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Constitutional exclusion under section 35(5) of the Constitution of the Republic of South Africa, 1996

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Declaration

I, **Dave Ashley Vincent Ally**, declare that the work presented in this thesis is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLD Degree.

Signed………………………………………….

Date…………………………………………….

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Date……………………………………………..

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SUMMARY/ OPSOMMING

This thesis examines the interpretation of section 35(5) of the Constitution of the Republic of South Africa, 1996, which empowers the courts to exclude unconstitutionally obtained evidence in criminal trials. A generous and purposive interpretation should be at the heart of the admissibility assessment.

This work explores the threshold requirements and the substantive phase of the interpretation of section 35(5). Given that this provision is manifestly modelled on the terms contained in section 24(2) of the Canadian Charter, the manner in which the courts of that country have grappled with the interpretation of section 24(2) has been accorded particular importance.

As a preliminary issue, the courts must consider whether the threshold requirements of section 35(5) have been satisfied. It is concluded that the courts of South Africa have interpreted the threshold requirements of section 35(5) in a broad manner, thereby making it less onerous to satisfy, compared to the threshold requirements contained in section 24(2).

The substantive phase of the admissibility assessment should consist of two legs that must be clearly separated from each other, for the reason that the assessment in each leg of the analysis serve to enhance different societal interests. The public interest in protecting the rights of the accused should be the central consideration during the first leg, while the societal interest in convicting the guilty should be contemplated during the second leg.

The **first leg** of the analysis is concerned with the effect that admission of the evidence would have on the fairness of the trial. It is suggested that the trial fairness requirement should be determined by means of a conscription analysis. The prosecution may rely on the 'discoverability' doctrine or on the 'independent source' exception. The admission of evidence based on these exceptions would not render the trial unfair. Such an infringement would, accordingly, not add to the seriousness of the violation. Conversely, although admission would tend to render the trial unfair, the evidence should **not** 'automatically' be excluded. However, such an infringement should be regarded as a serious violation, since section 35(5) was designed to prevent unfair trials.

The **second leg** is focused on the effect that either the admission or exclusion of the evidence would have on the integrity of the criminal justice system. It is concluded that the 'current mood' of society should not be determinative of the admissibility assessment.

The following overall admissibility framework is recommended: Despite the fact that admission would render the trial unfair, the courts should be allowed to consider police 'good faith' and other factors ordinarily considered during the second leg, in order to make an admissibility ruling. Differently put, a balancing exercise should be performed, in which the factors identified in the seminal case of *Collins* are considered and weighed at the end of the analysis. More importantly, the seriousness of the violation should be a significant factor in the overall admissibility assessment, since judicial condonation of serious infringements would generally impact negatively on the repute of the criminal justice system.

Hierdie tesis ondersoek die grondwetlik verskansde remedie wat Suid-Afrikaanse howe magtig om ongrondwetlik verkreë getuienis in strafsake uit te sluit. Dit word voorgestel dat 'n onbekrompte en doeldienende uitleg toegepas moet word ten einde betekenis aan artikel 35(5) te gee.

Die drempelvereistes en die substantiewe fase van artikel 35(5) word onder die soeklig geplaas. Aangesien artikel 35(5) onteenseglik geskoei is op die bepalings van artikel 24(2) van die Kanadese Handves van Regte, gee hierdie navorsing besonderse aandag aan verwikkelinge wat betrekking het op die uitleg van hierdie Kanadese bepaling.

Alvorens die meriete van 'n artikel 35(5) dispuut oorweeg mag word, moet daar bepaal word of die bepalings van die drempelvereistes nagekom is. In hierdie verband word konkludeer dat die Suid-Afrikaanse howe 'n onbekrompte uitleg volg, wat dit minder moeilik maak vir 'n beskuldigde om die vereistes van hierdie drempelvereistes na te kom, in teenstelling met iemand wat op artikel 24(2) sou steun.

Die substantiewe fase van die toelaatbaarheidsvraag bestaan uit twee bene, welke bene duidelik van mekaar onderskei moet word, omrede elke been die bevordering van 'n verskillende publieke belang onderskraag. Tydens die eerste been word die publieke belang in die beskerming van die regte van die beskuldigde oorweeg, terwyl die openbare belang in die bevordering van die publieke belang in die skuldigbevinding van skuldige partye gedurende die tweede been ondersoek word.

Die **eerste been** van die toelaatbaarheidsondersoek wentel om watter effek toelating van die getuienis op die billikheid van die verhoor het. Dit word voorgestel dat hierdie aspek bepaal moet word deur middel van 'n konskripsie-analise. Die staat mag steun op die feit dat die getuienis noodwendigerwys op 'n

grondwetlike wyse ('discoverability') of op grond van die 'independent source'-leerstuk verkry kon word. Toelating van getuienis wat op een van hierdie wyses verkry kon word, het nie 'n negatiewe effek op die verhoorbillikheidsvraag nie. Indien toelating van die gewraakte getuienis die verhoor onbillik sou maak, moet daardie getuienis **nie** 'outomaties' uitgesluit word nie. Inteendeel moet 'n skending wat 'n negatiewe impak op die verhoorbillikheidsondersoek het, as 'n ernstige inbreukmaking beskou word, aangesien artikel 35(5) ontwerp was om onbillike verhore te verhoed.

Die **tweede been** van die toelaatbaarheidsondersoek is gemoeid met die vraag of toelating of uitsluiting van die getuienis die regspleging nadelig sou tref. Daar word konkludeer dat daar nie besonderse gewig gehef moet word aan die 'huidige gemoedstemming' van die gemeenskap nie.

Die volgende algehele raamwerk waarbinne die artikel 35(5) analise behoort plaas te vind, word voorgestel: Ten spyte van 'n bevinding dat toelating van die getuienis 'n verhoor onbillik sou maak, behoort byvoorbeeld, die 'goeie trou' van die polisie oorweeg word, alvorens besluit word dat die getuienis toegelaat of uitgesluit word. Anders gestel, moet 'n balanseringsproses plaasvind aan die einde van die analise, waartydens die faktore wat in die Kanadese saak van *R v Collins* uitgelig is, evalueer word, ten einde vas te stel of die getuienis toegelaat of uitgesluit moet word. Die aard en erns van die betrokke inbreukmaking moet deurgaans 'n sentrale plek in die toelaatbaarheidsondersoek inneem.

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ABBREVIATIONS AND ACRONYMS

A

A or AD	Appellate Division of South Africa (now SCA)
All ER	All England Reports
ALR	Australia Law Reports
A-G	Attorney-General
Alta CA	Alberta Court of Appeal
ASSAL	*Annual Survey of South African Law*
AU	African Union
Alta CA	Alberta Court of Appeal

B

BCLR	Butterworths Constitutional Law Reports
BC CA	British Columbia Court of Appeal
BC PC	British Columbia Provincial Court
BCLR	Butterworths Constitutional Law Reports

C

CBR or *Can BR*	*Canadian Bar Review*
CCLA	Canadian Civil Liberties Association
CC	Constititutional Court
Can Crim LR	*Canadian Criminal Law Review*
Cr App R	Criminal Appeal Reports

Cr Law Rev	*Criminal Law Review*
CLQ	*Criminal Law Quarterly*
CkH	Ciskei Division of the High Court of South Africa
Col L Rev	*Columbia Law Review*
CR	Criminal Reports (2nd, 3rd, 4th, 5th, or 6th series)
CRR	Canadian Rights Reporter
Cr App R	Criminal Appeal Report
CILSA	*Comparative International Law Journal of Southern Africa*

D

DLR	Dominion Law Reports
DCJ	Deputy Chief Justice
DP	Deputy President of the Constitutional Court
DPP	Director of Public Prosecutions

E

E & P	*International Journal of Evidence and Proof*
EHRR	European Human Rights Reports

H

HL	House of Lords

I

IC	Interim Constitution of South Africa
ICCS	International Criminal Court Statute

ICCT	International Criminal Court
ICTY	International Criminal Tribunal for Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICCPR	International Covenant on Civil and Political Rights
Israel LR	*Israel Law Review*

N

Nfld CA	Newfoundland Court of Appeal
NSCA	Nova Scotia Court of Appeal

O

Ont C (Gen Div)	Ontario Court General Division
Ont CA	Ontario Court of Appeal
Ont Prov Div	Ontario Provincial Division
Ont Prov Ct	Ontario Provincial Court

P

P	President of the Constitutional Court (South Africa)
PH	Prentice Hall Reports
PACE	Police and Criminal Evidence Act
Prov Ct J	Provincial Court Judge

Q

QB	Queen’s Bench Division

S

SA	South African Law Reports
SACC	*South African Journal of Criminology and Criminal Law*
SACJ	*South African Journal of Criminal Justice*
SALJ	*South African Law Journal*
SAJH	*South African Journal of Human Rights*
SCA	Supreme Court of Appeal
Stell LR	*Stellenbosch Law Review*
SACR	South African Criminal Law Reports
Sask CA	Saskatchewan Court of Appeal

U

UT Fac LR	*University of Toronto Faculty of Law Review*
UDHR	Universal Declaration of Human Rights

Z

ZASCA	South African Supreme Court of Appeal

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