

CHAPTER 9

THE ADMISSIBILITY AT THE SUBSEQUENT CRIMINAL TRIAL OF EVIDENCE TENDERED BY THE ACCUSED FOR PURPOSES OF THE BAIL PROCEEDINGS

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9.1 INTRODUCTION

Section 60(11B)(c) of the Criminal Procedure Act, which provides that evidence tendered at a bail application by an accused forms part of the evidence at the subsequent criminal trial, has come under severe criticism from various legal quarters since its inception.¹ In this chapter it is investigated whether there is merit in this criticism, and whether this serious inroad into the freedom and security of an accused is sanctioned by the South African and Canadian Constitutions. Central to this discussion is the right against self-incrimination. The chapter also determines whether evidence, obtained as a *result of* evidence tendered by the accused during the bail application, may be used at the subsequent trial.² In conclusion, it compares the situations under Canadian and South African law.

Unlike countries with inquisitorial systems such as Holland and Italy, where the right against self-incrimination is not afforded the same value, this right has been a prominent feature of both the Canadian and South African legal systems and has been taken up in the constitutions of both countries.³

¹ See for example *S v Schietekat* 1998 (2) SACR 707 (C); *S v Joubert* 1998 (2) SACR 718 (C) and *Snyckers in Chaskalson et al* (1996) 27 - 91 and further. Section 60(11B)(c) seems to provide for the whole bail record to become part of the trial record. See my discussion in par 9.3.1.

² Where the evidence itself is not allowed.

³ MacIntosh (1995) 389, for example, indicates that under the inquisitorial system in Italy the accused is forced to testify at his trial and can be questioned about the offence by the presiding officer.

Griswold refers to the right against self-incrimination as follows:⁴

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.

However, the privilege against self-incrimination is not without its critics. This is evident from the comments of the well-known 19th century political philosopher, Jeremy Bentham:⁵

One of the most pernicious and irrational rules that ever found its way into the human mind If all criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking as guilt invokes the privilege of silence.

The conceptual relationship between the right to silence,⁶ the right against self-incrimination and the presumption of innocence has caused some problems.

⁴ In his book *The Fifth Amendment Today* (1955) as cited by MacIntosh *ibid*. Griswold was dean of the Harvard Law School during the 1950s. However, MacIntosh *ibid* indicates that Griswold expressed the philosophy underlying the right to remain silent in the paragraph cited. MacIntosh indicates that the right to remain silent is sometimes referred to as the accused's freedom from self-incrimination as guaranteed by section 11(c).

⁵ As quoted by Salhany (1986) 99.

⁶ Section 35(3)(h) of the Final Constitution provides that every accused has a right to a fair trial which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.

For example, it has been held that the right to silence is the governing principle.⁷

In *R v Director of Serious Fraud Office, ex parte Smith*⁸ Lord Mustill expressed the opinion that the "right to silence" did not denote any single right, but referred to a "disparate group of immunities". The immunities differed in nature, origin, incidence and importance.⁹

In *R v Hebert*¹⁰ the Supreme Court of Canada indicated that the right to remain silent is protected as a fundamental principle of justice under section 7. It is broader than both the common law confession rule and the rule against self-incrimination. However, this decision may confuse as it contends that the underlying theme of both the common law confession rule, and the privilege against self-incrimination, was the individual's right to choose whether to make

⁷ See the decision by the House of Lords in *R v Brophy* [1982] AC 476 481, [1981] 2 All ER 705 (HL).

⁸ [1993] AC 1 (HL) 30 - 1.

⁹ The six identified immunities are:

- An universal immunity from being compelled on pain of punishment to answer questions;
- An universal immunity from being thus compelled to answer questions which may incriminate;
- A specific immunity of suspects undergoing interrogation from being thus compelled to answer questions;
- A specific immunity possessed by accused persons at trial from being thus compelled to testify and answer questions;
- A specific immunity by persons charged with an offence from being interrogated;
- A specific immunity possessed by an accused in certain circumstances from having adverse comment made on failure to answer questions before the trial or at the trial.

¹⁰ [1990], 2 SCR 151, 57 CCC (3d) 1 34 (SCC).

a statement to the authorities or to remain silent. This the court coupled with a concern with the repute and integrity of the judicial process.¹¹

The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*,¹² when confronted with the constitutional validity of section 60(11B)(c) of the Criminal Procedure Act, also indicated that the right to remain silent was the governing principle. The court explained that the issue was not so much the right of an arrested person to be released on bail,¹³ but the different constitutional right enjoyed by every person, upon arrest and thereafter, to remain silent. The court indicated that this right was expressed in the following number of complementary ways in the Constitution:

- to remain silent while under arrest;¹⁴
- not to be compelled while under arrest to make any confession or admission that could be used in evidence against that person;¹⁵
- to be presumed innocent, to remain silent, and not to testify at trial;¹⁶ and

¹¹ *Ibid* at 2. What the court did not indicate or accept was that the underlying principle in section 7 is the presumption of innocence and it is that principle which underlies the right to remain silent, the right not to incriminate yourself, and also underlies the common law confession rule.

But also see Chaskalson *et al* (1996) 27 - 40 and further; *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) 162, 1995 (2) BCLR 198 (C); a decision by the Australian High Court in *Pyneboard (Pty) Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 per Murphy J; *R v Jones* [1994] 2 SCR 229 249 (Can) (dissenting decision by Lamer CJ).

¹² 1999 (7) BCLR 771 (CC).

¹³ Under section 35(1)(f).

¹⁴ Under section 35(1)(a).

¹⁵ Under section 35(1)(c).

¹⁶ Under section 35(3)(h).

- not to be compelled to give self-incriminating evidence at trial.¹⁷

However, the silence and self-incrimination rights at trial are based upon the presumption of innocence. This was correctly endorsed by the Constitutional Court in *S v Zuma*:¹⁸

[T]he common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt Reverse the burden of proof and all these rights are seriously undermined.

For practical and analytical purposes it can be said that the right to silence deals with the prohibition on compelling a person to testify, and whether inferences may be drawn from a failure to testify.¹⁹ Self-incrimination deals with the extent to which an accused can be said to be compulsorily conscripted against himself by any given procedure. It is therefore clear that we are here dealing with the right not to incriminate oneself.

¹⁷ Under section 35(3)(j).

¹⁸ 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) par 33.

¹⁹ See *S v Brown* 1996 (11) BCLR 1480 (NC); 1996 (2) SACR 49 (NC).

9.2 CANADIAN LAW

9.2.1 General

Section 13 of the Canadian Charter provides that “a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings”.²⁰

²⁰ Except in a prosecution for perjury or the giving of contradictory evidence. Although the primary provision, section 13 of the Charter is not the only provision that affords protection in this context. Section 5(2) of the Canada Evidence Act RSC 1985, c C - 5 that has been in place long before the Charter provides the following:

Where with respect to any question a witness objects to answer on the ground that his answer may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or any provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence.

Section 5(2) guarantees a witness at a bail hearing that his testimony will not be admissible or used for any purpose against him at the subsequent criminal trial. However, section 5(2) will only apply when invoked by *objecting to answer questions* at the bail hearing on the ground that the answer might tend to incriminate or establish liability under civil proceedings. Section 5(2) therefore only affords protection to the answer given to a question of the Crown or presiding officer. It does not cover the testimony which the applicant of his own accord chooses to submit in order to obtain bail (whether he carries the burden of proof or not). It seems that if an applicant for bail, for example, testifies in order to obtain bail, but refuses to answer a question by the Crown on the merits of the case and is overruled, the answer will be shielded from the trial by section 5(2). However, except maybe in the instance where an accused has objected to answer a question at the bail application and the answer is used to test only the credibility of an accused during cross-examination at trial, section 13 of the Charter affords much wider protection in this context including the protection afforded by section 5(2). See par 9.2.1 and 9.2.2.

The Canadian Charter expressly deals with the privilege against self-incrimination in two contexts, namely in sections 11(c) and 13.²¹ However, this does not preclude the implication of a similar and wider protection against self-incrimination in section 7.²²

The enumerated rights in sections 8 to 14 are specific examples of emanations of the general right to life, liberty and security of the person protected by section 7. The specific mention of these rights serves to reinforce the general rights secured by section 7, rather than to restrict them. The right to remain silent is therefore embedded in the right to liberty and security of the person within the meaning of section 7. The specific rights in sections 11(c) and 13 are afforded an additional measure of sanctity. When section 7 affords protection, the rights may be restricted in accordance with the principles of fundamental justice. The specific rights in sections 8 to 14 are not so limited.²³

²¹ The common law right was a right not to testify if the answers might tend to incriminate the witness. Canadian constitutional law has recognised *the right of an accused* not to testify, and that right has been enshrined in section 11(c) of the Charter. Canadian law has recognised *the right of a witness* not to be incriminated by evidence he has been compelled to give in another proceeding. That right was taken up in section 2(d) of the Canadian Bill of Rights. Section 13 of the Charter has given that protection constitutional status. See the decision by the British Columbia Court of Appeal in *Haywood Securities Inc v Inter-Tech Resource Group Inc; Haywood Securities Inc v Brunnhuber* (1985) 24 DLR (4th) 724 747 (BCCA).

²² See *RL Crain Inc v Couture and Restrictive Trade Practices Commission* (1983) 6 DLR (4th) 478 (SCQB) per Schebel J on December 1; *British Columbia Securities Commission v Branch* (1995) 123 DLR (4th) 462 (SCC); *Thomson Newspapers Ltd v Canada (Director of Investigation & Research Restrictive Trade Practices Commission)* (1990) 67 DLR (4th) (SCC) 161; *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC).

²³ The specific mention of the rights in sections 8 - 14 ensures their sanctity. The requirements for fundamental justice are furthermore determined by the specific rights themselves. See par 5.2.1.2.

The phrase “security of the person” in section 7 includes a right to personal dignity and a right to an area of privacy or individual sovereignty into which the state must not make arbitrary or unjustified intrusions. These considerations also underlie the privilege against self-incrimination.²⁴

If the relationship between section 7 and the other sections is considered, it is suggested that section 11(c) does not preclude a right not to be compelled to be a witness against oneself from arising before a person is charged. Rather, section 11(c) provides additional protection by setting the point at which the right not to be compelled to be a witness against oneself is no longer subject to possible deprivation in accordance with the principles of fundamental justice.

Similarly section 13 guarantees to a witness the specific right not to have self-incriminating evidence used against him in other proceedings. This is a separate right, which arises regardless of whether the witness testified voluntarily or under compulsion.²⁵ Unlike section 5(2) of the Canada Evidence

²⁴ *RL Crain Inc v Couture and Restrictive Trade Practices Commission* (1983) 6 DLR (4th) 478 (SCQB) 480.

²⁵ *RL Crain Inc v Couture and Restrictive Trade Practices Commission* *ibid*; *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC) at 525 DLR; *R v Sicurella* (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div) at CCC 422. See also *R v Carlson* (1984) 14 CRR 4 (BCSC) where McKay J at 5 - 6 held that it had no bearing on the matter that the witness initiated the earlier proceedings and was under no compulsion to testify. It is significant to note that during the first part of the 1980 - 82 drafting process, this part of the section read “when compelled to testify”. It was only in January 1981 when the revised resolution was placed before the Joint Committee of the Senate and House of Commons by the federal government that the wording was changed to “who testifies”. See Mcleod, Takach, Morton & Segal (1993) 14 - 4. It is submitted that the protection has been broadened to cover all witnesses at the first or earlier proceedings whether they were compelled at that time to testify or not.

Act²⁶ section 13 does not require any objection on the part of the person giving the prior testimony.²⁷ It is applicable even where the witness in question is unaware of his rights.²⁸ It is also of no consequence whether the accused is compelled at the subsequent trial to testify or not.²⁹ The use of the accused's prior testimony at the trial is a violation of section 13 of the Charter.

The protection in section 13 inures to an individual at the moment an attempt is made to utilise previous testimony to incriminate him.³⁰ Furthermore the determination whether the use of testimony is incriminating is to be considered from the point of view of the second proceeding. It is of no consequence whether the evidence was or was not incriminating in the first proceeding.³¹

In *Dubois v The Queen* the Supreme Court, when faced with the question whether the Crown was correct to have used the accused's testimony from his first trial as part of the evidence in chief at the new trial, explained that section 13 was a specific form of protection against self-incrimination.³² Section 13

²⁶ RSC 1985, c C - 5.

²⁷ See *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC) at 524 DLR. Prudent council may advise a witness who is concerned that he might incriminate himself to object to answer questions subject to being ordered to do so in terms of section 5 of the Canada Evidence Act (and provincial counterparts). He would then also enjoy the protection of section 5.

²⁸ *Dubois v The Queen* *ibid* in the dissenting judgment of McIntyre J at SCR 377.

²⁹ *R v Sicurella* (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

³⁰ *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC) at 523 DLR.

³¹ *Ibid* at 527 DLR.

³² In this case the accused had been convicted but his conviction was overturned and a new trial ordered by the court of appeal. Before the Supreme Court, the

must be viewed in light of the related rights provided for in sections 11(c) and 11(d) of the Canadian Charter. To allow such evidence could result in the violation of both sections 11(c) and 11(d).³³ Section 11(d) provides for the right to be presumed innocent until proven guilty and imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he need respond, either by testifying or by calling other evidence. This burden on the Crown to establish guilt and the right to silence³⁴ also underlie the non-compellability right. The important protection is therefore that the Crown must prove its case before there can be any expectation that the accused respond. The case to meet is therefore common to sections 11(c), 11(d) and 13. In the context of sections 11(c) and 13 it specifically means that the accused enjoys "the initial benefit of a right of silence" ... and its corollary, protection against self-incrimination.³⁵

Viewed in this context the purpose of section 13 is to protect individuals from being indirectly compelled to incriminate themselves, and to ensure that the Crown will not be able to do indirectly that which section 11(c) prohibits.³⁶

accused argued that the use of his previous testimony in the second trial was a violation of section 13 of the Canadian Charter.

³³ At 504 DLR.

³⁴ The concept of a case to meet are essential elements of the presumption of innocence.

³⁵ At 521 DLR and further.

³⁶ At 523 DLR. The right provided for in section 11(c) of the Canadian Charter reflects the common law privilege against self-incrimination previously safeguarded by section 2(d) of the Canadian Bill of Rights. (The provincial Evidence Acts are in compliance with section 11(c).) An accused is not a competent witness for the prosecution and may therefore not be compelled to testify.

The court held that any evidence tendered as part of the case against the accused was clearly incriminating evidence. However, the Supreme Court did specifically not address the question whether previous testimony could be used for purposes of cross-examination if the accused chose to testify in his own defence at the subsequent trial.³⁷ I now turn to this issue.

9.2.2 The use of prior testimony for purposes of cross-examination

The courts have accepted that if prior testimony is used to incriminate an accused during cross-examination at the later hearing, section 13 will function to prohibit such use. However, it is not precisely clear whether section 13 will prohibit resort to previous testimony during cross-examination if the purpose is other than to incriminate the accused. On a plain reading, section 13 would not seem to prohibit the use of the prior testimony for another reason.

In *R v Mannion*³⁸ the Supreme Court had the opportunity to deal with the matter. The court had to decide whether the Crown was correct to have used the testimony by Mannion in the earlier trial, for purposes of cross-examination at the later trial. McIntyre J³⁹ found that the purpose of the cross-examination was to incriminate the respondent. The court held that the evidence was relied on to establish the guilt of the accused. Section 13 of the Canadian Charter clearly applied to exclude the incriminating use of the evidence of these contradictory statements. But, it seems that the Supreme Court might also have imputed protection against the use of previous testimony if used for other reasons than to incriminate the accused. The court referred to section 5 of the

³⁷ At 528 DLR.

³⁸ [1986] 2 SCR 272 (Can).

³⁹ On behalf of the unanimous court at 279 - 281.

Canada Evidence Act and two cases that interpreted the effect thereof.⁴⁰ In these cases it was held that an accused may not be cross-examined or examined in chief upon evidence given at a previous hearing where he had invoked the protection of section 5. The court held that the Charter should not be construed as a limiting factor upon rights which existed prior to its adoption.

The British Columbia Court of Appeal in *Re Johnstone and Law Society of British Columbia*⁴¹ did not interpret the *Mannion* decision as affording protection when the previous testimony was used during cross-examination for purposes of credibility. The court held that a lawyer who was subject to a disciplinary hearing, could be cross-examined on his previous testimony⁴² for the purpose of determining his credibility.⁴³ However, if the main purpose of the cross-examination is to incriminate him, the cross-examination is contrary to section 13. In *R v B(WD)*⁴⁴ the Saskatchewan Court of Appeal agreed with *Johnstone*, holding that an affidavit sworn in a civil proceeding could be used to attack the credibility of an accused testifying in a criminal trial.

The Ontario Court of Appeal in *R v Kuldip*⁴⁵ disagreed with the interpretation of *Mannion* in *Johnstone*. Martin JA delivering the judgment explained that before

⁴⁰ See *R v Wilmot* (1940) 74 CCC 1 (Alta CA) and *R v Coté* (1979) 50 CCC (2d) 564 (Que CA).

⁴¹ (1987) 5 WWR 637 (BCCA).

⁴² Before the Registrar of the Supreme Court of British Columbia in a taxation of costs.

⁴³ Per Craig JA, at 652. The other judges were in substantial agreement.

⁴⁴ (1987) 45 DLR (4th) 429 (Sask CA).

⁴⁵ (1988) 62 CR (3d) 336 (Ont CA).

the Charter, a witness that invoked section 5(2) of Canada Evidence Act could not be cross-examined on the prior testimony at the subsequent criminal proceeding either to incriminate him, or to challenge his credibility. But the witness only had the protection if he objected to the testimony, a position that had been subject to some criticism. The court indicated that one of the purposes of section 13 was to redress the unfairness that resulted if an uneducated witness or a witness that did not have the benefit of legal aid failed to invoke section 5(2). If the effect of section 13 were so restricted it would mean that a sophisticated witness would continue to enjoy the benefit of section 5(2). An unsophisticated witness, on the other hand, who did not know that he had to object, would not.

Martin J also pointed out that where the prior evidence is used ostensibly to break down the credibility of the accused it nevertheless assists the Crown in its case and, in a broad sense, may help to prove guilt. It is often difficult to distinguish when prior testimony is used to incriminate the accused and when it is used to attack his credibility.⁴⁶

But does “testifies” and “evidence so given” as used in section 13 with reference to the prior proceedings include all forms of evidence? It also needs to be determined whether a bail application constitutes “any proceedings” as indicated in the wording of section 13 and whether the subsequent criminal trial constitutes “other proceedings” in relation to the prior bail application.

⁴⁶ At 346 - 347. However, section 13 specifically indicates that it prohibits the use of the prior testimony to *incriminate* the witness at the subsequent proceedings. Section 5(2) is not so limited.

9.2.3 “testifies” and “evidence so given”

In this part I consider the following questions:

- Do the phrases “testifies” and “evidence so given” limit the availability of the protection to the witness who gives *viva voce* testimony under oath in the first or earlier proceedings or is protection afforded from, for example, statements made from the bar?
- Is the wording broad enough to include other forms of evidence, for example, documentary evidence produced or identified by the witness in the earlier proceedings?
- Does the performance of an act during his prior testimony qualify for protection?

As to the first question, in *R v Carlson*⁴⁷ McKay J during a manslaughter trial, excluded evidence of certain incriminating statements made at a post-suspension hearing under section 16 of the Parole Act.⁴⁸ The accused had appeared before the Parole Board which procedures do not require testimony under oath. The court held that a person “testifies” for the purposes of section 13 of the Canadian Charter whether such testimony is made under oath or not, as long as the person is giving evidence “before a tribunal or officially constituted body”.⁴⁹

⁴⁷ (1984) 14 CRR 4 (BCSC).

⁴⁸ RSC 1970, c P - 2.

⁴⁹ At 5 - 6.

In *R v Sicurella*⁵⁰ the accused brought an application to prevent the introduction of voice identification evidence which arose out of verbal communications of the accused, while under oath and before a judicial officer in the course of a bail hearing and subsequent bail review. The Crown attempted to submit the evidence at the trial of an officer who had overheard the accused testify on these two occasions. The officer had also heard the voice of the accused during authorised intercepted communications and wanted to testify that he believed the voice to be that of the accused.

Renaud Prov Div J ruled that this evidence was inadmissible indicating that the case law supported the view that the prosecution could not advance the tape of what was stated at the bail hearings to support a prosecution. The preliminary inquiry judge concluded that it was fundamental to emphasise that the courts must be vigilant to discern and to promote the calculus underlying the Charter. This must be done even at the stage of the preliminary inquiry, in order that the right to silence should not be undermined. To permit the prosecution to look to what the accused has said, in the course of a judicial proceeding, is to assist the Crown. It only serves to impair the right to silence and to shift the onus of proof. For the reasons given, the court applied section 13 of the Canadian Charter and did not permit the Crown to adduce in evidence anything emanating from the mouth of the accused in the course of the judicial proceedings held before a justice of the peace. It therefore seems that the protection afforded goes much further than testimony under oath and includes anything said by the accused at the prior proceedings even if only used for voice identification purposes.

As to the second question, in deciding whether documentary evidence is included in “testifies” and “evidence so given” the provision in section 5(2) of

⁵⁰ (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

the Canada Evidence Act is taken into account.⁵¹ Section 5(2) protects “the answer so given”. This would presumably cover the testimony identifying the document. But does it cover the contents of the document? The policy in this regard was discussed in the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*.⁵² The report indicates that most of the Evidence Acts made no reference to the privilege against self-incrimination insofar as it related to documents. According to the report this creates doubt about the intention of the legislators. The report indicates that the Law Reform Commission Evidence Code is likewise silent and, because it is a code, its silence must be understood as limiting the privilege to testimony. The report justifies this position on the ground that there is an intrinsic difference between compelling a person to condemn himself out of his own mouth and using documents already in existence to do the same thing. Documents as evidence do not involve the risk of perjury and therefore are similar to real evidence.

But the task force argued that whether a witness is asked to provide information to the court in the form of testimony or in the form of a document, it is still information which is being produced for the particular purpose of the case at bar. That compulsion to produce a document should not be used as a means of laying a foundation for a subsequent case against the witness. It was therefore concluded that the documentary evidence should be treated in exactly the same way as testimony insofar as the privilege is concerned.

It seems that the courts have previously not considered the production of documents to be within the scope of the privilege against self-incrimination.⁵³

⁵¹ RSC 1985, c C - 5 and corresponding provisions of the Provincial Evidence Acts.

⁵² (1982) 440 - 441.

⁵³ See, for example, *Attorney-General Quebec v Bégin* [1955], SCR 593, 112

However, these cases were all decided before the commencement of section 2(d) of the Canadian Bill of Rights⁵⁴ and section 13 of the Canadian Charter.

In *Re Ziegler and Hunter*⁵⁵ the Federal Court of Appeal compared and analysed section 2(d) of the Canadian Bill of Rights and section 13 of the Canadian Charter. The court concluded that section 13 extended to cover the production of incriminating documents at the prior appearance pursuant to a subpoena *duces tecum*.⁵⁶

In *R v Sicurella*⁵⁷ Renaud Prov J found that Parliament by way of section 13 wished to protect the actual testimony and evidence arising out of such testimony.⁵⁸ It therefore seems that other forms of evidence arising out of the testimony will be protected by section 13.

With regard to the third question,⁵⁹ it is likely that the performance of an act such as the giving of a handwriting sample during his prior testimony will

CCC 209, 21 CR 217, (1955) 5 DLR 394 (SCC); *Curr v The Queen* [1972], SCR 889, 7 CCC (2d) 181, 18 CRNS 281, 26 DLR (3d) 603 (SCC), and *Reference under the Constitutional Questions Act; Re validity of section 92(4) of the Vehicles Act, 1957* (Sask) [1958], SCR 608, 121 CCC 321, 15 DLR (2d) 225 (SCC).

⁵⁴ See Annexure A.

⁵⁵ (1983), 39 CPC 234, 8 DLR (4th) 648, 51 NR 1 (Fed CA), leave to appeal to SCC refused (1984), 39 CPC 234n, 8 DLR (4th) 648n.

⁵⁶ At DLR 675.

⁵⁷ (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

⁵⁸ At CCC 427. See also the reasoning of the court *supra* in my discussion of the first question.

⁵⁹ See the questions at the beginning of this paragraph.

qualify for protection. The accused will therefore likely be protected from the use of that evidence at trial.⁶⁰

9.2.4 “any proceedings” and “any other proceedings”

On a plain reading of the term “any proceedings” a bail application will qualify as “any proceedings” for the purposes of section 13. Hogg⁶¹ referring to the same wording in section 14 of the Canadian Charter, indicates that it presumably included proceedings before both administrative tribunals and courts.⁶²

The meaning of the phrase “any other proceedings” has proved more troublesome. The word “other” in “any other proceedings” led some judges to hold that certain proceedings in the criminal process were not “other” proceedings in relation to the earlier proceedings. However, none of the judges seem to indicate that a criminal trial does not constitute “any other proceedings” in relation to the prior bail hearing.⁶³

⁶⁰ See the reasoning by the task force on the uniform rules of evidence *supra* and the reasoning in *R v Sicurella* *ibid*. See also Paciocco *Charter principles and proof in criminal cases* (1987) 462 as cited by McDonald (1989) 579.

⁶¹ *Canada Act 1982 Annotated* 49 as cited by Mcleod, Takach, Morton & Segal (1993) 14 - 6.

⁶² At 49.

⁶³ It is not clear whether a bail application would qualify for the subsequent or “other proceedings” in section 13 in relation to the prior trial. Would the prior testimony be “used to incriminate that witness in any other proceedings”? It seems not. In *Donald v Law Society of British Columbia* (1984) 2 WWR 46, additional reasons at (1985) 2 WWR 671 (BCCA) Hinkson JA had to consider whether a disciplinary proceeding against a lawyer qualified for the second proceeding in terms of section 13. He held that the Charter should not be restricted to criminal proceedings but should rather be given a broader meaning extending its operation to include any proceeding where an individual is exposed to a criminal charge, penalty or forfeiture as a result of having testified

In *R v Yakelaya*⁶⁴ the Ontario Court of Appeal held that a preliminary enquiry and a trial on the same charges are not *vis-à-vis* each other “other proceedings”. In *R v Protz*⁶⁵ the Saskatchewan Court of Appeal held that sentencing procedures are not “other procedures” in relation to the trial before conviction.

This issue ultimately came to be decided by the Supreme Court in *Dubois v The Queen*.⁶⁶ McIntyre J in a dissenting judgment held that the retrial of an accused was not another proceeding for the purposes of section 13 of the Canadian Charter. McIntyre J explained that the term “proceeding” in section 13 for purposes of a criminal case meant all judicial proceedings taken “upon one charge to resolve and reach a final conclusion on the issue therein raised

in earlier proceedings. Soon thereafter he held that section 13 extended to include all proceedings (at 54). Anderson JA at 57 also on behalf of the British Columbia Court of Appeal similarly held that the plain and ordinary meaning of section 13 was that evidence given by a witness in any proceedings shall not be used to “incriminate” that witness “in other proceedings”. He then pointed out that the specific disciplinary proceedings were penal in nature. This decision was followed by Estey J in *Bank of NS v Miller* (1985) 6 WWR 574 (Sask QB). Gallant J in *Johnson v Law Society of Alberta* (1986) 66 AR 345 (Alta QB) at 351 held that a lawyer before a discipline committee does not enjoy the protection of section 13. He indicated that the reference in section 13 to “incriminating evidence” and “incriminate” reinforced the interpretation that the rights in section 13 related to criminal and penal matters. But, in *R v Sicurella* (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div) it was specifically held by Renaud Prov Div J that a bail hearing and bail review, in the light of the broad interpretation that expression “proceedings” has received, fell within the meaning of “other proceedings” in section 13 of the Charter.

⁶⁴ (1985) 20 CCC (3d) 193 (Ont CA) per Martin JA.

⁶⁵ (1984) 13 CCC (3d) 107 (Sask CA) per Vancise JA.

⁶⁶ [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC). The facts appear from footnote 32.

between the same party and the crown”.⁶⁷ In this McIntyre J included the preliminary hearing, the trial, an appeal and a new trial. McIntyre J further explained that as the new trial was on the same indictment, between the same parties and raising precisely the same issues, the new trial could not be considered “another proceeding”.⁶⁸ However, all six of the other presiding judges found that a retrial on the same offence fell within the meaning of the words “any other proceedings”. According to the majority another viewpoint, in the context of the facts before court, would result in the accused being conscripted against himself and would indirectly violate the accused’s rights in terms of sections 11(c) and 11(d) of the Charter.⁶⁹

9.2.5 Derivative evidence

Another related issue, is whether evidence of fact obtained as a result of testimony in the bail hearing may be used at the subsequent trial.⁷⁰

In *R v Crooks*⁷¹ O’Driscoll J stated that the law of Canada in this area was not analogous to the position in the United States of America.⁷² Under American

⁶⁷ At DLR 505.

⁶⁸ *Ibid.*

⁶⁹ See my discussion in par 9.2.1.

⁷⁰ In *R v S (RJ)* [1995] 1 SCR 451 (Can) 552 the Supreme Court explained that derivative evidence was evidence found, identified or understood as a result of the “clues” provided by compelled testimony. Derivative evidence is therefore by definition independent from compelled testimony.

⁷¹ (1982), 39 OR (2d) 193, 2 CRR 124 (Ont HC), affirmed 2 CRR 124 at 125 (CA), leave to appeal to SCC granted, 46 NR 171, affirmed 2 CCC (3d) 57 at 64 N (CA).

⁷² See the United States Constitution, Fifth Amendment and 18 US Code 6002 (Immunity Statute).

law no information directly or indirectly derived from testimony or other information may be used against a witness in any criminal case.⁷³ The prohibition is against evidence given and derivative evidence. However, this protection goes further than the position created by sections 7, 11(c) and 13 of the Canadian Charter.⁷⁴

In *Thomson Newspapers Ltd v Canada (Director of Investigation & Research Restrictive Trade Practices Commission)*⁷⁵ La Forest J⁷⁶ explained that section 7 did not provide inflexible protection against the subsequent use of evidence derived from that testimony.⁷⁷ The use of derivative evidence in subsequent trials for offences under the Act does not automatically affect the fairness of those trials and complete immunity against such use is not required by the principles of fundamental justice. Derivative evidence exists independently of the compelled testimony, meaning that in most cases it could also have been discovered independently of any reliance on the compelled testimony. Its use by the prosecutor does not raise the same concerns as those in respect of the use of pre-trial evidence. Admittedly there will be some situations in which the derivative evidence is so concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer. For practical

⁷³ Except in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. 18 US Code 6002 prohibits the subsequent use of "information directly or indirectly derived from such testimony or other information".

⁷⁴ See also *Ruben v R* (1983) 24 Man R (2d) 100 (Man QB) per Hewak J.

⁷⁵ (1990) 67 DLR (4th) 161 (SCC).

⁷⁶ On behalf of the majority of the court. Lamer and Sopinka JJ dissented in part and Wilson J dissented *in toto*.

⁷⁷ At 163.

purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of pre-trial compelled testimony.

La Forest J elaborated that the principles of fundamental justice do not require an absolute prohibition against the use at trial of all derivative evidence on the ground that omission of such evidence can in some cases affect the fairness of the trial.⁷⁸ He held that the trial judge's power to exclude derivative evidence where appropriate was all that was necessary to satisfy the requirements of the Charter. This solution achieves an appropriate balance between the individual's right against self-incrimination and the state's legitimate need for information about the commission of an offence.⁷⁹ In this case La Forest J grounded his approach on the common law ability of judges now constitutionalised in section 11(d) of the Canadian Charter to ensure a fair trial by excluding evidence after considering its prejudicial effect and probative value.⁸⁰

The presiding officer in subsequent criminal proceedings can therefore exclude derivative evidence where appropriate.⁸¹ However, it seems that the Ontario Provincial Division in *R v Sicurella*⁸² had stronger views on this issue.⁸³ Renaud

⁷⁸ *Ibid.*

⁷⁹ At 163. The Supreme Court in *R v S (RJ)* [1995] 1 SCR 451 (Can) at 563 and further confirmed this earlier approach by the Supreme Court. However, the court also observed that evidence such as self-incriminating evidence, which impacts on trial fairness, is almost always excluded. The court therefore found it likely that derivative evidence which could not have been obtained but for a witness's testimony will be excluded. See also *British Columbia Securities Commission v Branch* [1995] 2 SCR 3; 123 DLR (4th) 462 (SCC).

⁸⁰ See also *R v S (RJ)* *ibid.*

⁸¹ See also *Mead v Canada* (1991) 81 DLR (4th) 757 (Fed Ct TD) at 757.

⁸² (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

Prov Div J indicated that Parliament intended to protect evidence arising out of testimony, in addition to the actual testimony itself.

9.3 SOUTH AFRICAN LAW

9.3.1 General

Section 60(11B)(c) of the Criminal Procedure Act provides as follows:

The record of bail proceedings, excluding the information in paragraph (a),⁸⁴ shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

It seems that the legislature with section 60(11B) intended to target testimony by the accused.⁸⁵ However, the first part of section 60(11B)(c) provides that

⁸³ At CCC 422 and further. The court seems to have been unaware of the decision of the Supreme Court.

⁸⁴ Information as to previous convictions, pending charges and whether the accused has been released on bail in respect of those charges.

⁸⁵ Section 60(11B) provides the following:

- (a) In bail proceedings the accused, or his or her legal advisor, is compelled to inform the court whether-
 - (i) the accused has previously been convicted of any offence; and
 - (ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.
- (b) Where the legal advisor of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.
- (c) [see text]
- (d) An accused who willfully-

the record of the bail proceedings, which would, for example, include the testimony by the investigating officer objecting to the granting of bail, forms part of the record of the subsequent criminal trial. On a literal interpretation, the record of proceedings at the bail hearing, excluding testimony by the accused, will therefore in any event form part of the trial record. If the accused is informed of the consequences and he elects to testify, that testimony is admissible at the subsequent criminal trial. Only the admissibility of evidence tendered by the accused is considered here.

Even though it is not indicated for which purpose the prior testimony may be used at the trial, I do not think that the intention of the legislature was that the evidence presented at the bail hearing by the accused should form part of the state case at the trial.⁸⁶ Using the evidence as part of the state case would clearly be an unjustifiable infringement of sections 35(3)(h) and 35(3)(j) of the Final Constitution.⁸⁷ It therefore seems that the intention must have been to use the prior testimony for purposes of cross-examination. I am of the opinion that the use of the prior testimony to incriminate an accused during cross-examination at trial would similarly be an unjustifiable infringement of sections

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- (i) fails or refuses to comply with the provisions of paragraph (a); or
 - (ii) furnishes the court with false information required in terms of paragraph (a),
- shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

⁸⁶ Also not the prior evidence by the state opposing bail. Another view would allow evidence without the accused having had the opportunity to contest that evidence at the trial.

⁸⁷ See my discussions in par 9.3.9 and the Canadian Supreme Court judgment in *Dubois v The Queen* 23 DLR (4th) 503 at 504 and 521 and further. However, this view is not accepted by all. The high court in *S v Dlamini* 1998 (5) BCLR 552 (N) allowed the state to prove the prior statements made by the accused at the bail application as part of the state case at the subsequent criminal trial.

35(3)(h) and 35(3)(j).⁸⁸ But section 60(11B)(c) does not differentiate between the use of the prior testimony to incriminate or to test the credibility of the accused on trial. It would therefore seem to afford the right to both incriminate and test the credibility of the accused who elects to testify at trial.

When deciding on the admissibility of evidence given by an accused at bail proceedings for purposes of the subsequent criminal trial, section 60(11B)(c) must be considered in the light of sections 12⁸⁹ and 35(3)(j) of the Final Constitution. In terms of section 35(3)(j) “every accused person has a right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence”.⁹⁰ Regard must also be had to sections 235 and 203 of the Criminal Procedure Act.

9.3.2 Section 235 of the Criminal Procedure Act

Section 235 under the heading “Proof of judicial proceedings” provides:

It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribes such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.

⁸⁸ See my discussion in par 9.3.9.

⁸⁹ See chapter 6.

⁹⁰ The Interim Constitution granted similar rights in section 25(3)(d). The section provided that every accused person shall have the right to a fair trial, which include the right to adduce and challenge evidence, and not to be compelled to be a witness against oneself.

In terms of section 235 of the Criminal Procedure Act the evidence so given at judicial proceedings⁹¹ may be proved⁹² by producing a copy of the record of those proceedings properly certified in terms of the requirements stated in section 235. Section 235 describes how judicial proceedings may be proved and does not decide what may be proved. This principle was not always accepted in the pre-constitutional era. In *S v Adams*⁹³ and *S v Venter*⁹⁴ it was held that the record of the bail application was admissible against the accused at trial in terms of section 235 and this was not affected by the accused's right against self-incrimination in terms of section 203.

After the advent of the Interim Constitution, Vivier J in *S v Nomzaza*⁹⁵ deviated from this finding by holding as follows:

- Evidence given by an accused will only be admissible in terms of section 235 if otherwise admissible.
- Each case must be handled on its own facts.
- In the light of the Constitution there will be cases where the admission of the bail proceedings will render the trial unfair.

⁹¹ It is submitted that the term "judicial proceedings" is wide enough to include a bail application.

⁹² Although the copy shall be *prima facie* proof that any matter recorded thereon was properly recorded the copy does not constitute *prima facie* proof of any fact recorded.

⁹³ 1993 (1) SACR 611 (C).

⁹⁴ Case 59/95 unreported (A) as cited in Du Toit *et al* (1987) 24 - 110.

⁹⁵ [1996] 3 All SA 57 (A). On 29 May 1996.

Because section 235 in any event allowed a certified copy of the bail record to be handed in at trial, the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*⁹⁶ saw the first part of subsection (11B)(c) as an unremarkable procedural provision. The court indicated that subsection (11B)(c) merely acted as a shortcut for the incorporation of the bail record into the trial record.

It is therefore suggested that as in the case of section 235 the prosecution would only be able to rely on section 60(11B)(c) if the bail record contained otherwise admissible evidence.

9.3.3 Section 203 of the Criminal Procedure Act

Section 203 under the heading “Witness excused from answering incriminating question” provides:

No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961,⁹⁷ have been compelled to answer by reason that the answer may expose him to a criminal charge.

Whereas the 1955 Act⁹⁸ protected a witness against any questions the answer to which might expose him to “any pains, penalty, punishment or forfeiture, or

⁹⁶ 1999 (7) BCLR 771 (CC).

⁹⁷ The reference to 30 May 1961 in section 203 entails that the law of evidence as at that date, with inclusion of the then accepted English law of evidence, prevails with regards to the privilege against self-incrimination. The history of the rule is described by Wigmore (1961) par 2250 as a long story woven across a tangled warp. It is partly composed of the contrivances of the early canonists, the severe contest between the courts of the common law and the church and “of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts”.

⁹⁸ By way of section 234.

to a criminal charge, or to degrade his character”,⁹⁹ section 203 presently confines the privilege to answers which may expose one to a criminal charge.¹⁰⁰ However, the protection has been limited by sections 204, 205 and lately section 60(11B)(c).

9.3.4 Pre-constitutional jurisprudence

The pre-constitutional nature and scope of the privilege against self-incrimination was considered at some length by the Appellate Division in *S v Lwane*,¹⁰¹ and *Magmoed v Janse van Rensburg*,¹⁰² some 26 years later.

⁹⁹ See Du Toit *et al* (1987) 23 - 47; Hiemstra (1993) 491.

¹⁰⁰ Section 200 of the CPA expressly provides that a witness in criminal proceedings may not refuse to answer a question on the ground that the answer may expose him to civil liability. See *Wessels NO v Van Tonder* 1997 (1) SA 616 (O) 620 - 1. Many varied considerations for this particularly English institution has been given throughout the years. The modern rationale for this rule has been said to be the belief that “the coercive power of the state should not be used to compel a person to disclose information which would render him liable to punishment”. See May (1990) 245. In *Miranda v Arizona* 384 US 436 705 - 6 (1966) the American Supreme Court indicated that the idea that a man should be compelled to give answers exposing himself to the risk of criminal punishment is probably still repellent to public opinion, even though it was no longer based on the unpopularity of the Star Chamber. The court also considered that people must be encouraged to testify freely. In the absence of some kind of privilege against incrimination they might not be prepared to come forward as witnesses. Supporters of the rule have also argued that the rule encourages the search for independent evidence. If the police cannot rely on the evidence given by the suspect they would have to procure the evidence themselves. However, it has been unclear to what extent police resort to other investigations if the accused is not willing to assist. It has also been argued in support of the rule that an accused should not be asked to account of himself unless a *prima facie* case has been established against him. Another reason that has been advanced by the supporters of the rule was that the rule relieves the courts from false testimony. If an accused cannot bring himself to admit the crime he should therefore rather have the option to refrain from testifying rather than to perjure himself. See Zuckerman (1989) chapter 15.

¹⁰¹ 1966 (2) SA 433 (A).

Even though section 203 does not require a witness to be cautioned in respect of self-incriminating evidence,¹⁰³ Thompson JA in *S v Lwane*¹⁰⁴ held that such a general rule of practice existed in South Africa.¹⁰⁵ The rule was based on the consideration that, in South Africa, the vast majority of persons who enter the witness-box are likely to be ignorant of the privilege against self-incrimination.¹⁰⁶ The effect of the non-observance of the rule was to be determined upon the particular facts of the case. In this enquiry the nature of the incriminating statement and the ascertained or presumed knowledge of his rights by the deponent will always be important factors.¹⁰⁷

It would therefore seem that proof that an uncautioned witness was actually aware of his rights would ordinarily render the incriminating evidence admissible, despite non-observance of the rule of practice.¹⁰⁸ However, in a separate concurring judgment Holmes JA in *Lwane* indicated that non-observance of the duty of the court to inform a witness of his right against

¹⁰² 1993 (1) SA 777 (A); 1993 (1) SACR 67 (A).

¹⁰³ There is no rule in pre-30 May 1961 English Law of Evidence that a court must warn a witness that he is not obliged to answer questions that might incriminate him. See *R v Coote* [1873] LR 4 (PC) 599.

¹⁰⁴ 1966 (2) SA 433 (A).

¹⁰⁵ At 440. See also *R v Ramakok* 1919 TPD 305 308 where the existence of the rule was confirmed much earlier. The rule was also confirmed in *R v Ntshangela* 1961 (4) SA 592 (A) at 598H.

¹⁰⁶ At 439F and further.

¹⁰⁷ At 440G - 441A.

¹⁰⁸ The same approach seems to have been taken in *Magmoed*.

self-incrimination was an irregularity which would ordinarily¹⁰⁹ render the incriminating evidence inadmissible in a prosecution against the witness.¹¹⁰

In *Magmoed v Janse van Rensburg*¹¹¹ Corbett CJ explained that the criminal justice system and decisions of the courts evinced a general policy of concern for an accused person in a criminal case. This policy includes the rule that an accused should be fairly tried, as well as the various rules which exclude certain types of evidence on the ground that it would *inter alia* be unduly prejudicial to the accused. These measures place limitations on the power of the prosecution to obtain a conviction. They ensure that the accused is not wrongly convicted.

The court held that one such privilege in the sphere of the law of evidence was the privilege against self-incrimination in terms of section 203 of the Criminal Procedure Act. The court described the privilege as “a personal right to refuse to disclose admissible evidence”.¹¹² The privilege is that of the witness and has to be claimed by him.¹¹³ Where the privilege is claimed by the witness, the court must rule on it. Before allowing the claim of privilege, the court must be satisfied from the circumstances of the case and the nature of the evidence that there are reasonable grounds to apprehend danger to the witness if he is

¹⁰⁹ In principle it has been stated that if the accused is represented or otherwise deemed to know of his right against self-incrimination, non-observance of this rule will not render the incriminating evidence inadmissible at the later proceedings.

¹¹⁰ 1966 (2) SA 433 (A) 444F.

¹¹¹ 1993 (1) SA 777 (A); 1993 (1) SACR 67 (A).

¹¹² 819I SA.

¹¹³ 819I SA.

compelled to answer.¹¹⁴ The witness should be given considerable latitude in deciding what is likely to prove an incriminating reply.

The court held that where a witness objects to answering a question on the ground of the privilege against self-incrimination and the objection is overruled by the presiding officer who compels the witness to answer the question, then his reply, if incriminating, will not be admissible in subsequent criminal proceedings against him.¹¹⁵

The court also restated the established rule of practice that the court should inform a witness of his right to decline an answer which may be incriminating. This practice arose because in South Africa many uneducated persons enter the witness-box.¹¹⁶ However, if the witness was not ignorant of this right, it was not necessary to caution him in this regard.

With regards to statements made at a bail application, the full bench in *S v Steven*¹¹⁷ indicated that the accused could have invoked the privilege against self-incrimination. They chose not to do so. As they were represented by counsel there was no question whether the magistrate should have advised them of their rights. The court indicated that the question was not whether the magistrate had committed an irregularity, but rather whether the accused will

¹¹⁴ See also *R v Boyes* (1861) 1 B & S 311 at 330, 121 ER 730 738. The danger must be real and appreciable, not imaginary and of insubstantial character (*S v Carneson* 1962 (3) SA 437 (T) 439H). The privilege may therefore not be claimed where the possibility of criminal liability has been removed. For example where indemnity has been granted in terms of section 204. See *R v Hubbard* 1921 TPD 433 439.

¹¹⁵ 821E SA.

¹¹⁶ 820G - 820I SA.

¹¹⁷ Case number A1237/93 (unreported) (W) 20.

have a fair trial if the record of the bail application is admitted in evidence. However, it was common cause between the state and the legal counsel of the accused that where an accused gives evidence in a bail application, he retains the privilege against self-incrimination.

9.3.5 Case-law after the Interim Constitution

9.3.5.1 General

After the advent of the Interim Constitution both the Constitutional Court and the supreme court had the opportunity to consider the nature and scope of the right against self-incrimination in the context of bail applications. The Constitutional Court also had the opportunity to discuss the link between the right against compelled pre-trial self-incrimination and the trial, and some supreme courts pronounced on the compulsion requirement.

9.3.5.2 The right against self-incrimination in the context of bail

In *S v Zuma*¹¹⁸ the Constitutional Court restated the policy that the testimony of an applicant for bail is inadmissible against him at his later trial if he was unaware of his right against self-incrimination. Kentridge AJ explained that the accused could not have a fair trial if he is cross-examined on the incriminating evidence he gave at the bail application, if he did so while ignorant of the right to refuse to answer incriminating questions. Kentridge AJ saw the question as whether the accused was unaware of the rule against self-incrimination.¹¹⁹

¹¹⁸ 1995 (2) SA 642 (CC).

¹¹⁹ At 651J - 652D.

In *S v Nyengane*¹²⁰ the supreme court in applying the same policy refused to admit the testimony of an applicant for bail at his subsequent criminal trial.¹²¹ The magistrate had failed to warn the accused that he was not obliged to answer questions that might have been self-incriminating. The court held that the fact that the accused was represented by counsel made no difference since his legal representative was an inexperienced candidate attorney whose ignorance, could not be held against the accused.

In *S v Botha (2)*¹²² the court refused to allow the state to use the record of the bail application as evidence against the accused because the accused had been ignorant of his right to refuse to answer incriminating questions.¹²³ The magistrate at the bail hearing did not warn the accused that he had the right to refuse to answer incriminating questions. The accused also alleged that his legal representatives with whom he had only consulted for a mere 10 to 15 minutes before the bail application, had also not informed him of such right. Consequently the accused was cross-examined on the merits and gave incriminating answers.¹²⁴ Myburgh J held that the accused could not have a fair trial if such evidence were to be received.

Even though Myburgh J fell back on the old principles he also pointed to the dilemma that the accused faced.¹²⁵ The accused had a right to remain silent

¹²⁰ 1996 (2) SACR 520 (E).

¹²¹ The court also indicated and there was no provision in the Criminal Procedure Act that permitted the accused's testimony in the bail application to be used at the subsequent trial.

¹²² 1995 (2) SACR 605 (W).

¹²³ At 609 - 10.

¹²⁴ At 608.

¹²⁵ At 611. Some three years before the commencement of section 60(11B)(c).

and the right against self-incrimination. He also had a right to bail. However, if he exercised the first-mentioned rights he could be refused bail. If he decides to testify, his evidence may be used against him at the subsequent trial. The court indicated that the way to avoid burdening the accused with that choice, is to follow the procedure adopted with the evidence of an accused given at a trial within a trial. In this way the bail application would be insulated in a watertight compartment with no spill-over to the subsequent trial.¹²⁶

The courts in the era of the Interim Constitution therefore treated the right against self-incrimination in the same way as before. If the accused was aware, or deemed to be aware of his right to refuse to answer self-incriminating questions at the bail application, his testimony would be admissible at the ensuing trial. However, one supreme court did point out that the accused after the advent of the Interim Constitution had a right to bail and the right against self-incrimination. If the evidence from the bail application was allowed to spill over to the trial it would mean that the accused would have to choose between his right to bail and his right against self-incrimination. It is therefore important to investigate whether there is a link between compelled pre-trial self-incrimination and the trial, and whether the exercise of this choice amounts to the sort of compulsion required by the right against self-incrimination. These issues were discussed by the courts in the same era.

¹²⁶ As to the isolation of a trial within a trial see *R v Dunga* 1934 (AD) 223 226; *S v De Vries* 1989 (1) SA 228 (A) 233H - 234A; *R v Brophy* [1982] AC 476, [1981] 2 All ER 705 (HL) 709D - E; *S v Sithebe* 1992 (1) SACR 347 (A) 341a - c per Nienaber JA.

9.3.5.3 The link between the right against compelled pre-trial self-incrimination and the trial

The link between the right against compelled pre-trial self-incrimination and the trial was explained by the Constitutional Court in *Ferreira v Levin NO; Vreyenhoek v Powell NO*,¹²⁷ *Bernstein v Bester NO*¹²⁸ and strengthened in *Nel v Le Roux NO*.¹²⁹

In *Ferreira v Levin NO; Vreyenhoek v Powell NO* the constitutional validity of section 417(2)(b) of the Companies Act 61 of 1973 was examined. In terms of this section an examinee was required to answer under the threat of a fine or imprisonment or both any question put to him notwithstanding that any answer to such question might be used in evidence against him in subsequent criminal proceedings. Chaskalson P, on behalf of the majority, held that the section infringed the rule against self-incrimination.¹³⁰ He explained that the rule against self-incrimination was “not simply a rule of evidence” but “a right”, which, by virtue of the provisions of section 25(3) of the Interim Constitution, was a constitutional right. He also indicated that it was “inextricably linked to the right of an accused to a fair trial” and it existed to protect that right.¹³¹ The reason why the evidence given by an examinee at an inquiry held under section 417(2)(b) could not be used against him if he was subsequently prosecuted

¹²⁷ 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).

¹²⁸ 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) par 60f.

¹²⁹ 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC).

¹³⁰ Par 159 of the judgment.

¹³¹ *Ibid.*

flows from this connection between the privilege against self-incrimination and the right to a fair trial.¹³²

In a minority judgment Ackermann J concluded that “the right of a person not to be compelled to give evidence which incriminates such person is inherent to the rights mentioned in section 25(2) and (3)(c) and (d) of the Interim Constitution”.¹³³ The judge cited with approval the decision in *R v S (RJ)*¹³⁴ where the Canadian Supreme Court discussed the right against self-incrimination in terms of protecting the person concerned “against assisting the Crown in creating a case to meet”. However, Ackermann J did not see that the constitutionality of section 417(2)(b) could be challenged in terms of section 25(3) of the Constitution.¹³⁵ He decided that section 417(2)(b) violated the widely interpreted provisions of section 11(1) of the Interim Constitution. In this regard Chaskalson P pointed out that the reasoning that led Ackermann J to conclude that section 417(2)(b) was inconsistent with section 11(1) would also have led him to conclude that it was inconsistent with section 25(3).¹³⁶

¹³² Par 159 & 160 of the judgment.

¹³³ Par 79 of the judgment. Sections 25(2), (3)(c) and (d) appear in Annexure C.

See also *S v Zuma* 1995(1) SACR 568 (CC) par 33 and *R v Camane* 1925 AD 570 575.

¹³⁴ [1995] 1 SCR 451, 26 CRR (2d) 1 76.

¹³⁵ Ackermann J held that section 25(3) rights only accrued to an “accused person” when such person became an accused in a criminal prosecution. An examinee at a section 417 enquiry was not an “accused person”. Ackermann J explained that only when such evidence was tendered at the criminal trial did the threat to any section 25(3) right against self-incrimination arise.

¹³⁶ In *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC) *Ferreira's* case was followed and applied in respect of sections 415(3) and (5) of the Companies Act in relation to the corresponding section of the Final Constitution, section 35(3). The court in *S v Mathebula* 1997 (1) BCLR 123 (W) 147 also accepted this principle as part of the right to a fair trial.

However, at supreme court level it was also held that the compulsion of some types of evidence does not violate the right against self-incrimination. In *Msoni v Attorney-General of Natal*¹³⁷ the division between “real” and “communicative” evidence made by the Canadian courts while dealing with fingerprints was invoked.¹³⁸ The court in *Msoni* held that only the compulsion of “communicative” evidence could be regarded as violating the right against self-incrimination.¹³⁹ But in *S v Hlalikaya*¹⁴⁰ there was a deviation of the “communicative” requirement where a suspect’s standing in an identity parade, was given a self-incrimination dimension. A wider meaning regarding compulsory self-incrimination was also given in *S v Melani*¹⁴¹ where the court

¹³⁷ 1996 (8) BCLR 1109 (N).

¹³⁸ See *Collins v The Queen* [1987], (1) SCR 265, 33 CCC (3d) 1 (SCC). See also *S v Huma* 1996 (1) SA 232 (W) and *S v Maphumulo* 1996 (2) BCLR 167 (N).

¹³⁹ *Msoni* followed the American decision in *Schmerber v California* 384 US 757 (1966) (blood sample not self-incrimination). In Canada, this reasoning was also applied by the Ontario Court of Appeal in *R v Altseimer* (1982), 1 CCC (3d), 142 DLR (3d) 246, 38 OR (2d) 783 to a breath sample. However, the Supreme Court of Canada in *R v Therens* (1985), 13 CRR 193, (1985) 1 SJR 613 held that a breath sample amounted to conscription of the accused against himself. See also *R v Dersch* [1993], 3 SCR 768, 85 CCC (3d) 1 (SCC) (blood sample) and *R v Greffe* [1990], 1 SCR 755, 55 CCC (3d) 161 (SCC) (object extracted from rectum). In the latter cases the self-incriminating principles were entangled with the violations of the right to counsel.

In England the privilege against self-incrimination at common law is interpreted as not extending to the compelled production of intimate samples. See *Apicella AR* [1985] 82 Cr App R 295 (CA); *Smith RW* [1985] 81 Cr App R 286 (CA) and *Cooke S* [1995] 1 Cr App R 318 (CA).

¹⁴⁰ 1997 (1) SACR 613 (SE).

¹⁴¹ 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E) 191, 1996 (1) SACR 335 (E).

viewed conscription as “through some form of evidence emanating from himself”.¹⁴²

9.3.5.4 The compulsion to testify

In *Davis v Tip*¹⁴³ the applicant was charged with misconduct and had to appear in a disciplinary enquiry. However, he had been criminally charged in respect of the same charges which proceedings had not been finalised. At the enquiry it was submitted that the applicant’s right in terms of section 25(3)(c) IC would be violated if the inquiry proceeded since he might of necessity be called upon to answer evidence against him if he wished to avoid a finding of misconduct. This evidence could then be used against him in the criminal proceedings.¹⁴⁴

Nugent J held that the exercise of this choice, even if it is an unpleasant one, to defend the applicant’s interest in the disciplinary enquiry did not amount to the sort of compulsion required for the violation of “the right to remain silent”.¹⁴⁵ However, the reasoning of the court in coming to this conclusion, is not convincing. The finding by the court, in the first instance, that the two Canadian cases referred to by the applicant do not provide authority for the proposition that such an illusory choice is equal to violating the applicant’s

¹⁴² Snyckers in Chaskalson *et al* (1996) 27 - 46 submits that a distinction should be drawn between real evidence obtained independently of the person of the accused, and real evidence intimately connected with his person. He submits that compelled production of the former does not by itself amount to self-incrimination, but compelled reproduction of the latter may be a different matter.

¹⁴³ 1996 (1) SA 1152 (W), 1996 (6) BCLR 807 (W).

¹⁴⁴ At SA 1154 - 1155.

¹⁴⁵ At SA 1158H - J. See also *S v Mbolombo* 1995 (5) BCLR 614 (C).

“right to silence”, is astonishing.¹⁴⁶ The two Canadian cases say in as many words that such a choice amounts to no choice at all and that the applicant will thus be *forced* to wave his “right to silence”.¹⁴⁷ The court furthermore, while accepting that an accused may not be placed under compulsion to incriminate himself, perplexingly based its findings on the right to silence¹⁴⁸ rather than on the right against self-incriminating evidence.¹⁴⁹ The distinction also, that the court tried to make between the “compulsion to testify” as required by “the right to silence”, and “the choice to testify” as in the application before court seems forced and unconvincing.

The court explained that what distinguished “compulsion to testify” from “making a choice to testify” was whether the alternative that presented itself constituted a penalty which served to punish a person from choosing a particular route as an inducement to him to not do so.¹⁵⁰ In the present case the applicant might be required to choose between incriminating himself or losing his employment. However, his loss of employment would be the consequence of him being found guilty of misconduct and not a punishment to induce him to speak.¹⁵¹

¹⁴⁶ At 1158C. Counsel for the applicant referred to the decision of the Nova Scotia Court of Appeal in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1993) 18 CRR (2d) D - 6 Digest and the Nova Scotia Supreme Court in *Williams v Deputy Superintendent of Insurance* (1993) 18 CRR (2d) 315.

¹⁴⁷ See *Williams ibid* 331 and 337. The *Williams* decision followed the *Phillips* decision *ibid*.

¹⁴⁸ Enumerated in section 25(3)(c) IC.

¹⁴⁹ At 1158G - H.

¹⁵⁰ At 1158H - J.

¹⁵¹ At 1159A - B.

In *Seapoint Computer Bureau (Pty) Ltd v Mcloughlin NO*¹⁵² the applicant applied to stay a civil proceeding pending the determination of a criminal case. The applicant contended that the cross-examination during the civil proceedings would expose him to the risk of making incriminating statements that would prejudice his position in the criminal proceedings that might follow. In this case the court, relying heavily on the *Davis* decision and the analysis therein, also held that only the actual coercive compulsion to answer questions, as opposed to the exercise of a choice amounted to the sort of compulsion required for the violation of "the right to remain silent".¹⁵³ However, the *Seapoint* court seemed to base its decision on the equation of the common law right to silence with the right against self-incrimination.¹⁵⁴

9.3.6 Case-law under the Final Constitution

During the period between the advent of the Final Constitution and the commencement of section 60(11B)(c) of the Criminal Procedure Second Amendment Act, the supreme court was also called on to decide whether the submissions by the applicant for bail should be admissible against him at his subsequent trial.¹⁵⁵

¹⁵² 1996 (8) BCLR 1071 (W).

¹⁵³ See also *Osman v Attorney-General of Transvaal* 1998 (11) BCLR 1362 (CC) where the actual coercion to speak was also decisive.

¹⁵⁴ At 1081 and further.

¹⁵⁵ The decision came on 9 April 1998 after the Criminal Procedure Second Amendment Act 85 of 1997 was assented to on 26 November 1997, but before the date of commencement of *inter alia* subsection (11B)(c) which commenced with the remainder of the Act on 1 August 1998.

It was contended before Vahed AJ In *S v Dlamini*¹⁵⁶ that an accused person should be free to say whatever he wants at a bail application in order that he may feel comfortable and secure in securing his freedom at that stage.

Vahed AJ referred to the Supreme Court of Appeal in *S v Nomzaza*¹⁵⁷ which held that in general everything said by the accused at the bail application was admissible at the later trial unless there were circumstances rendering such statements inadmissible. He was of the opinion that *Botha's* case¹⁵⁸ did no more than take the proposition one step further.¹⁵⁹ The court said that such a process was always available to the accused and to impose a blanket rule as suggested by counsel would result in bringing the administration of justice in disrepute. He saw this as a necessary consequence of a situation where the public would witness accused persons who had been fully informed of their rights, making incriminating admissions during the course of bail proceedings which admissions could not be proved against them at their subsequent trial.

The court also emphasised that it had to be assumed that the framers of the Constitution had been mindful of the possibility of including a provision similar to that of section 13 of the Canadian Charter in the Constitution and had deliberately refrained from doing so.¹⁶⁰ If the accused who applied for bail is

¹⁵⁶ 1998 (5) BCLR 552 (N).

¹⁵⁷ [1996] 3 All SA 57 (A).

¹⁵⁸ *S v Botha (2)* 1995 (2) SACR 605 (W).

¹⁵⁹ *Botha's* case pointed to the dilemma faced by the accused because of the conflict between the two rights in question. The court held that if it was real and material to the extent that in admitting the evidence the record of the bail proceedings might render the trial unfair, that question could be determined during the course of the trial within a trial.

¹⁶⁰ The court does not seem to have been aware of the decision in *Dubois v The Queen* [1985], 2 SCR 350, 23 DLR (4th) 503 (SCC). In both *Dlamini* and *Dubois* the use of the record of the bail proceedings *as part of the state case*

placed in the dilemma referred to in *Botha's* case this might have the effect of limiting one or the other of the rights in question, but such limitation was justifiable in the interests of not bringing the administration of justice in disrepute. It followed that there was no warrant for adopting a blanket rule that evidence given by an accused at bail proceedings would be inadmissible at his later trial.

9.3.7 The constitutionality of section 60(11B)(c)

The Criminal Procedure Second Amendment Act 85 of 1997, including section 60(11B)(c), commenced on 1 August 1998. In light of the constitutional right not to be a compellable witness against oneself, the framers of the Act presumably accepted that an applicant for bail would not be "forced" to forego his right against self-incrimination in pursuing his right to bail. In this part it is investigated whether section 60(11B)(c) can withstand constitutional scrutiny.

The first two cases decided on section 60(11B)(c) were both by Slomowitz AJ in the Cape Provincial Division, on the same reasoning.¹⁶¹ In *S v Schietekat*¹⁶² Slomowitz AJ explained that no person may be required to be a witness

came to be decided. However, this argument does not hold water when the admissibility of the bail record as part of the state case at trial comes to be decided. The Supreme Court of Canada held that in this instance section 13 merely insured that the Crown would not be able to do indirectly that which section 11(c) prohibits. The use of the testimony from a prior proceeding during the Crown case at the later trial was therefore in any case prohibited by section 11(c). It therefore seems that the right created in section 35(3)(j) is sufficient to prohibit the use of prior proceedings as part of the Crown case and does not call for a right similar to section 13 of the Canadian Charter to be taken up in the Constitution.

¹⁶¹ *S v Schietekat* 1998 (2) SACR 707 (C) and *S v Joubert* 1998 (2) SACR 718 (C).

¹⁶² At 714.

against himself. It was not an inquisition, for a bail proceeding was not a Star Chamber. Slomowitz AJ commented that whatever the purpose of Parliament may have been in enacting it, its effect was malevolent. He indicated that an accused who elects to exercise his right to apply for bail, runs the risk of being interrogated on the merits of the case against him. His own testimony will then be used against him as part of the state's case when he eventually comes to trial. Slomowitz AJ asked the question whether the provision was fashioned to discourage those who seek their liberty. An accused who testifies might well incriminate himself, whether that be of the crime charged or more seriously, of other offences unknown and uncharged. In conclusion the court felt bound to hold that the section violated the Constitution.

The constitutional validity of section 60(11B)(c) ultimately came before the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*.¹⁶³ In this decision which dealt with various constitutional challenges, the court also saw fit to discuss the law regarding bail in general. Of importance, for present purposes, in the general discussion, is the court's introduction to the new section 60(11B)(c):¹⁶⁴

Further, in a new sub-s (11B), another legislative innovation was introduced: an applicant for bail became obliged to furnish information to the court (upon pain of imprisonment for withholding it or furnishing it untruthfully) and the record of bail proceedings was made part of the trial record.

Still, when the court specifically dealt with the admissibility of bail proceedings at trial,¹⁶⁵ it disagreed with the reasoning and conclusion reached in *Botha's* case that the record of bail proceedings should be kept distinct from the

¹⁶³ 1999 (7) BCLR 771 (CC).

¹⁶⁴ Par 15 of the judgment.

¹⁶⁵ Par 86 and further of the judgment.

evidence as to guilt. The court did thus not agree that it should be kept apart on the analogy of evidence in a trial within a trial, for example as to the whether a confession is voluntary or not.¹⁶⁶

However, the court did accept that the evidence given at a bail hearing might return to haunt the accused at the trial.¹⁶⁷ The court could not deny that there is a certain tension between the right of an arrested person to make an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under sections 35(1) and (3) of the Constitution. Yet, the court did not see that kind of tension as unique to persons applying for bail. The court reiterated that people living in democratic and open societies are often called upon to make hard choices.

Kriegler J on behalf of the unanimous court explained that litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices.¹⁶⁸ He saw it as an inevitable consequence of the high degree of autonomy afforded to the prosecution and the defence in a predominantly adversary system of criminal justice. An accused who is ideally assisted by a competent legal representative, in substance conducts the defence independently. He has to take many key decisions whether to speak or to keep silent. Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral or written evidence, and if so, by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the

¹⁶⁶ Par 93 of the judgment.

¹⁶⁷ *Ibid.*

¹⁶⁸ Par 94 of the judgment. This approach closely follows the argument by the DPP.

basis of the defence under section 115 of the CPA? Does one adduce evidence - one's own or that of others? The court explained that each and every one of these choices could have decisive consequences.¹⁶⁹ They therefore pose difficult decisions. But the court points out that the choice remains that of the accused and that the choice cannot be forced upon him.

Kriegler J commented that the reasoning in *Botha* wished to give the accused the best of both alternatives, or as it was bluntly put in *Dlamini*, the right to lie. One can therefore present any version of the facts without any risk of a come-back at the trial. At trial one can choose another version with impunity. However, the court did not consider the right to remain silent in the Constitution, or the right not to be compelled to confess or make admissions as offering blanket protection against having to make a choice. Still, the court agreed that the principal objective of the Bill of Rights was to protect the individual against abuse of state power. It does so, amongst others things, by shielding the individual faced with a criminal charge against having to help prove that charge. But the court indicated that the shield against compulsion does not mean that an applicant for bail can choose to speak, but not be quoted.¹⁷⁰ As a matter of policy the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an informed choice, elects to testify in support of a bail application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently held against the accused.¹⁷¹

¹⁶⁹ *Ibid.*

¹⁷⁰ See also par 9.3.5.4.

¹⁷¹ At par 95 of the judgment.

Referring to the ills that befell the accused in *Botha, Dlamini* and *Schietekat* the court indicated that there was no need in propounding a broad and radical remedy for an ill that must be treated conservatively and selectively. The court agreed with the Supreme Court of Appeal in *S v Nomzaza*¹⁷² that:

- there was no general principle at common law excluding from the evidence at trial, incriminatory or otherwise prejudicial evidence given by an accused at a prior bail hearing; but
- if the admission of such evidence would render the trial unfair, the trial court ought to exclude it.

The court indicated that it was not the right to silence that was imperilled by the accused electing to speak, and found no warrant for creating a general rule, which according to the court, would exclude cogent evidence against which no just objection can be levelled. But, if there is a valid objection in particular circumstances the trial court should disallow such evidence. In *Botha's* case, for example, where he did not know of his right not to answer incriminatory questions and effectively convicted himself, the incriminatory evidence should be excluded at trial.

The court accordingly found that the record of bail proceedings is not automatically excluded from, nor included in the evidentiary material at trial. Whether or not it is to be included depended, according to the court, on the principles of a fair trial.¹⁷³

¹⁷² [1996] 3 All SA 57 (A).

¹⁷³ Van der Merwe in Du Toit *et al* (1987) 9 - 34B approves this approach (in the revision service 22 which seems to have been published soon after this decision on 3 June 1999). He argues that sections 60(11B)(c) and 60(11) create special difficulties. An accused who has to testify in terms of section 60(11) in order to obtain bail, finds himself in the position that his testimony and answers in cross-examination, may be used against him at the subsequent

The Constitutional Court approvingly referred to the flexible approach advocated by Ackermann J in *Ferreira v Levin NO; Vreyenhoek v Powell NO*¹⁷⁴ and indicated that that approach should be followed. The court therefore found no inevitable conflict between section 60(11B)(c) of the Criminal Procedure Act and any provision of the Constitution.

9.3.8 Derivative evidence

But what about evidence deriving out of the evidence given by the accused at the earlier bail application? May that evidence be used against the accused at trial? This situation will present itself where the evidence given by the accused is ruled inadmissible, but certain evidence has emanated from such inadmissible evidence.¹⁷⁵

trial. He says that the argument that there is nothing wrong with this conflict, overlooks the fact that evidence supporting bail differs "in ambit, objective and detail from testimony on the merits where guilt or innocence is the issue". He foresees the possibility that an accused who testifies at his trial is not fully aware of the "allegations of fact" that he would face at the trial against him. This is said to be especially the case where the charge sheet has not been drawn up, or no indictment or summary of facts have been served, or where the accused is denied access to the police docket in terms of section 60(14). He therefore argues that the mere fact that an accused has been warned that his testimony may be used at trial, cannot *ipso facto* make that evidence admissible. He argues that the final test is contained in section 35(5) of the Constitution. If the admission of the evidence would be unfair or otherwise detrimental to the administration of justice, it must for that reason be excluded.

¹⁷⁴ 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Endorsed by the same court in *Bernstein v Bester NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

¹⁷⁵ For example where the accused had been unaware at his earlier bail application that he had the right to refuse to answer incriminating questions.

In *Ferreira v Levin NO; Vreyenhoek v Powell NO* the court¹⁷⁶ 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.¹⁷⁷

In this regard section 35(5) of the Final Constitution provides the following: "Evidence obtained in a manner that violates any right 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."¹⁷⁸

No difference is drawn between direct and derivative evidence. Once it is determined that the evidence was obtained in an unconstitutional manner it must be decided whether the admission of such evidence will render the trial

¹⁷⁶ 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Relying on Canadian authority. See *R v S (RJ)* [1995], 1 SCR 451, 26 CRR (2d) 1 (SCC).

¹⁷⁷ The Constitutional Court's decision superseded the supreme court in *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C) 162, 1995 (2) BCLR 198 (C) where it was held that the preferred view, which served the right against self-incrimination best, and which coincides with the position under American and English law, is that derivative evidence emanating from self-incriminating evidence should be excluded.

¹⁷⁸ In deciding what could be detrimental to the administration of justice it is relevant to look at the public's perception of justice although this is not decisive. In *S v Melani* 1996 (1) SACR 335 (E) and *S v Ngcobo* 1998 (10) BCLR 1248 (N) the supreme court dealt with illegally obtained evidence under the Interim Constitution. The courts (at 352 and 1254F - G respectively) held that public opinion would probably show that the majority of the South African population at this stage in the history of the country, would be quite content if the courts allowed unconstitutionally obtained evidence. However, the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC) par 88 has indicated that the fundamental values of the criminal justice system are not subject to public outcries and polls. The question to be asked is whether the admission of the evidence would bring the administration of justice in disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances. See *S v Malefo* 1998 (2) BCLR 187 (W) 213A and *Collins v The Queen* (1987) 28 CRR 122 at 136 - 7.

unfair or be detrimental to the administration of justice. If the answer to any one of the two legs of the question is affirmative, the evidence must be excluded.

In *Ferreira v Levin NO; Vreyenhoek v Powell NO Ackermann J*¹⁷⁹ indicated that derivative evidence “though not created by the accused and thus not self-incriminating by definition” was “self-incriminating nonetheless because the evidence could not otherwise have become part of the Crown’s case”.¹⁸⁰

In principle it therefore seems that derivative evidence will have been obtained in an unconstitutional manner.¹⁸¹

However, on the reasoning by the court in *Ferreira v Levin* in allowing derivative evidence emanating from a section 417 enquiry, it may be argued that derivative evidence¹⁸² emanating from a bail application should be allowed:¹⁸³

- The hearing of a bail application serves an important public purpose and cannot be equated with evidence obtained as the result of unlawful conduct. Where the evidence was, for example, obtained as the result of torture, public policy might dictate that it be excluded even if the fact(s) can be proved independently. A different approach would allow the ends to

¹⁷⁹ Again relying on *R v S (RJ)* [1995], 1 SCR 451, 26 CRR (2d) 1 (SCC).

¹⁸⁰ Par 145 of the judgment.

¹⁸¹ The limitations clause must be applied before the Constitution’s exclusionary rule comes into play.

¹⁸² And for that matter direct evidence given at the bail application.

¹⁸³ See also Malan (1996) E12 - 41 and further.

justify the means.¹⁸⁴ Where the admission of evidence under the latter circumstances would bring the administration of justice into disrepute, the same cannot be said of the evidence emanating from a bail application.

- The state has a responsibility to protect its citizens against crime. To allow such evidence at trial cannot simply be said to bring the administration of justice into disrepute.¹⁸⁵
- South Africa does not have nearly the resources to combat crime as effectively as the United States where derivative evidence is not admissible.¹⁸⁶ The use of such evidence may in certain cases be the only way to combat crime effectively.¹⁸⁷

9.3.9 Critical appraisal

It is clear that the record of bail proceedings is inadmissible as evidence at trial, if the accused was unaware of his right against self-incrimination. However, section 60(11B)(c) now obliges the court to warn the accused at the bail application that the evidence may be used against him if he elects to testify.¹⁸⁸ Section 60(11B)(c) therefore sets stricter requirements and if the court does not warn the accused, the evidence is inadmissible, irrespective whether the accused was aware of his rights or not. It therefore follows that if a witness at

¹⁸⁴ Par 150, page 91E - G of the judgment.

¹⁸⁵ At par 151 page 92A - B the court explains that the public, and especially the victims of the crime, might find a denial of the right to use such evidence inexplicable.

¹⁸⁶ See par 152 of the judgment. In this regard it must be remembered that Canada has similar resources as the United States to combat crime but the use of derivative evidence is allowed only under certain circumstances.

¹⁸⁷ Par 152 of the judgment.

¹⁸⁸ See the latter part of the wording of section (11B)(c) - "must inform ... and such evidence becomes admissible"

the bail proceedings knew of his right against self-incrimination, but is not warned, and elects to testify, his evidence is not allowed at his future trial.

It also seems that where an arrested person is compelled to submit evidence before trial in this context, the absence of use immunity in the criminal proceedings could not be justified under the limitation provision.¹⁸⁹ At common law an accused could also not be compelled to give self-incriminating evidence. The right against self-incrimination therefore operated only at the trial where the incrimination might occur. No complaint based on self-incrimination, if any, outside that context had any meaning.¹⁹⁰

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 the accused has a purely adversarial role to play. This approach must be applied to all forms of evidence emanating from the accused, including derivative evidence. The presumption of innocence, as the governing principle,

¹⁸⁹ Section 36.

¹⁹⁰ See *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) where it was held that the applicant could not validly (and did not) object to answering self-incriminating questions in view of the transactional indemnity and use immunity provisions in section 204(2) and (4) of the CPA.

See also *Dabelstein v Hildebrandt* 1996 (3) SA 42 (C) at 66, in the context of Anton Piller orders.

It is submitted that one could still validly refuse to answer questions at pre-trial if other rights would be affected by the answers. Unless the threatened violation would be upheld as justified under limitation analysis. See *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) par 61 and *Nel v Le Roux NO* 1996 (1) SACR 572 (CC) par 6ff.

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

Since the advent of the fundamental rights era the question whether the record of bail proceedings should be allowed at the subsequent trial rests on a different footing. The Final Constitution provides that an accused has a right to a fair trial, which includes the right against self-incrimination. The arrested person also has a right to bail in terms of section 35(1)(f) of the Final Constitution. The accused now faces a dilemma. If he fails to give evidence or refuses to answer incriminating questions at the bail application, he may be refused bail and in the instance of some more serious offences where he carries the burden of proof, he will be refused bail.¹⁹¹ If he elects to testify or submit other evidence or answers incriminating questions in order to get bail (to which he has a right), he foregoes his right not to be compelled to give self-incriminating evidence, for the testimony may be used at his subsequent trial.

The reasoning of and conclusions reached by the Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*¹⁹² cannot be supported. Even though it is without a doubt true that criminal litigation presents a litigant with difficult choices, the examples given by the court in paragraph 94 of the judgment are not comparable to the situation under discussion. One would not in one of the examples given have to forego one constitutional right in order to exercise another. Does an accused therefore in one of the examples given have a constitutional right to submit written evidence and also a constitutional right to adduce oral evidence? Would an accused have to abandon the one to

¹⁹¹ Kotzé (1998) 1 *De Jure* 188 seems to be of the similar view that the cumulative effect of sections 60(11) and 60(11B)(c) was to breach the right against self-incrimination.

¹⁹² 1999 (7) BCLR 771 (CC).

exercise the other? Can he not do both? In this example given by the Constitutional Court it is but a choice that an accused has to make within one fundamental principle, that is, his right to be heard at the bail application.

The accused can furthermore obtain the legal remedy he pursues by submitting either oral or written evidence. It is merely a question of tactics dictating what would be appropriate in specific circumstances. He is not forced to do the one or the other, on pain of not being granted a remedy, should he refuse.

On the reasoning of the Constitutional Court it also seems that a witness under section 417(2)(b) of the Companies Act has a right to lie but in that instance it is acceptable.¹⁹³ In light of the judgment by the Constitutional Court it furthermore seems that the witness under section 417(2)(b) has a choice: Does he answer questions now and escape conviction and sentence under section 417(2)(b), or should he rather keep quiet and escape possible conviction and sentence because of his non-assistance later?¹⁹⁴

It is argued that the evidence given at the bail hearing is not voluntary if it is done under pain of not receiving bail. An applicant in bail proceedings is obliged to give evidence or answer questions in order to obtain bail and is therefore "forced" to do so.¹⁹⁵ In principle there should be no difference

¹⁹³ In par 94 Kriegler J commented that if an accused was allowed to present any version of facts at the bail application without any risk of come-back at trial, the accused would have the right to lie. See par 9.3.7. However, in *Ferreira v Levin NO; Vreyenhoek v Powell NO* 1996(1) SA 984 (CC) par 159 - 160 the Constitutional Court ruled that the testimony given at a section 417(2)(b) enquiry is protected from use at any subsequent trial. See par 9.3.5.3.

¹⁹⁴ Where the charges may be more serious and personal liability for the Company's debt may be incurred.

¹⁹⁵ Especially where he bears the burden of proof.

whether one faces a fine or imprisonment under section 417(2)(b), or imprisonment when one fails to testify at a bail application. In both cases the right against self-incrimination is offended and the testimony or answers should not be allowed at the subsequent trial.

In addition I submit that if an accused confesses because he has been promised incarceration on failure thereof, the confession will not be allowed because it was not done voluntarily. If an applicant for bail is told that he will be incarcerated if he does not give evidence, it was similarly not done voluntarily, and the evidence must be excluded.¹⁹⁶ In both these instances the choice is between incarceration and assisting the prosecution. If policy does not allow the one, the other should not be allowed either. Because of the inextricable link between the right against self-incrimination the right of an accused to a fair trial, there will in both these instances not be a fair trial if the evidence is allowed.

It is therefore submitted that the common-law rule in regard to the burden of proving that a confession was voluntary made should also be applied here. This rule is not accidental but an integral part of the right not to be a compellable witness against oneself. This in turn reinforces the underlying principle of the presumption of innocence which entails that the accused is not obliged to assist the state in proving its case. This is also how section 12 would inform the interpretation of section 35(3)(j).

For the reasons given I submit that section 60(11B)(c) offends the right against self-incrimination. Neither can it be saved by the limitation clause provided for in section 36(1) of the Final Constitution.

¹⁹⁶ I submit that the fact that the threat might not have emanated from a person in authority should not change the principle.

Although the level of criminal activity is a “pressing and substantial”¹⁹⁷ concern and clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36,¹⁹⁸ there are other factors relevant to such exercise. One must be careful to ensure that the alarming incidence of crime is not used to justify extensive and inappropriate invasions of individual rights.¹⁹⁹

Section 36(1)(a) requires that the nature of the right that has been infringed must be taken into account. This is not only a separate enquiry but also an indication of how stringently the other factors must be viewed. If the right to be limited, as here, is crucial to the constitutional project, it must be understood to mean that the other limitation requirements must be tightened accordingly.²⁰⁰ It will therefore be more difficult to justify the infringement of a

¹⁹⁷ See *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) where it was indicated that the objective had to be “pressing and substantial”.

¹⁹⁸ See section 36(1)(b) which provides that “the importance of the purpose of the limitation” must be taken into account. No fixed order in which the factors must be considered is prescribed. The following order has been proposed by Woolman in *Chaskalson et al* (1996) 12 - 49 to ensure that the correct questions be asked at the correct time:

- “The nature of the right”;
- “The importance of the purpose of the limitation”;
- “The relation between the limitation and its purpose”;
- “The nature and extent of the limitation”;
- “Less restrictive means to achieve its purpose”.

However, Theme Committee Four seems to have softened any rigidity in approach with statements like: “[t]he list of factors should remain open-ended”, “none of the factors should be regarded as a conclusive test” and “care should be taken not to formulate these factors as tests.”

¹⁹⁹ See *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 68.

²⁰⁰ See also Woolman in *Chaskalson et al* (1996) 12 - 50.

right that is of particular importance to the constitution's ambition to create an open and democratic society based on human dignity, equality and freedom.

As a matter of concern for an accused person in criminal trials, our courts and legal scholars have indicated that it is unacceptable that an accused be compelled to assist the state in obtaining a conviction. It has on many occasions also been indicated that this right was inextricably linked to the right of an accused to a fair trial. Non-compliance with this offends the underlying principle, namely the presumption of innocence. Such is the importance of this right.

In addition, section 36(1)(c) provides that the nature and extent of the limitation must be taken into account. This factor ensures that where a serious infringement of a right occurs, the infringement will carry a great deal of weight in the exercise of balancing rights against justifications for its infringement. From the point of view of the individual affected by this invasion: his right against self-incrimination is taken away completely in this instance.²⁰¹

²⁰¹ Under the Interim Constitution the "essential content" requirement reminded the court that there is a point beyond which the government may not go in limiting a fundamental right notwithstanding how important and pressing the government's objectives might be. See Woolman in Chaskalson *et al* (1996) 12 - 16. The focus is thus taken away from the plight of the government and regard is had to the detrimental effect that the limitation may have on the right of the right-holders.

However, the "essential content" requirement was deleted from the Interim Constitution and therefore does not appear in the Final Constitution. This was due to the inability of the courts and legal scholars to give substance to this requirement. See, for example, *S v Makwanyane* 1995 (3) SA 391 (CC) where four different opinions were given. Chaskalson P at 446G - 448A explained that the purpose of the provision was to ensure that rights may not be taken away altogether and that a meaningful distinction can be drawn between the objective and subjective content of a right. Kentridge AJ 470 rejected Chaskalson P's understanding and found it difficult "on any rational use of language" to explain the essential content of a right in terms of a subjective dimension. Ackermann J 458F - H disagreed with Chaskalson P on the

It is well established that section 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other.²⁰²

If the object of the government is to control the violent and serious crimes mentioned in schedules 5 and 6, it seems that the government could have used some means less restrictive of the rights of accused.²⁰³ In the first instance, an accused can be prevented from saying one thing with impunity at the bail hearing and another at the trial, without invading his right against self-incrimination. This can be done by allowing the record of the bail proceedings,

objective and the subjective content. Mahomed DP 496G - J indicated that there might be a third way to understand the term "essential content". However, the court found that the "essential content" requirement could be established by simply tightening the rest of the tests during limitation analysis. See also De Waal (1995) 11 *SAJHR* 18 - 21.

When the Final Constitution was written Theme Committee Four and the Constitutional Assembly also recognised that at least one of the factors recognised by the court in *Makwanyane* (and adopted in section 36) could be utilised to perform the same function. This, the Theme Committee said, could be done by taking into account "the extent and nature of the limitation", and dropped the requirement from the limitation clause.

²⁰² This requirement was explained by the court in *S v Williams* 1995 (7) BCLR 861 (CC) 880D - E before the express requirement in section 36. The court indicated that the test relied on proportionality. It is a process of weighing the individual's right, which the state wishes to limit, against the objective that the state seeks to achieve by such limitation. This evaluation must necessarily take place against the backdrop of the values of the South African society as articulated in the Constitution.

²⁰³ See section 36(1)(e) and par 8.3.5.3. It has been indicated that the state has to prove the requirement of minimal intrusion. See also *Brink v Kitshoff* NO 1996 (6) BCLR 752 (CC) 770J - 771; *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC). See *Tétreault-Gadoury v Canada (Employment and Immigration Commission)* (1991) 4 CRR (2d) 12 26 (SCC); *Rodriquez v British Columbia (Attorney-General)* (1994) 17 CRR (2d) 193 222 and 247 (SCC) and *R v Laba* (1994) 120 DLR (4th) 175 179c (SCC) under Canadian law.

to test only the credibility of the accused at trial. There also does not seem to be an obvious need to cast the net so widely as to include the record of all bail proceedings, whatever the charge, in the trial record. There seems to be no common sense connection between these “lesser” crimes and the purpose of the legislature.

It is therefore submitted that this is one instance where the equilibrium between the freedom and security of the accused and the interests of society is out of balance and needs to be corrected.

9.4 CONCLUSION

Under Canadian law the testimony by the accused at the bail hearing may not be used as part of the Crown case at trial or to incriminate the accused during cross-examination. This prohibited testimony includes oral testimony whether under oath or not, documentary evidence introduced and other acts performed while testifying. It is not clear whether section 13 of the Canadian Charter allows the use of the prior testimony to test the credibility of the accused during cross-examination. However, section 5(2) of the Canada Evidence Act protects an accused at the trial from an answer given at the bail hearing, where he objected to answer the question on the grounds that the testimony might tend to incriminate or establish his liability in a civil proceeding. Such answer may therefore not be used to test the credibility of the accused during cross-examination at trial.

Under South African law the intention does not seem to have been that the record of the bail proceedings should form part of the state case at trial. However, it does seem that the evidence presented by an applicant informed of his right against self-incrimination, and pursuing his right to obtain bail, may

be used to incriminate or to test the credibility of an accused who elects to testify at his trial. All the evidence that forms part of the record of the bail proceedings is allowed. While the evidence may be excluded under South African law in the interests of justice, it is usually not seen to be in the interests of justice where the applicant has so been informed. Under the same circumstances Canadian law prohibits the use at the trial of the previous testimony at the bail hearing.

However, where the use of evidence is prohibited under South African law, for example where the accused was unaware of his right against self-incrimination, the admissibility of derivative evidence at the subsequent criminal trial is on similar footing as under Canadian law. Here the courts under both systems have the discretion to exclude the evidence to ensure a fair trial.²⁰⁴

²⁰⁴

An evaluation of the principles indicate that modern Canadian law has extended the doctrine of protection against self-incrimination beyond the common law principle which protects a witness from being compelled to respond to questions which might incriminate him. Since the advent of the Canadian Charter, section 13 has guaranteed that the prior testimony of a witness (including an applicant for bail) may not be used to incriminate that witness at any other proceeding whether it was given freely or under compulsion. As this right is at odds with the aim of the prosecution to secure the conviction of the guilty, this extension under Canadian law must be ascribed to the fact that the prosecution in Canada can function effectively without any assistance from the accused. Under Canadian law the administration of justice therefore has the luxury of being able to benefit from both the extended right against self-incrimination and a capable prosecution.

On the other hand South African law, by admitting the record of the bail hearing at the trial, has fallen short of the same common law principle that was taken up in our law. See my arguments in par 9.3.9. On the face-value thereof this heavy blow has come about due to the fact that the Constitutional Court has found that the Hobson's choice that an applicant for bail has does not amount to the type of compulsion required for the violation of the right against self-incrimination. Even if the indication by the Constitutional Court seems to be that the common law principle is not to be degraded one cannot help but wonder whether public opinion and an ineffective prosecution in recent times has anything to do with the finding by the court.