his plea of not guilty to murder, and not guilty to unrelated firearms offences, the trial of Oscar Pistorius commenced on 3 March 2014. As juries have been abolished in South Africa (Abolition of Juries Act 34 of 1969 (South Africa)), the presiding judge was Justice Thokozile Masipa, and she was assisted by two lay assessors.

A considerable amount of time during the trial was taken up with the management of media matters. This was done with considerable care, patience and sensitivity, and there were a number of instances where Justice Masipa was required to clarify or modify her orders. These issues were themselves live broadcast, and whilst they were neither telegenic nor compelling, they demonstrated the seriousness with which the court took the demands of open justice.

The court heard 49 days of evidence in the trial. The court gallery always appeared crowded, and there was another crowded ‘overflow’ court nearby, filled with international journalists. The live broadcast included long periods in which nothing happened, or where the media pack was seen to be amusing themselves to pass the time. Where broadcasting was not permitted, viewers watched a still photograph of Oscar Pistorius on their screen. Some of the testimony was delivered in Afrikaans through a court interpreter. Pistorius’ neighbours testified that they heard screams or an argument during the night of the shooting, with some discrepancy about whether it was a woman or a man screaming. Under cross-examination, they held fast to their evidence that the screaming occurred before the shooting. There was also evidence from the security guard and estate manager who responded to the shooting. Expert evidence was called by both prosecution and defence, from fields including ballistics, pathology, anaesthesiology, police forensics, acoustic engineering, forensic psychiatry, social work and sports medicine. The court also heard from the surgeon who had amputated Pistorius’ limbs when he was 11 months old. Pistorius himself gave evidence and was subjected to cross-examination for five days. The court heard testimony from one of Pistorius’ ex-girlfriends and his agent. The court was shown multiple text messages sent between Pistorius and Steenkamp via their iPhones and

using WhatsApp messaging. The bathroom door through which Steenkamp had been shot, and which Pistorius broke down with a cricket bat, was brought into the courtroom, as was the cricket bat; a forensics expert conducted an in-court demonstration with the bat. The South African Test cricketer, Herschelle Gibbs, viewing the trial on television, tweeted: ‘Just saw my signature on the bat used by the accused in oscar trial... lol #neveradullmoment’ (Rice, 2014).

Unsurprisingly, some of the most compelling and memorable evidence presented at the trial was visual evidence, including photographs and video footage. Both the prosecution and defence tendered evidence of this kind, and it was displayed on monitors in the courtroom. The monitors were visible to the witness box, prosecution and defence, the judge and assessors, as well as the gallery. The broadcast of the trial displayed the monitors, except when the judge prohibited such broadcasting. In addition to videos and images, the monitors were used to display the SMS (text) messages and WhatsApp messaging which was tendered into evidence. Through these visual technologies, Sherwin’s ‘visual sublime’ was evident, acknowledging that visual spectacles contain an ‘excess of meaning’, sometimes concealing a ‘formidable terror’, and that this ‘dazzling baroque labyrinth’ poses both a challenge and a thrill for creators and consumers of visualised law (2011, 3-5).

When police investigators first arrived at the Pistorius home after the shooting, photographs were taken of both Steenkamp’s body and of Pistorius himself. Steenkamp had been shot in the right thigh, the shoulder, and in the head. The fourth shot fired did not hit her. Those photographs were graphic and had very high impact, and Masipa J and both parties were vigilant about, and sensitive to, the effects of these images. According to David Smith, a journalist at *The Guardian*, June Steenkamp’s lawyer, Dup de Bruyn, had an agreement with the lead prosecutor Gerrie Nel that Nel would notify the Steenkamp family in advance of displaying any graphic images; Reeve’s mother, June, used this notification in order to avoid viewing those images during the trial (BBC 3 2014; Smith, 2014a).

Early on Day 6, Masipa J clarified her earlier order prohibiting the print media from broadcasting images and publishing photographs of some witnesses for the duration of the trial because the Court has ‘the duty to respect the dignity and privacy of witnesses who have taken the trouble to come and give their evidence’ (Hess, 2014: [9:39]; Livestream, 2014: [4:10]–[4:24]). The print media had complained that they were normally entitled to publish images of any witness after they have been excused, and Masipa J disagreed. She explained that this was not a ‘normal’ situation, and that a ‘cautious’ approach was demanded. She said that all

witnesses were vulnerable to having public perceptions of them altered by their having given evidence, and this was compounded for witnesses who were otherwise private people. She had been informed that two witnesses had been humiliated and attacked on social media after testifying, and she was motivated to protect their ‘private family life’ as well as their dignity and privacy. She also said that the state had a duty to protect state witnesses, and that duty continued until the conclusion of the trial.

Her ruling was that witnesses who were public figures could have their images published after they finished providing evidence at the trial, but images of witnesses who were not public figures, and who objected to their image being broadcast or published, could not be published for the duration of the trial. This ruling did not apply to audio broadcasting of their testimony, and there were no constraints upon journalists live tweeting their testimony. It also didn’t apply to broadcasting images of the public gallery. This decision was intended to conform with constitutional jurisprudence in which privacy and dignity are bound together, and that only famous people, in limited contexts, might have fewer privacy protections (*NM & Others v Smith & Others* 2007 (5) SA 250 (CC): 88). It had the effect of conflating privacy with dignity, as if it were somehow more dignified to hear – but not to see – a witness testifying, or as if privacy vested in one’s image but not one’s voice or speech. It also had the effect of placing into stark contrast the live broadcast of images and audio of Pistorius himself, and his visceral reactions to some of the evidence, and whether his dignity could have survived these events, which is discussed below. The Constitutional Court, in an earlier ruling on privacy, dignity and psychological integrity, recognised that its judgment involved ‘a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity’, regardless of whether constitutional or common law principles were applied (*NM & Others v Smith & Others* 2007 (5) SA 250 (CC): 31). In making the order in the Pistorius trial, Masipa J appeared to be holding the same principles in balance, and she ordered that the media agencies appoint an attorney to be present in court every day ‘to ensure that the cameras stick to the rules and to act as a point of contact person for complaints from either the state or the defence teams’ (Livestream, 2014: [8:30]–[8:47]).

The state prosecutor then made a special application to the Court to further restrict the broadcast of the testimony of state pathologist, Professor Gert Saayman, who had taken photographs of Steenkamp’s injuries whilst conducting an autopsy (Harding 2014; Smith et al., 2014; Youtube, 2014: [14:20]). The application was to prevent his testimony from being broadcast entirely, banning both audio and video, and also preventing any publication of the exhibits –

photographs – that he would show during his testimony. The application was framed in terms of ‘the respect and dignity of [...] the deceased’ and the ‘rights’ of Steenkamp’s family and friends, and an instance where press freedom, or freedom of communication, should be restricted. Whilst the court was not required to rule on the issue, there is no extant South African jurisprudence which recognises a right to dignity after death.⁶

The court waited for the media counsel, Nick Ferreira, to make his way through traffic to attend; when he arrived he made submissions about the ‘groundbreaking case’ before the court, and the ‘highly unusual trial’ that was unfolding (YouTube, 2014: [23:00]). Ferreira agreed that the dignity of the deceased and her family were a priority and suggested that the live broadcast be stopped for the duration of the pathologist’s evidence. He proposed a compromise position, which was that the media provide a summarised version, or package, of Saayman’s evidence to the parties and the court for approval and subsequent broadcast (YouTube, 2014: [22:15]–[27:32]). Ferreira argued that his approach addressed ‘the issues of sensitivity that the witness has raised’ and ‘accommodates all of the concerns which have been raised by the witness, it accommodates any possibility of infringement of dignity of the deceased or of any kind of trial-related prejudice that may occur as a result of the broadcast’ (YouTube, 2014: [25:14]–[26:21]). He continued:

And moreover [the media’s proposed approach] has the advantage of being the far less restrictive approach insofar as the media’s right to freedom of expression is concerned and insofar as the principle of open justice is concerned because it’s an approach which says ‘we do not ban in advance everything that this witness might say because we don’t know what he might say.’ It might be that some of his evidence is perfectly benign, doesn’t raise any concern at all. If so, there’s no good reason to limit the rights of freedom of expression or the principle of open justice insofar as that evidence is concerned. But it appropriately strikes the balance between the sensitivities which have been raised by the witness, and those important principles of freedom of expression and the principle of open justice (YouTube, 2014: [26:21]–[27:32]).

⁶ There is recognition that the right to life incorporates the right to dignity, and consideration given to the quality of one’s life (Ex parte Minister of Safety and Security: In re S v Walters and Another 2002 (2) SACR 105 (CC): [5]; S v Makwanyane and Another 1995 (3) SA 391: [326]–[327]). There is further recognition that ‘people who lack the capacity to cultivate the subjective aspects of dignity can nevertheless be said to have a type of dignity which demands respect’ (Feldman, 1999, 2000, 2002: 127).

Ferreira requested that the media retain access to the testimony, that live tweeting be permitted, and that the media broadcast an approved summary following the testimony. Defence counsel, Kenny Oldwage, was concerned about these delays and interruptions to his client's trial, and also made the point that the media's proposal that the parties collaborate on preparing a media package went far beyond their roles in the administration of justice. The prosecutor, Gerry Nel, in an effort to expedite the proceedings and, in his words, 'just to get the show on the road, m'lady', proposed a mutually-agreed live broadcast blackout (YouTube, 2014: [38:00]). The court made the order banning all live broadcasting in any medium, including live tweeting (YouTube, 2014: [50:47]). Masipa J said that Professor Saayman's testimony would be of an 'explicitly graphic nature' and should not be shown world-wide. The trial continued with journalists and the public remaining in the galleries.

However, the prosecutor then sought leave for Professor Saayman to address the court further about the ethical issues that would arise from the graphic and detailed nature of his evidence, given his professional duty not to do harm, and this was granted. Professor Saayman asked that his evidence not be broadcast because 'the very graphic details pertaining to some of the injuries and wounds which may be described have the potential to compromise the dignity of the deceased'; he further invoked 'the good morals of society' (Smith et al., 2014. See also Harding 2014).

During Saayman's testimony, some images were blocked from being displayed to the courtroom gallery or on certain monitors within the courtroom (Smith 2014b; Smith 2014c). Instead, images of the deceased were circulated around the courtroom rather than displayed on the courtroom monitors. Steenkamp's parents were forewarned about the 'gruesome' images that would be shown (BBC 3, 2014). During the lunch recess, Lulama Luti, a spokesperson for the Ministry of Justice, clarified the judge's order: summaries and paraphrasing were allowed after the testimony, but direct quotations and live reporting (including tweeting and blogging) were not permitted (Hess, 2014).

The constraints placed upon the reporting led to the outcome that a proportion of the reporting related to the constraints themselves. Following Sherwin's analysis of the 'gratification-based logic' that supports the public dissemination of legal processes, but also the 'anxieties', open justice and its limitations became a substantial topic in the reportage of the trial, which had been characterised by ongoing 'meta-reporting', in analysis conducted by Wallace Chuma (2016: 330; see Sherwin 2010: 12; Sherwin 2011: 3). For example, during Saayman's

testimony, when journalists were prevented from reporting live about his evidence, the News24 channel devoted to trial coverage included the following reports in its live news feed:

9:36 – And we've started. Judge Masipa is granting an order...

9:37 – Order regards witness images being used by media.

9:39 – Court has duty to respect witnesses' dignity and privacy, says judge Masipa.

9:40 – Judge says character of two witnesses attacked in social media after taking stand.

9:41 – Duty to protect witnesses until end of trial, says judge.

9:41 – Print media prohibited from publishing photos of witnesses irrespective of source.

9:43 – Judge Masipa grants court order allowing print media to publish photos of witnesses who are public figures once they have finished evidence.

9:44 – Judge also orders that no picture of objecting witnesses (who are not public figures) can be published for duration of trial.

9:44 – Roux (BR) starts cross-examining Pieter Baba (PB). [...]

12:04 – No live broadcast of evidence. Applies to twitter too, says judge.

12:13 – The UK Telegraph's Aislinn Laing has tweeted: 'In the absence of clarity from the judge, we'll try to update you on the Telegraph live blog but will be summarised.' Personally, I think this might not be best. Agree?

12:14 – Saayman has started giving his evidence but we can't tell you what it is because of the order.

12:32 – David Smith has quoted Judge Masipa as saying: When I referred to Twitter, I failed to refer to blogging as well. Twitter is not allowed, blogging is not allowed.

12:34 – To clarify: We can tell you, for instance, what OP's doing in court right now. We can't tell you what Saayman is saying while testifying though. Not now.

13:28 – Ministry of Justice says Saayman's testimony can be summarised but no direct quotes, tweets Debora Patta (Hess, 2014).

Following Saayman's testimony, journalists in the courtroom reported that Oscar Pistorius had vomited, gagged and retched repeatedly whilst hearing the evidence (Smith, 2014b). Whilst the gallery could not see the images shown by Saayman during his testimony, these would have been visible to Pistorius. The testimony and the images detailed the bullet wounds to Steenkamp's body, including the exit wounds and other marks and discolouration of her skin, which he testified was consistent with the impact of a bullet fired through a door (Smith, 2014b, 2014c). It included testimony that said the expanding bullets used by Pistorius had caused maximum tissue damage to Steenkamp's head, leaving fragments in her skull. The bullets were designed to 'open up, flatten out and mushroom when striking human tissue'; 'the usual result is it folds out like the petals of a flower. They were specifically designed by the manufacturers to have very sharp jagged edges. This projectile was designed to cause maximum damage. It has a black metal jacket' (Smith, 2014b).

Pistorius was described as 'hunched over' and with 'hands on his ears as if trying to block out the words', 'weeping and clasping his hands behind his neck' whilst he heard the testimony, and that Masipa J briefly adjourned proceedings twice to ask defence counsel Barry Roux to attend to his client (Smith, 2014c). She also asked whether Pistorius was able to hear and understand the proceedings. Pistorius' sister, Aimee, went to sit with him in the dock and embraced him, but he was described as 'inconsolable' and 'curling into a ball' (Smith, 2014b). When Professor Saayman described a photo which showed the 'smearing and scattering of tissue including bony elements', Pistorius rocked back and forth and retched (Smith, 2014b). Masipa J asked Roux if he could assist his client, to which Roux replied, 'My lady, he's not fine but he's not going to be fine. He's having some difficulty. He's very emotional but it's not going to change' (Smith, 2014b). The dock microphone was moved away from him and a metal bin was placed at his feet (Smith, 2014c). He vomited into it several times.

One journalist reported that, whilst Pistorius had 'mostly retained his self-possession' during the testimony of neighbours and his ex-girlfriend, it was the 'cold, clinical, scientific' language used by Professor Saayman that 'finally robbed [him] of his composure' (Smith, 2014b). In one respect, Pistorius' emotional performance enacted what Mokgoro J, above, had identified as a component of *ubuntu*; that is, the 'sensitising' of the wrong-doer to the harmful effects of their wrong-doing (*Dikoko v Mokhatla* [2006] ZACC 10: 32). Meanwhile, Steenkamp's family

and friends were described as weeping during the testimony. Carl Pistorius, the defendant's brother, left the courtroom. The judge's registrar was described as having her hand over her mouth as she heard the testimony; other court personnel were described as looking nauseous (Hess, 2014). In witnessing the evidence, these people were enacting the *ubuntu* qualities of '[g]roup solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity' (Mokgoro, 1997: 4).

The issue of Steenkamp's dignity was examined by reporters and commentators observing the trial. Some criticised the ruling on the grounds that the dignity of other deceased crime victims had not been so carefully guarded by the courts (Hlongwane 2014; Patta 2014). In particular, one contrast was drawn between the dignity of Steenkamp and that of 34 miners shot by police in Marikana in 2012, and whose injuries and deaths had been graphically broadcast and reported upon following extensive media access to the court. Another contrast was drawn between the dignity of Steenkamp and that of Anene Booysen, a young black woman who in 2013 was gang-raped until she died of her injuries. Again, extensive and high-impact reporting of the evidence of her injuries was permitted, as her death had triggered widespread public protest and condemnation and also a statement from the United Nations (United Nations in South Africa, 2013). The South African journalist, Debora Patta (2014), comparing the cases, wrote of Booysen: 'Her injuries were horrific – but no detail was spared, including the very graphic testimony from a paramedic who found her with her intestines hanging out. The dignity of Booysen and her family was not ever raised in court'.⁷ Jacqueline Rose (2005: 3), in her *London Review of Books* essay about the Pistorius trial, noted that, following Booysen's death, Reeva Steenkamp had retweeted a report of her funeral and, on Instagram, had posted an image of a man's hand silencing a woman's scream with the text: 'I woke up in a happy safe home this morning. Not everyone did. Speak out against the rape of individuals'. At the time of her death, Steenkamp was preparing to give a speech in a Johannesburg school in honour of Booysen and to draw attention to rape and sexual violence. For Rose, this was evidence of a cross-racial affinity that Steenkamp felt with Booysen, given their shared experience as women living in a society that was dangerous for women. For Patta, it warranted no distinction in the manner in which the evidence of their injuries was reported. She argued that open justice demanded that the public had access to the evidence, and that whilst a temporary ban on live

7 For more analysis of the distinction between the media coverage of Steenkamp and Booysen, see Melanie Verwoerd and Claudia Lopes (eds) 2015, *Sexualized Violence in the National Debate: Cross-border observations on India and South Africa*, Heinrich Böll Foundation Southern Africa.

broadcasting might be justified in the Pistorius case, there was no rationale for banning reporting of the verbatim testimony of Professor Saayman. She wrote, 'But the public has a right to hear these details – undiluted and as harsh as they are. South Africa's justice system cannot be seen to serve rich and poor, black and white in different ways' (Patta, 2014).

PART 4: CONCLUSION

Eight months after the delivery of the trial verdict, the National Press Club of South Africa announced that its 2014 Newsmaker of the Year Award was to be given to the Oscar Pistorius Trial. By contrast, the previous year's winner was Nelson Mandela, awarded posthumously. The 2014 award reflected the 'news value' and 'media attention' garnered by the trial, and the fact that it 'dominated the news in 2014' (National Press Club, 2015). A media release explained that the award for the trial included the 'roles played' by Oscar Pistorius himself, Judge Thokozile Masipa, the prosecutor Gerrie Nel and the defence counsel Barry Roux. The award appeared to confirm the fragility of open justice as a constitutional aspiration, when commercial media interests are so clearly its primary stakeholders and beneficiaries. The award confirmed Sherwin's position that visual spectacles of justice are, on the one hand, 'authentic', 'grounding', 'sublimely transformative', but on the other hand, 'deadening, reductive, flat and sensationally hollow' (2011, 10).

Acknowledging the tragedy and loss at the heart of the trial, the Chairperson of the National Press Club, Jos Charle, said 'The National Press Club expresses its heart-felt sympathy to all the role-players that suffered from the actions that gave rise to this trial – especially the Steenkamp family' (National Press Club, 2015). In his statement justifying the award, Charle made it clear that media value could be calculated for specific trial events:

Media-wise the trial was bigger than the FIFA 2014 World Cup. Judge Thokozile Masipa's banning of blogging and tweeting of graphic evidence by pathologist Gert Saayman prompted 2 500 articles. In 24 hours news and social media hit over 106 000 unique inserts. Pistorius having retched in court was carried in 2 300 news articles. In nine days the press hit the 750 000 article mark (National Press Club, 2015).

In support of the award, Johannes Froneman, a professor of journalism, stated, 'the shroud of secrecy has been ripped off court proceedings' (National Press Club, 2015). He continued, 'this trial has finally drawn the line on the old mass media dispensation', and the announcement

detailed the new formats and opportunities presented by the digital age and media convergence (National Press Club, 2015). Despite all of the pre-trial jurisprudential hand-wringing about achieving transparency and dignity in a nation still building its institutions of democracy, the trial broadcast was here being celebrated for having salvaged a media industry in decline.

Making clear the entanglements between the judicial system and the media, the address at the the award ceremony was delivered by the then-Deputy Chief Justice of South Africa Dikgang Moseneke. Moseneke was a lifelong friend of Mandela, whom he met as a fellow prisoner on Robben Island; he was executor of Mandela's estate, and he is a scholarly judicial thinker and an outspoken proponent of the proper administration of justice. In the audience at the award ceremony was Justice Thokozile Masipa, whom he acknowledged. In his speech, Moseneke recognised that the Pistorius trial 'changed irreversibly' the nature of the interaction between the justice system and the media, and 'ushered in a new era' in that relationship (Moseneke, 2015: 29). He conceded that with 'the rapid advancement in technology', the expectation that citizens 'must, or should have to, wander into courtrooms to find out what is happening' was no longer valid (30). The sources of open justice in South Africa are both constitutional and traditional, he explained. The preamble of the Constitution describes a democracy founded upon accountability, responsiveness and openness (30). However, traditional African culture saw disputes resolved under the shade of a tree, witnessed by all, and enabling everyone to participate, in a process known as *lekgotla*. Moseneke pointed out that the architectural symbolism of the Constitutional Court building is justice under a tree (30). He said that open justice is vital in post-apartheid South Africa, because 'trust in government institutions in this country is hard-earned', demanding that 'we [...] subject ourselves to the greatest of scrutiny' (30). It wasn't clear that the scrutiny offered by the trial broadcast, nor the trial's outcome, achieved the goal of building public trust in the administration of justice.

South Africa's transformational constitutionalism has been infused with references to dignity. Moseneke's comments in his speech suggest that incremental technological affordances – smartphones, laptops, live streaming, live text-based platforms – could also have transformational effects, achieving open justice in a dignified manner appropriate to the digital age (Moseneke, 2015: 33). Apparently illustrating this point, he sent a tweet during his speech (see Moseneke, 2015, footnote 2).

However, as many observers of the Pistorius trial later noted, despite its aspirations to democratise access to criminal proceedings, extreme open justice did not restore dignity to a

much-maligned criminal justice system. Judge President Mlambo, in making his unprecedented order to open criminal proceedings to the nation, was clear in stating that his aim was to correct the perception that South Africa's rich and famous were treated with 'kid gloves' (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [27]). The verdict and the sentence, in many quarters, and despite Masipa J's carefully reasoned judgments, undermined those transformational objectives.

This was starkly illustrated by the South African journalist, Sisonke Msimang (2014), who observed the Pistorius trial. She noted that, in the courtroom next door, another trial was unfolding, in which a black man, Thato Kutumela, was on trial for the rape and murder of his 18 year old girlfriend, Zanele Khumalo, also a model, who was five months pregnant. Msimang made the point that, whereas police acted upon Steenkamp's murder immediately and laid charged swifly, Kutumela was not charged for nine months, and Khumalo's family waited two years for the trial to commence; that too was thought to be above the usual standard, and journalists explained this was due to Khumalo's beauty and her middle-class status. There was considerable international media coverage given to the stark distinction between the two concurrent trials. Msimang argued that race continues to matter to the way that violence is experienced, perpetrated and addressed in South Africa. Sandile Memela, from South Africa's Department of Arts and Culture, attributed the distinction to 'structural racism'; he stated: 'I don't think this country is living up to its ideals of justice and equality for all. Everyone has a right to be respected and treated with dignity' (Peck, 2014).

Whilst the objectives of the constitution were always squarely in the mind of those who made careful and considered decisions to open the courtroom to the media, the spectacle of open justice often made it difficult to determine whether human dignity had survived in a voyeuristic and exploitative mediascape. It was Reeva Steenkamp's dignity which was most invoked, and gave rise to questions about whether her dignity – constitutionally speaking – survived her death, and whether her surviving family and friends might continue to guard her dignity in the afterlife. Of course, Pistorius himself, as a criminal defendant, had constitutional protections which also operated to preserve his dignity and human rights.⁸ He was paraded before the cameras at the beginning and end of each day of the hearing, often appearing frightened and exhausted. Images of him crying, rocking, crumpled in his seat, holding his head, retching and

⁸ His dignity, constitutionally speaking, was protected following his criminal conviction and his imprisonment: *S v Makwanyane and Another* 1995 (3) SA 391: [142]; *S v Walters* 2002 (4) SA 613 (CC).

with strings of mucous coming out of his nose cannot be reconciled with his constitutional rights to dignity, equality and freedom.

Another important consideration, in the South African context, was the dignity of all South Africans, potential trial observers, all of whom would live with the legacy of the trial and its reflection of criminal justice in the post-apartheid state. How could the trial be conducted so as to dignify the nation? Whilst it is true that the criminal courts generate intense emotions, and whilst open justice ought to provide an accurate account of the administration of justice, the global media celebration of the trial's most traumatic and undignified moments was not consistent with the aspirations of the Constitution.

Technologies of media production remain mostly at odds with the techniques of the criminal trial, which is characterised by lengthy oral submissions, motionless personnel, disjointed narratives, delays, and arcane, awkward legal terminology.⁹ Traditionally, open justice has relied upon the expectation that the citizen makes the effort to attend court, observe its rituals, and follow its processes. For those who make that effort, the brief moments of visceral, traumatic or true emotion are all the more poignant for the extended formality and prolixity that surrounds them. In traditional open justice regimes, dignity is maintained by only sharing intimate, humiliating or personal facts with those citizens who did make the effort to attend. By live broadcasting the trial, and offering these sensitive details to an infinite global audience of strangers, there is no expectation of sustained attention, and no demand that the viewer sees a courtroom incident in the time-consuming context of all of the evidence. Viewers can switch the trial on and off, tune in for highlights, avoid complexity and rely upon sensational commentary. The decision to live broadcast the trial did nothing to address the court's concerns about poor media practices, and it remains difficult to see why improving sloppy journalism should be a responsibility of the criminal justice system.

For many observers, broadcasting the trial had the effect of putting South Africa itself on trial. However, others worried that the trial had exactly the opposite effect, by failing to provide any account of what really happens in South Africa's criminal justice system. Pippa Green (2014)

⁹ Pistorius' defence counsel, Barry Roux, caused a viral internet sensation when he repeatedly used the phrase 'I put it to you' in his cross-examination of witnesses. It was ridiculed in a rap song on YouTube ('I put it to you, that it's true / everything you say, I will misconstrue / I'm Barry Roux and I put it to you / ten times in a row just to confuse you'), as well as on Twitter and in multiple online memes: see YouTube (2014) Barry Roux Parody Rap Song. 14 March, 2014. Available at: <https://www.youtube.com/watch?v=IIWOjuOx0sQ> (accessed 29 August 2017); Wall Street Journal (2014) 'I put it to you, My Lady' from Oscar #Pistorius trial becomes South African catchphrase. Twitter, 19 March, 14. Available at: <https://twitter.com/wsj/status/446246258152595456> (accessed 29 August 2017).

made the observation that the ‘metanarratives’ to emerge from the trial coverage were the larger themes of gender violence, disability, crime and guns. Meanwhile, Wallace Chuma (2016: 323) was concerned that the disproportionate media attention to the Pistorius trial had the effect of distorting any sense of context, in which the real crises preventing South Africa from achieving democracy were entirely effaced. He wrote of the unacknowledged ‘backdrop of increasing social inequalities, poverty and crime, all of which raise fundamental questions about the material content of democracy two decades after the formal end of legislated racial segregation’ (Chuma, 2016: 330). Broadcasting the Pistorius trial did nothing to address public perceptions about injustice in South Africa, and in some quarters only served to consolidate them.

The decision to broadcast the Oscar Pistorius trial brought cameras and media professionals into the courtroom, with the explicit intention of showcasing the newly-robust institutions of South African criminal justice. That decision also had the effect of showing to international media outlets more peripheral but significant facets of the courts: the ‘dusty, shabby, rundown’ courthouse, ‘not many windows’, ‘unclean, bare brick corridors’, ‘no seats on the toilets and the cubicles do not lock’ (Peck, 2014). In ruling to open the courtroom to the world, Judge President Mlambo acknowledged that he was dealing with constitutional rights on a ‘collision course’ with each other (*Multichoice (Proprietary) Ltd v National Prosecuting Authority, In Re: S v Pistorius* [2014] ZAGPPHC 37: [1]). His ruling asserted that dignity and open justice are compatible principles. Transparency and openness, however, also have the important effect of revealing uncomfortable truths about inequality and indignity, and it is these facts that continue to beset South Africa under transition.

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