DPP, Western Cape v Killian
2008 5 BCLR 496 (SCA)

Compulsion to give self-incriminating evidence – derivative use of inquiry proceedings at subsequent criminal trial.

1 Facts

The first respondent was convicted and sentenced in the regional court on one count of fraud and twenty-three counts of theft. He instituted review proceedings in the Cape High Court and also appealed against his convictions and sentences to the same court. He was successful in his review application before the Cape High Court. The Cape High Court granted leave for this appeal with regard to the review to the Supreme Court of Appeal. The appeal against the convictions and sentences before the Cape High Court had, by then, not been heard. The judgment discussed here therefore only deals with the review.

The first respondent was interrogated in terms of the Investigation of Serious Economic Offences Act (117 of 1991) which was subsequently repealed by the National Prosecuting Authority Act (32 of 1998), which enacted similar provisions to those applicable here. Section 5(6) provided that the Director of the Office for Serious Economic Offences could summon to an inquiry anyone believed to be able to furnish information on the subject of the inquiry. Section 5(8)(a) provided that nobody could refuse to answer any question for fear of criminal prosecution, and subsections 5(10)(b) and (c) denied the right to silence in that it compelled the interrogatee to be sworn in or affirmed, and "to answer fully and to the best of his ability" any question lawfully put or risk prosecution. Section 5(8)(b) provided that no evidence regarding any questions posed and answers given at such an inquiry was admissible in criminal proceedings save if the charge were one of statutory perjury or of contravening section 5(10).

The respondent was represented at the inquiry by counsel. Mr E, of the Office for Serious Economic Offences, conducted the inquiry and compiled a report in which he recommended that the respondent be prosecuted on an array of charges, including those on which he was eventually convicted. Pursuant to this recommendation, the respondent was criminally charged.

The prosecutor at the trail, Mr S, had received a copy of the report and a transcript of the inquiry evidence which included the evidence of the respondent. Mr S fell ill during the trail and, in order to avoid prejudicial delay to the respondent, was substituted by Mr E. Mr E completed the State case and cross-examined the respondent when he testified in his defence. The first respondent was represented throughout the trail.

2 Judgment in the Cape High Court

The Court found that it was grossly irregular for the prosecution to have had a transcript of the respondent's inquiry evidence and for Mr E to have conducted part of the prosecution case. The court held that these two irregularities rendered the trial unfair, explaining that it provided the prosecution with an immense advantage.

The court also pointed out that the prosecution, even if opposing the application, seemed to share the view. The court referred to the affidavit by one of the Deputy Directors of Public Prosecutions attached to the replying affidavit. This affidavit countered a challenge to the constitutionality of sections 26(6) and 27 of the Prevention of Organised Crime Act (121 of 1998), which Act provides for a similar process. The affidavit indicated that the purpose was not to use the acquired evidence against the deponent in a criminal case. For this reason there is a policy that these disclosures are strictly withheld from the criminal investigation and the prosecuting teams.

The court accordingly held that these features vitiated the trial and the respondent's failure to raise relevant objections during the criminal proceedings was clearly due to his ignorance that they constituted irregularities.

3 The First Respondent's Argument before the Cape High Court (as quoted by the SCA)

In his affidavit supporting the review, the first respondent claimed that the trail was unfair for the following reasons:

- "I had no right to refuse to answer any question at the interrogation. If I had refused, the person who had to decide if I must furnish an answer to such question was the person asking the question, Advocate [E]. He was both 'the judge and jury'. No independent arbitrator was appointed to whom I could have appealed to stop Advocate [E] eliciting answers from me unfairly.
- I was the target of the inquiry conducted by Advocate [E]. I was called upon to answer the questions of Advocate [E] after the matter had been fully investigated by him. As can be seen from the record of such interrogation, the questions put to me were not aimed at investigating the facts but were aimed at eliciting in detail, and did elicit in detail, my defence to the charges. Such information extracted from me guided the prosecution in the presentation of its case and in the cross-examination of myself during the criminal trial.
- I had to answer the questions posed to me without having knowledge or sight of the evidence against me and without having had legal advice on such evidence. Numerous admissions were extracted from me during the interrogation, which admissions were made without full knowledge of the facts and which then carried a criminal sanction if I later wanted to amend or change such admissions.
- During my cross-examination at the trial, evidence obtained during Advocate [E's] inquiry and not presented during the State case was put to me by Advocate [E], unfairly I submit. I refer in this regard to the cross-examination relating to what Mr [H] is purported to have said to Advocate [E].

- When Advocate [E] cross-examined me during the criminal trial, I understood that he was questioning me with the full knowledge of what had transpired during the inquiry and with the knowledge of the answers he had extracted from me. His understanding of my defence case was unique as he knew in advance what the answer to his question would be. Furthermore, because I had given answers at the inquiry without knowing the full ambit of the evidence, such answers were also not full and complete. I was faced however with the dilemma during cross-examination at my trial that if I changed my evidence at all I would be faced with criminal sanctions and my credibility would suffer. I believe that the Regional Magistrate's findings on my credibility resulted from my dilemma.
- I submit that my interrogation by Advocate [E] was geared towards a prosecution and as I was the pioneer of the scheme that was the subject of his inquiry I was therefore more than a suspect; I was the person against whom the State was building a case. The search and seizure of all my documents, the fact I was called in for questioning right at the end of the investigation and the type of questions posted to me, prove this.
- This issue of Advocate [E] becoming a prosecutor in the matter was never raised or discussed with me during the trial by my then counsel or attorney."

4 Question before the Supreme Court of Appeal

Howie P, who delivered the judgment saw the question before the court as whether a criminal trial was unfair, to the extent of being vitiated, because the person who acted as prosecutor also interrogated the accused in an earlier statutory inquiry, where at the earlier interrogation the provisions denied the interrogatee the right to silence and the right against self-incrimination (par 1).

The respondent did not rely on the prosecution's possession of the inquiry record in the SCA (par 17). However, the SCA did pronounce on the fairness of the prosecution's mere possession of the transcript of the respondent's inquiry evidence (see par 18 of the case record and the judgment below).

5 Judgment in the Supreme Court of Appeal

The court held that counsel for the first respondent did not raise any objection or complaint during the interrogation that the questions, or the manner in which they were put, were unfair.

Furthermore, no objection was raised when Mr E took over the prosecution. Nor was any objection made at the start, or at any time during the respondent's cross-examination, with regard to Mr E's roll as prosecutor or in relation to the content or manner of his questioning.

Counsel for the first respondent successfully objected when Mr E tried to cross-examine him concerning evidence given by someone at the inquiry, and not called as a witness in the trial. The first respondent was accordingly protected from any potential unfairness inherent in such questioning.

It has not been demonstrated or alleged (other than the belief referred to in the fifth point in the first respondent's arguments) that the trial magistrate made credibility findings adverse to the respondent due to the cross-examination based on the respondent's inquiry evidence or attributable to Mr E's knowledge of such evidence.

The court held that there was no direct use of the inquiry evidence in the trial nor was there any evidentiary derivative use. The court saw the defining issue as whether there was what one might call non-evidentiary derivative use, in so far as Mr E was able, with knowledge of the inquiry evidence, to shape his cross-examination as far as possible to attack the respondent's credibility and thereby to defeat his defence.

The court held that in terms of section 35(3) of the Constitution (Constitution of the Republic of South Africa, 1996) an accused person had a right to a fair trial. The word "includes" in section 35(3) indicates that the right extends beyond the specific matters listed in the subsection.

Fairness must be substantive, not just procedural. It involves more than the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. It was the breach of those formalities, rules and procedures which the legislature had in mind in enacting the provision in section 309(3) of the Criminal Procedure Act 51 of 1977. Here, the court was not strictly concerned with whether there was an irregularity within the meaning of the Criminal Procedure Act but whether there was unfairness to the first respondent in terms of the Constitution, due to the fact that Mr E acted as prosecutor and, if so, whether such unfairness was so profound that the trial verdict could not be allowed to stand.

With regard to the possession by the prosecution of the inquiry record, the court held that the objective of the Investigation of Serious Economic Offences Act was the investigation and prosecution of serious economic crimes. It would have been illogical and self-defeating, having obtained an inquiry report recommending criminal proceedings, to have withheld the report and the inquiry record from the prosecutor. Presentation of the prosecution case was subject to the bar against direct use of the inquiry evidence and, further, subject to the trial court's control of the use of derivative evidence in general and derivative use of the accused's inquiry evidence in particular. By those measures fairness in the ensuing trial could adequately be achieved. The prosecution's mere possession of the inquiry record has not been shown, in fact, to have prejudiced the fairness of the trial.

With regard to the issue before the court, that is, that the initial interrogator later prosecuted the case, the court referred to the finding by the court *a quo* that a prosecutor enjoyed an "immense advantage" in, *inter alia*, having personally conducted the prior interrogation. The court found it unclear, on the facts of the case, how Mr E, having conducted the inquiry, was in a better position than Mr S. The court held the only possible advantage to be that Mr E would have been aware of instances, if there were such, when the respondent appeared obviously uncomfortable or at a loss, when specific issues were canvassed, so that those could be concentrated upon in cross-examination. However, the court found it inconceivable that

the respondent would not have remembered such occasions and had therefore been in a position to brief counsel to object accordingly. Mr E would in all other respects not have been able to make any better non-evidential derivative use of the inquiry proceedings than Mr S.

The court agreed that there would be cases in which the accused would not have legal representation at the interrogation or the trial. However, the court did not see that as an argument for an absolute ban on a dual role by the interrogator/prosecutor. The court stressed that derivative use is not absolutely excluded but is subject to the trial court's ruling as to what is fair. The court held that what applied to evidential derivative use had to be applied to non-evidential derivative use. With an unrepresented accused the trial court would therefore have to exercise extra caution to ensure that the required fairness is maintained.

The court interpreted the argument before it to include that Mr E's role as interrogator robbed him of the impartiality or lack of bias required of a prosecutor. The court held that it was an *ad hoc* issue of fact and did not compel a universal conclusion of procedural law. Additional knowledge and understanding which a prosecutor obtains in an investigatory position cannot amount to bias or prejudice.

The court held further that the determination of what is fair or unfair in a particular case may depend on the accused's subjective view of the proceedings or their surrounding circumstances. However, one cannot expect a court in the absence of an objection by the accused to guess what that view is if there are no facts or circumstances which should reasonably prompt the court to inquire and investigate. Yet, there is no onus on an accused in this regard and there can be no waiver of the right to a fair trial. At the same time, the absence of a defended accused's objection to the prosecutor's involvement or the prosecutor's cross-examination is a factor which can reasonably induce the court to infer that the accused has no intention to allege prosecutorial unfairness.

Neither precedent nor principle persuaded the court that a prosecutor's dual role in a case created a substantive unfairness *per se*. The State consequently succeeded with the appeal.

6 Discussion

Several South-African statutes compel persons to appear before designated officials to answer questions, even though the answers may incriminate these persons at a later criminal trial. However, the witness is protected by the same legislation from later use of the elicited evidence against the witness in his capacity as an accused in a criminal trial.

The earlier inquiry may provide evidence, derivative evidence or non-evidential derivative use advantages to the State with regard to any ensuing criminal trial. It is by now well established that, where an individual is conscripted to testify at an inquiry, as in this case, that evidence cannot be used against the person at a later criminal trial (*Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC)). It has furthermore been held under South African law that the use of evidence secured indirectly or obtained directly as a result of compelled self-incriminating answers, so-called

derivative evidence, is subject to the discretion of the court to exclude such evidence at any ensuing criminal trial. That leaves the non-derivative use advantages gained from the inquiry.

In the case under discussion the Supreme Court of Appeal correctly held that the fairness of a criminal trial having regard to the non-derivative evidential use advantages that may have been gained by the prosecution from an inquiry had to be decided in terms of section 35(3) of the Constitution (par 16). Yet, the court also held that what applied to evidential derivative use had to be applied to non-evidential derivative use (par 23). In holding this, the court, perhaps unconsciously, indicated that the fairness of non-evidentiary derivative use was also to be decided in terms of section 35(5) of the Constitution.

If it was the intention of the Supreme Court of Appeal to hold that section 35(5) should govern the fairness of non-evidentiary derivative use, I submit that the court was mistaken. Section 35(5) governs the admission of unconstitutionally obtained evidence. With non-evidentiary derivative use the State does not want to admit evidence gained from the inquiry at the subsequent criminal trail. It concerns advantages that have been gained which are not evidentiary in nature.

In the hope of shedding more light on the subject I will first discuss the test to be applied where the State wants to admit derivative evidence, after which I will discuss the test where it is alleged that the state gained non-evidentiary advantages at the trial due to an earlier inquiry. Thereafter, I will endeavour to apply the test to the facts of the case under discussion.

The Constitutional Court in *Ferreira v Levin* (*supra*) relying on Canadian authority (*R v S (RJ)* [1995] 1 SACR 451 (Can)) held that a court had the discretion to exclude derivative evidence obtained because of compelled statements, where the statements themselves would be subject to use immunity to ensure a fair trial. Again, relying on *R v S (RJ)*, the court held that derivative evidence, though not created by the accused and thus not self-incriminatory by definition, is nonetheless self-incriminatory and could not otherwise have become part of the State case (see, *inter alia, Michiel v Hodes* 2003 1 SACR 524 (C) and *Shaik v Minister of Justice and Constitutional Development and Others* 2004 1 SACR 105 (CC) where this approach was confirmed).

Since the introduction of section 35(5) of the Constitution, the admissibility of unconstitutionally obtained derivative evidence is like the admission of all other unconstitutionally obtained evidence, an issue that must be decided in terms of section 35(5).

Section 35(5) provides as follows:

> "Evidence obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice" (the limitations clause must of course be applied before section 35(5) comes into play).

When interpreting and analysing the right against self-incrimination it is apposite to look at the way that the right is dealt with under American, Australian and Canadian law. The law of criminal procedure and evidence

in these jurisdictions is also premised on the English common law of criminal procedure and evidence. These systems are therefore based on the same fundamental principles. The underlying rationale or reasoning for the existence of these principles are therefore similar and accordingly suitable for consideration (see *Ferreira v Levin; Vryenhoek v Powell supra*). The right against self-incrimination has also been taken up in the American and Canadian Constitutions.

It is furthermore extremely apposite to look at the Canadian law in this regard as South Africa relied heavily on section 24(2) of the Canadian Charter of Rights and Freedoms in drafting section 35(5) (Schwikkard & Van der Merwe *Principles of Evidence* (2009) 185). The South African courts, when interpreting section 35(5), frequently rely on and refer to Canadian cases in turn (see *S v Pillay* 2004 2 SACR 419 (SCA) par 122).

The American, Australian and Canadian governments have also recognised that in certain instances there is a need to obtain information from witnesses. Consequently, legislation was enacted in all these jurisdictions which compelled a witness to answer all questions put to him, but which protected the witness from later use of the elicited evidence against the witness at a criminal trial.

Under American law no information directly or indirectly derived from compelled testimony may be used against a witness in any criminal case. The prohibition is against evidence given and derivative evidence (*Kastiger v United States* 406 US 441 (1972). The court accordingly ruled that "use" and "derivative use" immunity was co-extensive with the Fifth Amendment.

Under Australian law the Australian High Court considered the common-law right against self-incrimination in *Sorby v Commonwealth of Australia* ((1983), 152 CLR 281). The majority of the court, in line with the American authority, ruled that the right against self-incrimination extends to protect a witness from the use of the testimony itself as well as the derivative evidence.

Under Canadian law the relevant portion of section 24(2) of the Charter provides as follows:

> "Where . . . Court concludes that evidence was obtained in a manner that infringed or denied any rights guaranteed in this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice in disrepute."

In *R v Grant* (2009 SCC 32) the Supreme Court of Canada clarified the criteria relevant in determining "all the circumstances" in section 24(2). The court held that, when faced with an application for exclusion under section 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing conduct by the State; (2) the impact of the breach on the Charter-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. At the first stage, the court considers the nature of the police conduct that infringed the Charter and led to the discovery of the evidence. The more

severe or deliberate the State conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct. The courts dissociate themselves by excluding evidence linked to that conduct, in order to preserve public confidence in, and ensure state adherence to, the rule of law. At the second stage, the extent to which the breach actually undermined the interests protected by the infringed right is investigated and evaluated. The more serious the infringement, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this point. In each case the weighing process and the balancing of these concerns is a matter for the trial judge.

The court also clarified when admission of evidence obtained by a Charter breach "would bring the administration of justice into disrepute". The court held that the term "administration of justice" in general terms embraced maintaining the rule of law and upholding Charter rights in the justice system as a whole. The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Section 24(2)'s focus is not only long term, but prospective. If the Charter is breached damage has already been done to the administration of justice. Section 24(2) uses that proposition as its point of departure and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. Section 24(2)'s focus is also societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns.

Whether the non-evidentiary derivative use of the earlier proceedings is unconstitutional must be determined by the accused's right to a fair trial provided for in section 35(3) of the Constitution. In terms of section 35(3) the accused has the right to a fair trial which includes, in section 35(3)(j), the right not to give self-incriminating evidence. The first stage is to determine whether the right of the accused to a fair trial has been infringed. The second stage is whether the infringement can be justified as a permissible limitation to this right in terms of section 36 of the Constitution (Ian Currie & Johan de Waal *The Bill of Rights Handbook* (2005) 166).

In the SCA the respondent relied on the fact that the inquiry prosecutor was also used at the subsequent criminal trial. The respondent argued that this advantaged the state in that the prosecutor, with knowledge of the inquiry evidence, could shape his cross-examination as far as possible to attack the respondent's credibility and thereby defeat his defence. The court also understood the respondent's argument to include that the prosecutor's role as interrogator at the inquiry robbed him of the impartiality or lack of bias required of a prosecutor.

In *S v Shaik* (2008 1 SACR 1 (CC)) it was argued that the prosecutor had, before and during the proceedings in the High Court and the Court of Appeal, overstepped the barrier between prosecutor and investigator, *inter alia*, by overseeing search and seizures and assisting various officials. This, it was argued, carried the danger that prosecutorial duties would be made subordinate to the investigative fervour of securing convictions.

The court held that, as there was no challenge to the constitutionality of the National Prosecuting Authority Act (32 of 1998), the only question was whether the prosecutor acted within the bounds of the Act. If so, the trial could not be unfair.

The court found that the prosecutor did not assume the functions of the investigators and he kept his distance during the proceedings. The court, furthermore, distinguished that case from the *Killian* matter (the case under discussion in the court *a quo*) on which the applicant relied, as there was no allegation that the accused was interrogated by the prosecutor before the trial.

With regards to impartiality the Constitutional Court held that additional knowledge and understanding of the facts did not amount to bias or prejudice. The court also did not see any problem therein that the prosecutor received the evidence from the investigator.

The Constitutional Court accordingly did not find any alleged prosecutorial misconduct that revealed prospects of a successful appeal.

It was therefore not argued before the Constitutional Court that the fact that the prosecutor at the trial interrogated the accused during the investigation constituted prosecutorial misconduct, and the court accordingly did not make a ruling on this point.

Turning to the facts of the *Killian* case, the Investigation of Serious Economic Offences Act (*supra*) also gave prosecutors more authority than just to institute cases. The question is whether a prosecutor who interrogated the accused at the inquiry, and also prosecutes at the trial, oversteps his authority. It is certainly not common practice that a prosecutor is used in both these capacities.

My understanding is that this practice, because of the blurred lines in the prosecutors' duties, will possibly not be an irregularity. Even if it is found to be an irregularity, I submit it will not be a fatal irregularity. I submit that there will have to be specific evidence that the prosecutor did not comply with his duty to remain impartial and to execute his functions without fear, favour and prejudice. With regard to the accused's right against self-incrimination, an argument for the speedy adjudication of the case will suffice to justify any infringement to the accused's right against self-incrimination where the first prosecutor at trial fell ill as occurred here.

However, I submit that if the respondent had relied on and proven to the Supreme Court of Appeal the grounds in his affidavit in support of his review in the High Court, the infringement may not be a justifiable limitation to the accused's right against self-incrimination.

Section 36(1)(a) requires that the nature of the right that has been infringed be taken into account. It is evident that the right not to incriminate one-self has been a prominent feature under South African law for a long time.

Griswold in his book *The Fifth Amendment Today* (1955) (as cited by MacIntosh *Fundamentals of the Criminal Justice System* (1995) 389) refers to the right against self-incrimination as follows: (Griswold was Dean of the Harvard Law School during the 1950s):

> "I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilised. As I have already pointed out, the establishment of the privilege is closely linked historically with the evolution of torture. But torture was once used by honest and conscience public servants as a means of obtaining information about crimes which would not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull a lever which springs the trap on which he stands. We have through the course of history developed a considerable feeling for the dignity and intrinsic importance of the individual man. Even the evil man is a human being."

Wigmore on Evidence (Vol 8 McNaughton rev 1961 310 ff) lists twelve possible justifications for the continued existence of this right in modern times:

- "It protects the innocent defendant from convicting himself by a bad performance on the witness stand.
- It avoids burdening the Courts with false testimony.
- It encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves.
- The privilege is a recognition of the practical limits of governmental power. Truthful self-incriminating answers cannot be compelled, so why try.
- The privilege prevents procedures of the kinds used by the infamous Courts of Star Chamber, High Commission and Inquisition.
- It is justified by history, whose tests it has stood. The tradition it has created is a satisfactory one.
- The privilege preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized and regrettable scenes.
- It spurs the prosecutor to do a complete and competent independent investigation.
- The privilege aids in the frustration of 'bad laws' and 'bad procedures', especially in the area of political and religious belief.
- It protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society.
- The privilege prevents torture and other inhumane treatment of a human being.
- The privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

A review of the historical origins and justifications for its future existence show that the rule goes further than the exclusion of unreliable statements and extends to considerations including fairness, dignity and the reputation of the administration of justice.

At the core of this right is the burden on the State to make out a case against the accused before he needs to respond, that is, the concept of "a case to meet". Even where "a case to meet" has been presented, the burden of proof remains upon the State to the end. These essential elements of the presumption of innocence underlie the non-compellability right. The State must therefore have some justification for interfering with the accused and cannot rely on the individual to produce the justification out of his own mouth. It is also evident that a salient feature of this right is the element of voluntariness.

However, there are other factors to be taken into account in the limitation exercise. Section 36(1)(b) provides that "the importance of the purpose of the limitation" be taken into account. The limitation must be worthwhile and must contribute to an open and democratic society (Schwikkard & Van der Merwe 179). The prevention, detection, investigation and prosecution of crime generally have been accepted by the Constitutional Court as legitimate purposes (see eg *S v Manamela* 2000 3 SA 1 (CC) par 32 and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) par 53).

It is, furthermore, well established that the purpose, effects and importance of the infringing legislation must be counterpoised against the nature and importance of the right that is infringed (*S v Williams* 1995 7 BCLR 861 (CC) 880D–E).

Section 36(1)(c) also provides that the nature and extent of the limitation must be taken into account. In the balancing of rights the more serious the infringement, the bigger the justification for the infringement will have to be. I submit that the respondent's grounds of review reveal a significant infringement of his right against self-incrimination.

7 Final Remarks

The importance of getting at the truth in any proceedings must be recognised. However, this goal must remain subservient to the protection of fundamental rights, otherwise our justice system is on the slippery slope towards the creation of a police state (see *S v Dhlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 7 BCLR 771 (CC) par 68 where in a unanimous judgment, the court held that one must be careful to ensure that the alarming incidence of crime is not used to justify extensive and inappropriate invasions of individual rights).

Many of the concerns at common law, said to be countenanced by the principle against self-incrimination, today relate even more fundamentally to general considerations of fairness, human decency and the integrity of the judicial system.

If it is accepted that the underlying principle is the presumption of innocence, and that the State bears the full burden of proving its case, the individual should not be obliged to assist the State in any way in proving its case against him. The State is not only the prosecutor but also the investigator of the crime. Against this backdrop, the accused has a purely adversarial role to play. This approach must be applied to all assistance that is elicited from the accused. The presumption of innocence, as the

governing principle, should therefore determine the extension and development of the scope of the right against self-incrimination.

I am concerned that the state will misuse legislation allowing for compulsory enquiries in order to gain unfair advantage against the accused. The grounds that the first respondent mentioned in his affidavit in support of his review in the High Court are of specific concern. I submit that if these grounds were found to have substance, the breach of the accused's rights would be significant, tipping the scale in favour of setting aside the criminal proceedings.

I accept, however, that not all non-evidential derivative use is worthy of protection. The mere fact that the inquiry prosecutor also prosecuted at the criminal trial did not afford the prosecution a meaningful advantage which should vitiate the proceedings. I am therefore of the opinion that the court came to the correct decision.

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